

**MINUTES OF THE
BOARD OF ADJUSTMENT WORK SESSION
EILEEN DONDERO FOLEY COUNCIL CHAMBERS
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE
PORTSMOUTH, NEW HAMPSHIRE**

6:00 P.M.

September 24, 2024

MEMBERS PRESENT: Phyllis Eldridge, Chair; Beth Margeson, Vice Chair; David Rheame; Paul Mannle; Jeffrey Mattson; Thomas Nies; Jody Record, Alternate

MEMBERS EXCUSED: Thomas Rossi

ALSO PRESENT: Stefanie Casella and Jillian Harris, Planning Department

I. REVIEW OF RULES AND REGULATIONS

A. Discussion with Deputy City Attorney Trevor McCourt

Chair Eldridge called the meeting to order at 6:00 p.m. and said Deputy City Attorney Trevor McCourt would lead the Board through the discussion. Attorney McCourt said he and the Planning Staff members Stefanie Casella and Jillian Harris would take notes and return with suggestions.

[Timestamp 4:50] Section I, Meetings, and Section II, Time and Date, were reviewed. Attorney McCourt said the sections related to when and where the meetings were held, how they were scheduled, and what the Board did in case of a lengthy agenda. He said there were a few questions from the Board about other kinds of meetings they might want to hold, like recommendations regarding zoning amendments or reviews on the Board's progress, which he thought would be an appropriate place to put those rules. He said if the Board wanted to have an annual meeting to discuss how the Board was doing regarding their decisions, it could put into the rules that the Board could instruct City Staff to schedule that sort of meeting sometime during the year, or the Board could schedule it on their own. Mr. Mattson asked if the Board could hold a meeting that was not listed. Attorney McCourt said the point of the Rules and Regulations document was to give the public an idea of what the Board expects out of applicants, the Staff, and themselves, how the meeting will be conducted, and when the Board can expect those meetings to occur on a regular basis so that they can provide for it. He said the more information that was provided to people, the better, but the Board was welcome to deviate from the rules. Mr. Rheame said that he didn't see a need to put something in the Rules and Regulations. He said typically the Board had a sense of when they were not being fully effective and then called for an additional meeting, especially if there were new Board members, to discuss Board procedures, but he did not recommend making it a regular meeting because then it might require three meetings in a month. Chair Eldridge agreed.

[Timestamp 9:26] Section III, Responsibilities of the Code Official, was discussed. Attorney McCourt said it was often Ms. Casella who helped prepare the applicants and the Board for working through any application. Vice-Chair Margeson said it was up to the Code Official to decide whether or not something came forward to the Board, but she said there were a few applications that didn't seem final and she didn't want to be put in that position. Attorney McCourt said the Board could request a third responsibility, which could be to make a threshold determination as to an application's completeness. Vice-Chair Margeson said it was already in the section as Item 7 and that Ms. Casella could be authorized to do that.

[Timestamp 11:19] Section IV, Applicant's Responsibilities, was discussed. Attorney McCourt said the section described how the Board expected an applicant to present their argument and what the requirements were. Mr. Rheume said Item 14 required the applicant to provide 11 copies, which he thought seemed archaic since everything was now digitized, and he said that should be updated. He then referred to Item 6, scales of all drawings and plans, and said there were instances when applicants said they didn't have a scaled drawing, so he suggested adding the term "if applicable". He said sometimes applicants would draw on a surveyor's plan, in which case he said the applicant should not include any of the surveyor's information but just say it was an illustration. Ms. Casella said that would work well for the applicants because smaller projects were hesitate to hire engineers or architects due to the cost. Attorney McCourt suggested adding a provision that either the Code Official or the Board itself, upon request, would have the applicant prepare and provide scaled drawings in appropriate circumstances. Mr. Mattson referred to the completeness of applications in Item 6 and said they were all great things that needed to be included, but sometimes some were more important than others and some could be overkill for a small project. Attorney McCourt said the phrase "unless waived by the Code Official" indicated that, but the edit regarding the scale spoke to the fact that it was not always provided and there were often circumstances where it wasn't necessary to provide the scaled drawing. Mr. Nies asked if larger projects that did not bring in traffic studies and the Board asked to see it or voted against the project should be added to the list since it could be waived by the Code Official when it wasn't necessary. It was further discussed. Mr. Mannle said he didn't think it was necessary because the applicant knew that he had to bring in material he needed to prove that he met the five criteria. The traffic study was further discussed. Mr. Rheume said the intent was to give a handout to the homeowner/applicant who didn't have any idea what the Board expected. He said larger projects usually required a traffic study and it was a rare exception when the Board got too little information. He said he would leave it out of the Rules and Regulations. Mr. Nies said he asked the question to find out if the Board should say that they expected to see a missing key part of an application. Chair Eldridge said the Board had the option to ask the applicant to postpone the petition before hearing it if that was the situation. Ms. Harris said the objective was to outline the minimum requirements, so the less that was in the package, the better. Vice-Chair Margeson agreed.

[Timestamp 22:54] Section V, Fees, was discussed. Attorney McCourt said it referred to the Fee Committee and that the Board didn't have the ability to change that.

[Timestamp 23:19] Section VI, Voting, was discussed. Attorney McCourt said the Board could consider whether they wanted to change how they voted or how things got to a rehearing. He recommended that there always be an affirmative vote to do something due to the requirement of findings of fact, so if the Board voted to deny an application, that would carry the majority, or if they approved, likewise. He said a motion should be passed instead of failing to pass the motion. Vice-Chair Margeson said if the Board was deadlocked, they had done the motion to deny or approve and they're at a tie, so that would be a denial. Mr. Nies said if there was a motion to approve and it failed on a tie vote, it should just stop because it would be clear that it's been denied. He said that was a Robert's Rules standard and he didn't think the Board should deviate from that on a tie vote. Attorney McCourt said it was different in this situation because the State law required findings of fact and support in one way or another. It was further discussed. Mr. Nies said the magic number four of yeas votes was confusing. Mr. Rheume said it was from the State Statute. Mr. Mannle said it had to be the majority of the Board members, not the Board members present.

[Timestamp 28:45] Mr. Rheume said Item 6 was written when he was past Chair of the Board and that the Board ran into cases where they had 3-3 tie votes. He said it was an attempt to ensure that there was information given back to the applicant if they were denied. He said the Board did put wording about a subsequent motion to perhaps break up the deadlock, which would give the applicant an opportunity to get a majority vote, but in the Chair's mind, the Board is deadlocked and the petition is denied, and they want to make sure for the record that the applicant knows why it's denied. The subsequent motion issue was further discussed. Mr. Mattson said he preferred that the Chair solicit comments from the Board members who voted against the petition so that the Board and the applicant were comfortable and it would be helpful information if the applicant wanted to come back with a different application. Attorney McCourt said the most important thing was that the Board was building its record and findings of facts. Ms. Casella clarified that findings of fact was not just about the five criteria but also about discussion around those pieces and explaining how the Board got to its decision to support whatever was written in those findings of fact sheets. It was further discussed. Vice-Chair Margeson said her problem with the paragraph was that it didn't cover the denial if the motion was to deny. She said the Board in practice had treated the subsequent motion as the opposite motion. For example, if they motioned to approve and it was a tie, then they motioned to deny and it was still a tie. She said the paragraph indicated that the subsequent motion was supposed to be another motion to approve and not necessarily another motion to deny. Mr. Nies agreed. Attorney McCourt asked what the Board wanted. Vice-Chair Margeson said their practice had been that if the motion fails, they went the opposite way on the next motion. She said they did not want to do a repeat motion. Mr. Rheume suggested rewording the first few words 'motion to grant'. He said a subsequent motion could have stipulations or conditions that could get the motion granted, so there was an opportunity to break the deadlock. It was further discussed. Mr. Mattson suggested that instead of saying if a motion is to 'grant or deny', it could say if a motion 'results in a tie vote'. He said it was better than the alternatives, which would be to pass it if both motions tied or to continue it indefinitely. It was further discussed. Vice-Chair Margeson said she thought a motion to grant or deny was appropriate working unless any subsequent motion could encompass a further motion to grant with conditions, and then a motion to deny. Mr. Rheume said the Chair had

the power to determine when the Board was deadlocked and thought that should be incorporated in the paragraph. Attorney McCourt said he would draft something up.

[Timestamp 48:45] Attorney McCourt recommended that Items 5 and 6 include what occurs when there was a tie vote, either on a request for rehearing or a motion to grant the decision of a Code Official appeal. He said clarifying that would be helpful. Mr. Nies asked why a tie vote on a rehearing of 3-3 resulted in an approval. Attorney McCourt said the idea was to give people more of a chance if there was any doubt in the Board's mind. He said the tie should go to having a rehearing because the Board could still make the decision that was made the first time around. Mr. Nies asked what Item 8 meant by indicating 'acted upon immediately'. Attorney McCourt said the Board should be having discussions based on a motion, so the next thing that should happen is a motion should be made and there can be discussion on the motion. Ms. Casella said if a discussion led to a postponement, the public hearing should then be re-opened and the issue postponed. Mr. Rheume said it might be possible that the Board postpones it because they want more time to formulate a motion that addresses all the criteria. He said if new information was not added by the applicant, the public hearing may not need to be opened again, but if the petition was postponed because the Board wanted more information from the applicant, then it would behoove the Board to re-open the public hearing to hear from the public what their reaction is to the new information.

[Timestamp 53:13] Mr. Rheume said that Item 2 in Section VI about voting for the Chair and Vice-Chair seemed confusing because it said it shall happen annually. He said it should be more specific about what meeting it would take place in and what meeting the new Chair and Vice-Chair would take effect. He said December made sense because terms expired on December 1. He said it should be made clear that it doesn't take effect until the January meeting because there could be a new Chair and also a pre-meeting with Staff. It was further discussed. Ms. Casella said it should be clarified when it is appropriate for remote participation in terms of Board members or applicants. Vice-Chair Margeson referred to Item 2 and said attendance was a broader thing to define in the rules but she was in favor of keeping Item 2 the way it was. Mr. Rheume said he was in favor of tightening it up. He also noted that Item 13 about the Chair and Vice-Chair gender should be made gender neutral. The alternates description in Item 13 was briefly discussed.

[Timestamp 1:00:49] Section VII, Miscellaneous, was discussed. Chair Eldridge said when the Board knew a petition was postponed, they took it out of the agenda's order at the beginning of the meeting to rule on it. Attorney McCourt said taking anything out of order would require a suspension of rules and that it would be helpful to clarify that in the Rule and Regulations. Chair Eldridge asked if it was a problem for an applicant to have two applications before the Board at the same time. Attorney McCourt said there should only be one application, including appeals, and that it should be included in the Rules. Vice-Chair Margeson said Item 4 said the applicant shall only be allowed to have one active application before the Board at any time including applications on appeal because those things could be remanded to the Board.

[Timestamp 1:03:50] Ms. Casella said it might be a good section to add the detail of Fisher v. Dover and the fact that it is applicable for not only variances but for special exceptions too. Mr. Rheume

said the Board seemed to struggle with how they resolved Fisher v. Dover issues. He said sometimes Staff brought it up and it was discussed ahead of time, or the applicant spoke to Fisher v. Dover. He asked what the public's role in it was as well, noting that they might say it applied or did not apply. He asked if it required a motion or not. Ms. Casella said the Board had the ability to invite the applicant to speak to Fisher v. Dover specifically. Attorney McCourt said the Board could work through and clarify how they wanted to handle Fisher v. Dover. He said the application was either substantially different or not, and if not, the Board could vote to request more information. Mr. Rheume suggested that the Staff ensure that the Board had the prior application as part of their package if there was a Fisher v. Dover situation. It was further discussed. Chair Eldridge asked if the applicant and the public should be alerted if there was a Fisher v. Dover situation. After more discussion, the Board decided that the paragraph should be changed but kept simple. Chair Eldridge said the applicant could appeal a decision or do a different application. Ms. Harris asked if the Board wanted the Decision Letter or all the materials from a previous application in the case of Fisher v. Dover. Mr. Rheume said he preferred the full application so that it could be compared. Vice-Chair Margeson said the previous Staff Report would also be helpful. It was decided that an on-line link would be most appropriate.

[Timestamp 1:13:58] Section VIII, Procedure for Public Hearings, was discussed. Mr. Rheume said the Board seemed to be helter-skelter in postponing petitions at times. He said postponing a petition was significant because it affected the applicant and the public, so he thought it was appropriate for a motion to postpone have commentary about why the maker of the motion thought it should be postponed. He said another issue was that sometimes the Board had a request to postpone but didn't have any information in the package, so if they chose not to postpone, they wouldn't know what to speak to. Ms. Casella said sometimes the information wasn't included because Staff was waiting for certain information and the petition had already been noticed. She said they added the postponement to the agenda as soon as they found out from the applicant that they wanted it postponed. Attorney McCourt suggested that if an applicant didn't show up and the Board wasn't comfortable postponing the petition, they could deny it without prejudice.

[Timestamp 1:23:57] Section IX, Electronic or Multi Media Presentations, was discussed. Attorney McCourt said the Board had submitted comments about people attending meetings remotely. The Board decided to discuss it at a subsequent meeting.

[Timestamp 1:24:48] A few pre-submitted comments were discussed. Mr. Mannle suggested that in Section IV, Applicant's Responsibilities, it should be added that the applicant is responsible for his own application and its factual correctness, otherwise it could be used against them. Attorney McCourt suggested that the term be 'can be considered to be against the applicant' instead of 'used against the applicant'. Vice-Chair Margeson asked if it was possible for the Board to do administrative approvals for items like condensers, similar to what the Historic District Commission did. Attorney McCourt said if there were items where the zoning ordinance was too restrictive, the issue could be brought to the Planning Board. It was further discussed. The Board decided to address Mr. Nies' list of comments at another meeting when Mr. Rossi was present.

II. OTHER BUSINESS

There was no other business discussed.

III. ADJOURNMENT

The meeting adjourned at 7:32 p.m.

Submitted,

Joann Breault
BOA Recording Secretary