

TO: Zoning Board of Adjustment
FROM: Peter Stith, AICP, Planning Department
DATE: October 24, 2022
RE: Zoning Board of Adjustment October 25, 2022

NEW BUSINESS

1. 53 Green Street – Rehearing of Appeal

NEW BUSINESS

1.

The Rehearing of the Appeal of **Duncan MacCallum, (Attorney for the Appellants)**, of the July 15, 2021 decision of the Planning Board for property located at **53 Green Street** which granted the following: a) a wetlands conditional use permit under Section 10.1017 of the Zoning Ordinance; b) preliminary and final subdivision approval; and c) site plan review approval. Said property is shown on Assessor Map 119 Lot 2 and lies within the Character District 5 (CD5).

A. Previous Board of Adjustment Actions:

Dimensional Variance: June 15, 2021 – Relief is needed from the Zoning Ordinance for the demolition of an existing building and construction of a 5-story mixed-use building which requires the following: 1) A Variance from Section 10.5A41.10D to allow 42.89% front lot line buildout where 80% is required. Said property is shown on Assessor Map 119 Lot 2 and lies within the Character District 5 (CD5) District. The Board **approved** the request, however with a vote of 3-2, the motion did not have the four positive votes required for granting a variance, therefore the **application was denied**.

Appeal: September 28, 2021 – Said property is shown on Assessor Map 119 Lot 2 and lies within the Character District 5 (CD5) and Character District 4 (CD4). On the matter of standing, the Board voted that the appellants **do have standing to bring the appeal forward**. On the matter of whether the Board has jurisdiction to hear the appeal of the granting of a wetland Conditional Use Permit, the Board voted that it **does not have jurisdiction to hear the appeal of the granting of a wetland Conditional Use Permit** pursuant to RSA 676:5, III, which delegates the administration including the granting of conditional or special uses to the Planning Board, and provides that decisions made pursuant to that delegation cannot be appealed to the BOA but may be appealed to the Superior Court. The Board voted to continue to the remaining items of the appeal to the October 19, 2021 meeting.

Appeal Cont.: October 19, 2021 – The Board voted that the request be **denied**, which resulted in a 3-3 tie. A motion to grant the appeal resulted in a 3-3 tie and did not receive 4 affirmative votes, therefore the appeal was denied.

Request for Rehearing (Appellants): December 21, 2021 – The Board voted that the request for rehearing be **granted**. A motion to grant the appeal resulted in a 3-3 tie, therefore the request for the rehearing was granted.

Request for Rehearing (Defendants): January 18, 2022 – The Board considered the application for the rehearing of the appeal of Duncan MacCallum (Attorney for the Appellants) of the July 15, 2021 decision of the Planning Board for property located at 53 Green Street which granted the following: a) a wetlands conditional use permit under Section 10.1017 of the Zoning Ordinance; b) preliminary and final subdivision approval; and c) site plan review approval. The Board voted to **postpone** the hearing to February.

Court Order: February 15, 2022 – The Board voted to acknowledge that all parties have agreed to stay the hearing until a decision is made in Superior Court.

Court Order: August 9, 2022 - The Superior Court ruled that the administrative remedies had not been exhausted and a rehearing before the ZBA was still pending.

B. Planning Department Supporting Information

A more complete history of the project's approval process through the Conservation Commission, Historic District Commission, Technical Advisory Committee and Planning Board can be found at the link below:

<https://www.cityofportsmouth.com/planportsmouth/53-green-street>

The following is a general analysis and summary of the public record, including but not limited to the letter of decision, pertaining to the counts as laid out in the appeal:

Legal Standing of Appellants

Defendant Complaint: The listed appellants have not demonstrated they have any legal standing as parties with a direct or definitive interest sufficient for standing.

Background: Accordingly to the Defendant, none of the 17 citizens listed as appellants in the complaint are abutters to the development project, or listed as noticed parties, or have any tangible or visible proximity to the development project from their listed place of residence. As presented by the defendant, the closest appellant is 1,500 feet away from the property with 2 other appellants just over 1,500 feet and the remaining appellants are more than 2,500 feet away from 53 Green Street. Additionally, the defendant claims that none of the appellants participated (either in writing or with oral testimony) in any of the five noticed public hearings before the Technical Review Committee, Conservation Commission, Planning Board and the Historic District Commission.

See attached Legal Memo for additional guidance.

Draft Motion

The Board Finds that finds that the appealing parties meet/do not meet the statutory requirements for standing provided under RSA 676:5 and therefore do/do not for the following reasons:

Count #1– Need for a CUP for an Expanded Building Footprint

Complaint: The appellants claim that the approved development project requires a CUP under Section 10.5A43.43 to allow for a structure to have a footprint of 29,374 SF whereas the underlying CD5 Character District limits a building footprint to 20,000 SF.

Background: The proposed development project is shown on the submitted site plan as having a lot containing an area of 47,350 SF (60% +/-) within 100 feet of the North Mill Pond (NMP) and an area of 31,500 SF (40%+/-) located outside the 100' buffer area within the North End Incentive Overlay District (NEIOD). The lot is also located in the CD5 Character District where building footprints are limited to 20,000 SF. However, adopted as an Innovate Land Use Statute under RSA 674:21(c), the Character-Based Zoning Ordinance provides three (3) different development intensity incentives that would allow for a larger building footprint. For example, Section 10.5A43.43 allows the Planning Board to approve a Conditional Use Permit (CUP) to allow up to a 40,000 SF building footprint provided certain development standards are met. Additionally, Section 10.5A.43.34 allows building footprints of up to 30,000 SF as well as an additional story or 10' in building height above what is shown on the Building Height Standards Map (10.5A.21B). Finally, Section 10.5A46.10 – the NEIOD – allows, “as-of-right”, building footprints up to 30,000 SF, and additional story or 10' in building height, as well as other increases in density. All three intensity incentive options allow for a larger building footprint than what is permitted within the underlying character district and all require certain public benefits (usually in the form of Community Space) within the development project¹.

Planning Board Decision: Given the lot is partially located within the NEIOD, the Planning Board approved development project using the development incentives listed under Section 10.5A46.10. The Board concluded that despite a portion of the lot was located outside the NEIOD it did not disqualify the larger development project from benefiting from the full set of listed intensity incentives under Section 10.5A46.10. In particular, the Board found that the intensity incentives apply to the entire “development project” which is represented as all building and site improvements located on the lot. As such, the Planning Board determined that the approved development project was required to conform to the building footprint incentives provided for under Section 10.5A46.10. Such intensity incentives allowed for a building footprint of up to 30,000 SF, thus, a CUP is was not required.

Draft Motion:

*The Board **finds/does not find** an error in the enforcement of the Zoning Ordinance in the July 15, 2021 decision of the Planning Board for the following reasons:*

Count #2– Compliance with the Wetland Criteria for a CUP

Complaint: The development project did not meet all the required standards or findings required by the Planning Board to approve a CUP under Section 10.1017.50 to allow for a development project to encroach within the 100 foot buffer area.

Background: This issue has been previously addressed by the BOA whereby a determination was made that, as an innovative land use statute listed under RSA 674:21, the proper appeal of a decision is placed before the Superior Court.

¹ Consistent with the 2014 North End Preliminary Vision Plan (See Attached Exhibit)

Planning Board Decision: Other than through broad and overly speculative alternative building and site analysis, the only reasonable alternative to consider against the proposed development at 53 Green Street is for the lot owner to renovate or modify the existing building and parking configuration. Do so makes a compelling argument that was apparent to the Planning Board that the proposed development project significantly improves the wetland buffer area through increased building setbacks from the waterfront, adding needed stormwater management, significantly reducing the existing impervious surfaces (an area the equivalent of nearly 20 surface parking spaces), and adding much needed stormwater treatment and wetland buffer planting and restoration of the existing degraded shoreline.. Thus, absent the needed rigor and due diligence required for consideration of any other reasonably studied alternative development scheme the no-build condition of renovating or altering the existing building and site seems to clearly indicate the Planning Board’s findings were supported by the evaluation criteria listed under the Ordinance.

See attached Legal Memo for additional guidance.

Draft Motion:

The Board finds/does not find that the Board does/does not have jurisdiction to hear the appeal in accordance with RSA 676:5 Appeals to Board of Adjustment.

Alternative:

The Board finds/does not find an error in the enforcement of the Zoning Ordinance in the July 15, 2021 decision of the Planning Board for the following reasons:

Count # 3– Compliance with the Building Height Requirements

Complaint: The development project does not meet the required building height standards for the portion of the lot located outside the NEIOD.

Background: The lot is located within the CD5 Character District. The “as-of-right” or underlying maximum building heights shown on the Building Height Standards Map (Section 10.5A.21B) for the lot are four (4) stories or 50’ along Green Street and two (2) stories or 30’ within 100’ of the NMP. Given the multiple building height standards for the lot, Section 10.5A21.21 allows the higher maximum building height standards to be utilized on the lot up to 100 feet from the NMP. In the CD5 Character District building heights are limited to the maximum shown on the Building Height Standards Map (10.5A.21B). However, the Ordinance provides two (2) different development intensity incentives that would allow for taller building heights on the lot. For example, both Section 10.5A43.34 and 10.5A46.10 allow building heights – as a matter of right - to be increased up to one additional story or 10’ in height above what is shown on the Building Height Standards Map. Thus, both intensity incentive options allow for a taller building heights than permitted within the underlying CD5 Character District and both require certain public benefits (in the form of Community Space or Workforce Housing) within the development project².

Planning Board Decision: In approving the project for 53 Green Street, the Planning Board determined that the intensity incentives pertaining to building height applied to lot areas located both within and outside the NEIOD. Notably, all of the abutting lots located along the NMP (and partially within the NEIOD) have a majority of their lot area located within 100’ of the NMP. Thus, the Planning Board

² Consistent with the 2014 North End Preliminary Vision Plan (See Attached Exhibit)

applied the intensity incentives to the entire “development” located on the entire lot (versus a portion thereof). As such, the Planning Board determined that the maximum building height within the 100’ setback area (outside the NEIOD) was afforded the same added story or 10’ in building height.

Draft Motion

*The Board **finds/does not find** an error in the enforcement of the Zoning Ordinance in the July 15, 2021 decision of the Planning Board for the following reasons:*