

**MINUTES of the
BOARD OF ADJUSTMENT MEETING
EILEEN DONDERO FOLEY COUNCIL CHAMBERS
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE
PORTSMOUTH, NEW HAMPSHIRE**

7:00 P.M.

December 21, 2021

MEMBERS PRESENT: Vice-Chairman Peter McDonell; Thomas Rossi, David MacDonald, Beth Margeson, Jim Lee; Alternate Phyllis Eldridge

MEMBERS EXCUSED: Arthur Parrott, Chase Hagaman

ALSO PRESENT: Peter Stith, Planning Department

Vice-Chair McDonell was Acting Chair. New member Thomas Rossi was introduced. Alternate Eldridge took a voting seat for all petitions.

I. ELECTION OF OFFICERS

Ms. Eldridge moved to elect Mr. Parrott as Chair, seconded by Mr. Lee.

Ms. Eldridge said Mr. Parrott was very experienced and was the right person for the job. Mr. Lee concurred.

*The motion **passed** unanimously, 6-0.*

Ms. Margeson moved to re-elect Vice Chair McDonell, seconded by Ms. Eldridge.

Ms. Margeson said Mr. McDonell had done a very good job as vice-chair and thought he would continue to do a fine job. Ms. Eldridge concurred.

*The motion **passed** unanimously, 6-0.*

II. APPROVAL OF MINUTES

A) Approval of the minutes of the meeting of November 16, 2021.

The November 16 minutes were approved as amended by unanimous vote, 6-0.

III. OLD BUSINESS

Acting-Chair McDonell requested that the GRN Realty Trust (Owner) and Glenn Normandeau (Applicant) petition for 15 Pickering Avenue be taken out of order and addressed.

It was moved, seconded, and passed to take the item out of order and address it. (See page 8).

A) 53 Green Street – Request for Rehearing

Acting-Chair McDonell asked the Board if they thought an error of procedure or law was made when they made a decision on the petition. Mr. Lee said the appellant requested that he be disqualified from participating in the vote and that the request seemed to be based on the fact that he was a secretary of an organization of citizens supporting some candidates in the past. He read a section from the Supreme Court that spoke to the qualifications for disqualifying someone, and he concluded that there was no conflict and that he should not be disqualified from voting. The issue was further discussed and Mr. Lee was allowed to vote.

*Ms. Margeson moved to **deny** the request for rehearing, seconded by Ms. Eldridge.*

Ms. Margeson said she believed that the Board made no error of procedure or law in their decision and that, looking at the motion for rehearing and the objection, she said there were problems with both. She said she didn't believe that the tie vote was a basis for a motion for rehearing because the Board's rules were clear that a tie results in a denial. She said nothing was raised in the appellant's motion for a rehearing that was not properly discussed and analyzed by the Board the first few times it was heard. Therefore, she didn't think a rehearing was merited. Ms. Eldridge concurred. She said the issues were the same as the ones the Board heard the first time, other than the fact that there was a tie vote, and she thought the Board followed the information they had correctly.

Mr. Lee agreed and said it was unfortunate that there were only six members and the Board wasn't able to reach a definite decision. He noted that two separate votes were taken, one in favor and one against, and there was a tie vote for each. Mr. Rossi asked if due consideration was given to the fact that the Overlay District zoning ordinance prevailed regarding the 100-ft setback from the pond, and Acting-Chair McDonell said the Board had discussed the issue at length and that it was given due consideration.

*The motion to deny the request **failed** by a vote of 3-3, with Mr. Lee, Mr. MacDonald, and Mr. Rossi voting against the motion.*

*Mr. MacDonald then moved to **grant** the request for rehearing, and Mr. Lee seconded for discussion.*

Mr. MacDonald said the Board should give the appellant the opportunity to introduce relevant information that may or may not have been heard or available. Mr. Lee concurred. Acting-Chair McDonell said the Board previously did a good job of trying to address all the issues that were presented to them by the appellant and he didn't know whether or not there was information that the Board didn't hear because it wasn't available, but he was convinced that the Board did not make a procedural error or error in law, so he would not support the motion to grant the rehearing. Mr. Lee said he believed that having an additional Board member to hear the issue would allow the Board to reach a definitive decision and put the matter to rest once and for all. Ms. Margeson said she didn't think there was any need for a definitive decision. She said the Board had decided that they were split, so the result was denial. In terms of Mr. MacDonald's motion, she said it was up to the appellant to insert new information or tell the Board, and without the appellant doing so that would merit a motion for a rehearing, she felt that granting the request to rehear on the sense that there was new information would be speculative.

*The motion to grant the request for rehearing **passed** by a vote of 3-3, with Ms. Eldridge, Ms. Margeson, and Acting-Chair McDonell voting against the motion.*

B) Request of Richard E. Tully Revocable Trust and Madeline F. Tully Revocable Trust, (Owners), for the property located at **194 Madison Street** whereas relief is needed from the Zoning Ordinance to convert a single-family dwelling into a two-family dwelling which requires the following: 1) A Variance from Section 10.521 to allow a lot area per dwelling unit of 1,219 square feet where 3,500 is required. Said property is shown on Assessor Map 146 Lot 17 and lies within the General Residence C (GRC) District. (LU-21-191)

SPEAKING TO THE PETITION

The applicant Jacob Boucher was present and said he wanted to convert the residence into a two-family one. He reviewed the criteria and said they would be met.

Ms. Margeson noted for the record that the variance for the lot area per dwelling went down by half and that the applicant wasn't enlarging the structure but that the structure would now contain two families instead of one. Mr. Boucher agreed and said no exterior or interior modifications would be done unless deemed necessary to meet compliance.

Acting-Chair McDonell opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one rose to speak.

Acting-Chair McDonell closed the public hearing.

DECISION OF THE BOARD

*Mr. Rossi moved to **grant** the variance request, seconded by Ms. Margeson.*

Mr. Rossi said the variance request was acceptable and was in keeping with the character of the neighborhood. He said granting the variance would not be contrary to the public interest because it was in an area that already had multi-family housing and was also fairly dense, so he didn't believe it would do any harm. He said it would not negatively affect the values of surrounding properties because they were all similar in character and that imposing the ordinance without a variance would be an unwarranted hardship.

Ms. Margeson concurred and said the variance would not be contrary to the public interest and would observe the spirit of the ordinance. She said the existing lot area was 2,439 square feet and what was required was 3,500 square feet, but the diminution in the lot area per dwelling wasn't really the actual expansion onto the property itself, so the public interest and spirit of the ordinance are observed. She said the benefit to the applicant was not outweighed by any harm to the public because there was no increase in size to the structure, and surrounding properties would not be harmed by granting the variance. She said literal enforcement of the ordinance would result in unnecessary hardship because the property is in the General Residence C district,

which had higher density, and the house would go from one dwelling to two, which was appropriate.

*The motion **passed** by unanimous vote, 6-0.*

- C) Request of **Monarch Family Trust of 2018, (Owner)**, for the property located at **45 Miller Avenue** whereas relief is needed from the Zoning Ordinance for an addition of a covered front porch and conversion of existing balcony into enclosed bathroom which requires the following: 1) Variances from Section 10.521 to allow a) an 8' left side yard where 10' is required; and b) 28% building coverage where 25% is the maximum allowed. 2) A Variance from Section 10.321 to allow a nonconforming building or structure to be expanded, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on assessor Map 129 Lot 21 and lies within the General Residence A (GRA) district. (LU-21-195)

SPEAKING TO THE PETITION

Architect Josh White representing the applicant was present to review the petition. He noted that the building was built in 1937 when the zoning was different, and when the applicant bought the property, the building had a lot of outstructures and the total lot coverage was 32 percent. He said significant renovations were done since then, and they wanted to transform the balcony into an additional second-floor bathroom and add a small covered porch, which would take the coverage up to 28 percent. He reviewed the criteria and said they would be met.

Ms. Margeson asked if the existing front was just being filled in. Mr. White said they were extending outward with a small farmers porch but not extending any of the building into the setbacks on the ground level.

Acting-Chair McDonell opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one rose to speak, and Acting-Chair McDonell closed the public hearing.

DECISION OF THE BOARD

Mr. Rossi said the correspondence from the neighbors was helpful in reassuring him about the validity of the request. Acting-Chair McDonell agreed. Ms. Margeson said the application initially gave her pause because the property had received a considerable amount of zoning relief and the present variance request would be the sixth one, but the reason for the variance request was the increase in the building coverage, so she felt that it wasn't against the purpose of the ordinance and not that much of a conflict.

*Mr. Lee moved to **grant** the variance requests, and Ms. Eldridge seconded.*

Mr. Lee said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance because it was a minimal request to fill in some of the existing building to increase its livable square footage and to place a small addition on the front, which

wouldn't really change that much in the neighborhood. He said substantial justice would be done because the benefit to the applicant would not be outweighed by any harm to the general public. He said granting the variances would not diminish surrounding property values because improvements would be made. He said there was no fair and substantial relationship between the general purpose of the ordinance and its specific application to the property and that the request was reasonable and should be granted. Ms. Eldridge concurred and had nothing to add.

*The motion **passed** by unanimous vote, 6-0.*

- D)** Request of **Artwill, LLC, (Owner)**, for the property located at **437 Lafayette Road** whereas relief is needed from the Zoning Ordinance for a proposed four (4) lot subdivision which requires the following: 1) Variances from Section 10.521 to allow a) 60.6' of continuous street frontage where 100' is required for proposed Lot 3; and b) 67.2' of continuous street frontage where 100' is required for proposed Lot 4, and c) A Variance from Section 10.521 to allow a 29.5' front yard where 30' is required. Said property is shown on Assessor Map 229 Lot 1 and lies within the Single Residence B (SRB) District. (LU-21-196)

Attorney Derek Durbin was present on behalf of the applicant and asked for a one-month continuance to the January meeting, when there would be a full Board.

*Ms. Eldridge moved to **grant** the request for a continuance, seconded by Ms. Margeson.*

Ms. Eldridge said the request was reasonable because it was a large project and the Board was short of members. Ms. Margeson concurred and had nothing to add.

*The motion **passed** by unanimous vote, 6-0.*

IV. NEW BUSINESS

- A)** Request of **Clark J. Anthony (Owner)**, for the property located at **64 Haven Road** whereas relief is needed from the Zoning Ordinance to construct a 10' x 12' shed which requires the following: 1) A Variance from Section 10.573.20 to allow a 5' side yard where 10' is required; and 2) A Variance from Section 10.571 to allow an accessory structure to be located closer to the street than the principal building. Said property is shown on Assessor Map 206 Lot 30 and lies within the Single Residence B (SRB) District. (LU-21-200)

SPEAKING TO THE PETITION

The applicant Tony Clark was present and explained that the front of his home faced Haven Road but the back and left sides of the lot faced another road. He said the shed would be 15 feet from the rear and five feet from the side yard. He noted that there were many sheds in similar positions in the neighborhood. He reviewed the criteria and said they would be met.

Ms. Margeson said she was familiar with the area and asked why the applicant couldn't site the shed closer to the house. Mr. Clark said it was the flat part of the yard and the chosen location

was to preserve the grassy area and the yard itself. In response to Mr. Rossi's questions, Mr. Clark said he spoke to his neighbors on both sides and that they had no problem with it. He said he wanted to place the shed five feet from the side instead of 20 feet because the yard wasn't that large. He reiterated that there were multiple sheds placed similarly within their sideyards.

Acting-Chair McDonell opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one rose to speak, and Acting-Chair McDonell closed the public hearing.

DISCUSSION OF THE BOARD

Mr. MacDonald said there was a lot of open space in the neighborhood and thought it was a good idea to have a storage shed for unsightly items like lawnmowers and so on, so he would support the request. Acting-Chair McDonell said he would support a motion to approve because the request to have the access structure located closer to the street than the principal building was due to the conditions of the lot, including having two streets fronting it. He said some people might think that the 10-ft sideyard setback could be complied with, but he didn't think it served a purpose here and that there was enough of a hardship. He said it wasn't like the shed would be located five feet off the property line or would abut up to something else and cause a problem for the neighbor, and he noted that the neighbor was in support. He said all the criteria were met.

Ms. Margeson said the ordinance was clear that the access structure needed to be close to the primary building. Mr. Stith said the purpose of the ordinance was that accessory structures would be located behind the principal structure and not closer to the road, but since the applicant's lot had two frontages, they were treated the same, so any accessory structure behind the true front of the house would still be in violation of that section of the ordinance since it was a through lot. He said the 15-ft distance wasn't an issue, that it was the location and the relation to the main structure. Ms. Margeson concluded that the ordinance was really concerned about having an accessory structure in front of the true front of the house.

DECISION OF THE BOARD

*Mr. Lee moved to **grant** the variances, and Ms. Margeson seconded.*

Mr. Lee said the property was burdened on two streets, so it wasn't possible to comply with strict conformance to the ordinance. He said the spirit of the ordinance and the public interest were observed and the benefit to the applicant would not be outweighed by any harm to the general public. He said if the shed were placed where it met compliance, it would be in the middle of the backyard, which would be a hardship. He said there was no fair and substantial relationship between the general purpose of the ordinance and the proposed use and that it was a reasonable request. Ms. Margeson concurred and had nothing to add.

*The motion **passed** by unanimous vote, 6-0.*

- B) Request of 35 Pines, LLC (Owner), for the property located at 295 Maplewood Avenue whereas relief is needed from the Zoning Variance to establish a barber shop which**

requires the following: 1) A Special Exception from Section 10.440 Use #7.20 to allow a barber shop where the use is allowed by special exception. Said property is shown on Assessor Map 141 Lot 35 and lies within the Character District 4-L2 (CD4-L2) and Historic District. (LU-21-211)

SPEAKING TO THE PETITION

The applicants Patrick Lavoie and Lauren Grady were present to speak to the petition. Mr. Lavoie said they wanted to operate their barbershop PCB (Port City Barbershop) in Unit One. He said he was the only employee and had operated his business for about 10 years. He explained that PCB was by appointment only and that one-hour increments were given to each client, with no overlap between clients. He said additional traffic would be minimal and that there were many parking spaces available nearby. He reviewed the criteria and said they would be met.

Ms. Margeson asked how the Planning Board weighed in on the special exception to eliminate on-site parking and was told that the meeting was postponed. She said she knew the area well and asked the applicant why he wanted to eliminate the on-site parking. Mr. Lavoie said the only parking behind the building consisted of two spots for the two condominiums, but that the boat launch had public parking and meters. He said most of his customers lived in the area and rode bikes or walked. Ms. Margeson asked how many spaces were available at the end of the street, and Mr. Lavoie said there were at least eight. Ms. Margeson said eventually things would get back to normal and more traffic would be generated. Mr. Lavoie said it was only a one-chair barbershop and that he did 10-12 haircuts a day, so there would be no change in traffic.

Mr. Rossi said he was familiar with the barbershop and that the rules were adhered to and it was never crowded. Mr. MacDonald said he looked at the property and that it was a congested area with not a lot of room for moving vehicles around. He asked how much traffic there was from the buildings that were farther out. Mr. Lavoie said they were multi-use apartment buildings and didn't think there were any businesses except for the non-profit next to him. Mr. MacDonald said there was new construction proposed for Northwest Street, so there would be additional traffic and no place to park or turn around at the end of the street by the bridge or potentially behind the applicant's building. He asked the applicant if he was concerned about how to alleviate traffic congestion. Mr. Lavoie said he was only concerned about his own property and business.

Acting-Chair McDonell opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one was present to speak. Mr. Stith stated that several letters of approval were received from the neighbors.

Acting-Chair McDonell closed the public hearing.

DECISION OF THE BOARD

*Ms. Eldridge moved to **grant** the special exception, seconded by Mr. Lee.*

Ms. Eldridge said there had been a commercial use for that property for decades and didn't think the barbershop would cause any more traffic than those other uses, especially under the

barbershop's rules. She said granting the special exception would pose no hazard to the public or adjacent properties on account of potential fire, explosion, or release of toxic materials. She said there would be no detriment to property values, seeing that the space had been commercial for a while and the neighbors were very excited about the business. She said granting the special exception would pose no creation of a traffic safety hazard or a substantial increase in the level of traffic, and no excessive demand on municipal services including but not limited to waste disposal, police and fire protection, schools and so on. She said there would be no significant increase of stormwater runoff onto adjacent properties, seeing that the building wouldn't change. She said everything would stay pretty much the same, and for those reasons the special exception should be granted. Mr. Lee concurred and had nothing to add.

Ms. Margeson said her concern was about the parking issue but that her questions had been answered to her satisfaction and that she didn't believe there would be any traffic safety hazard or substantial increase in the level of traffic congestion from such a low-impact business.

*The motion **passed** by unanimous vote, 6-0.*

V. OTHER BUSINESS

- A) Request of GRN Realty Trust (Owner), and Glenn Normandeau (Applicant), for the property located at 15 Pickering Avenue requesting to remove the stipulation barring him from applying for future variances. Said property is shown on Assessor Map 102 Lot 24 and lies within the Historic District and Waterfront Business District (WB).**

SPEAKING TO THE REQUEST

City Attorney Robert Sullivan was present and said he was familiar with that type of request because he was involved in a similar case in 1989. He said he spoke to the Marconi family, who were one property away from the applicant's property and who had been involved in the 1989 case. He noted that the applicant Glenn Normandeau was also present.

Ms. Margeson said it was a settlement that was approved by a judge of the Superior Court, even though it seemed strange at first glance to preclude a property from applying for variances going forward. She asked how the Board could reverse an order entered into by the Superior Court. Attorney Sullivan said the parties agreed to a negotiated settlement and that those parties were the BOA and Mr. Normandeau. He said the judge approved the entire settlement because it made the agreement more enforceable, but that the court didn't on its own enforce those agreements. He said whatever party felt that the document was being breached brought that into the court and pointed out that it was not being followed. He said if the Board now determined that it did not wish to see the 1989 condition placed on it by the previous board, then no one would bring it to the court to say that there was a violation because they'd say that it wouldn't be enforced anymore. He said it was an agreement between the BOA and Mr. Normandeau, who suggested that he and the BOA would change the agreement. He said if the BOA granted the relief, no one connected with City government would seek to enforce it. He said the document was recorded, so it created title issues for Mr. Normandeau, and that the City could work with him to produce documentation to resolve the title issue. Ms. Margeson asked if it would be

recorded in the Rockingham County Registry of Deeds that the BOA removed the stipulation. Attorney Sullivan said that's what he would want if he were Mr. Normandeau.

Ms. Margeson said the stipulation stated that it shall run with the land and shall be binding upon the plaintiff's heirs. She asked if anything could be done with the Rockingham Superior Court. Attorney Sullivan said not from the City's point of view. However, from Mr. Normandeau's perspective, if he resold the property and thought having the stipulation on record created an issue, he'd want to create some kind of document to be approved by the court. Since the case had been closed for almost 40 years, he said the City would have to bring a new action but it would be Mr. Normandeau's concern more than the City's. Ms. Margeson said certain buildings in the Waterfront District couldn't have a variance for residential use. Mr. Lee said because it was recorded in the Rockingham County Court, if someone bought that property, it was a cloud on the title. Attorney Sullivan said if someone were to buy the property and apply for a variance to allow some residential use on the waterfront and unless the Board had eliminated the stipulation, then the City wouldn't let the case go forward because the first preventive mechanism would be the City Planning Staff. Mr. Lee agreed but said if someone had a lien on the property and they paid it off and the lender didn't release the lien, then that lien would remain on record and it would be a cloud on the title. Ms. Margeson said she thought it was more of a condition on the land than a cloud on the title. Attorney Sullivan said the BOA had to approve changing it since they were the ones who originally did the action. Mr. MacDonald asked what reasons the 1989 BOA gave for their decision. Attorney Sullivan said it was a non-public executive session that wasn't on record, but that the BOA controlled a case like this and the City Administration would follow their instructions. Mr. Rossi said a major party in the 1989 negotiations had been Mrs. Marconi, so he had felt that the Marconis should comment and he had reviewed the materials online with Gino Marconi. He noted that there were quite a few members of the Marconi family present at the beginning of the meeting but that they had left.

Acting-Cahir McDonell opened public comment.

Public Comment

The applicant Glenn Normandeau said the property had been in his family since 1975 and that he bought it in 2003. He said he spoke with Gino Marconi, who decided that the Marconis didn't have an issue with it. He said he had known that an agreement was reached and that his father's attorneys agreed that the family wouldn't have residential use of the building on the water. He said he hadn't read the notarized agreement until a few months ago when he wanted to have the property appraised, and he realized that it prevented him and anyone else from requesting any variances. He said he thought he was the only person in the City who was prevented from filing a variance and that he may need to sell the property in the future, so it could be a problem.

Mr. MacDonald asked what reason the City gave for preventing Mr. Normandeau from even applying for a variance for that long a period of time. Mr. Normandeau said Mr. Marconi had been concerned that tall condos would be built, so it was seen as a doubling-up on the zoning to protect against that. He noted that piers in Portland were being turned into condo towers at the time and the Marconis were concerned that it would happen with his property. He said his father

had a marine lab there in 1975, which required a variance because the property was zoned residential at the time, and then sold the business. When the new owner left, it was discovered that the zoning had changed, which precipitated the concerns about development. Mr. MacDonald said none of those causes had materialized, so the reason given for imposing that restriction didn't seem necessary. Mr. Normandeau agreed.

Esther Kennedy said she supported Mr. Normandeau but thought the neighbors should have been noticed in advance. Mr. Stith said the Legal Department stated that the item wasn't a public hearing and was more of an administrative request of the Board, so it didn't need to be noticed, and the fact that it was opened to public comment didn't change that.

No one else rose to speak, and Acting-Chair McDonell closed the public comment session.

DECISION OF THE BOARD

*Ms. Margeson moved to recommend **approval** of the removal of the stipulation, seconded by Mr. MacDonald.*

Ms. Margeson said that, as far as removing the restriction preventing the applicant from seeking a variance with respect to Buildings C, D, E, and F as set forth in Exhibit I of the document, she didn't know what those were exactly and thought the Planning Staff could figure out what their real identification was. She said she saw no reason from a zoning perspective to keep those stipulations in place and that it was acceptable for the Board to remove the restriction on the property, seeing that the parties who made the agreement had no problems with it. Mr. MacDonald concurred and said that, based on the conditions of the property, people would realize that there wouldn't be any multi-story casino hotels and so on built in the Peirce Island channel, so the restriction request to change the use of the property was probably unreasonable.

Acting-Chair McDonell said he would support the motion. He said the circumstance and zoning were different, and the sort of development that was worried about a few decades before was precluded by the current zoning, and any variance requested would still have to come before the Board. He said removing the stipulation was a low-risk proposition.

*The motion **passed** by unanimous vote, 6-0.*

VI. ADJOURNMENT

The meeting was adjourned at 9:00 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary