

III. NEW BUSINESS

- B. Petition of **Salem Manufactured Homes, LLC**, for Appeal of an Administrative Decision to require a variance for the expansion of a non-conforming structure in accordance with Section 10.321 if the Zoning Ordinance for property located at 210 Oriental Gardens. Said property is located on Assessor Map 215 Lot 9-21 and lies within the Gateway Corridor (G1) District. (LU-23-43)

Neighborhood Context



0 40 80 160 Feet
1 inch = 84.6 feet

210 Oriental Gardens



Planning Department Comments

The applicant is appealing the determination of the Planning and Sustainability Director that a variance is required to grant a building permit for the replacement of a larger manufactured housing structure than the structure that was removed given the standards set forth in Section 10.321 of the Zoning Ordinance (provided below).

***10.321** A lawful nonconforming building or structure may continue and be maintained or repaired, but may not be extended, reconstructed or enlarged unless such extension, reconstruction or enlargement conforms to all the regulations of the district in which it is located.*

The letter of decision from the Planning and Sustainability Director is included in meeting packet for the Boards reference.

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Duxbury, Massachusetts 02332

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March 29, 2023

Via: Viewpoint

RE: Appeal of Administrative Decision - 210 Oriental Gardens

Board of Appeals
City of Portsmouth
150 Junkins Avenue
Portsmouth, NH 03801

Dear Chairman and Members of the Board:

I represent Salem Manufactured Homes, LLC (“SMH”) which is responsible for replacing homes at the Oriental Gardens Mobile Home Park in Portsmouth (“Oriental Gardens”). This letter is submitted in support of its appeal of an administrative decision.

Oriental Gardens is located in the Office Research Zone. While a Manufactured Housing Park is a prohibited use under sec 10.440, use 1.80, it has operated for many years and is lawfully grandfathered. Recently, SMH sought a building permit to replace an existing home with a new home that is slightly larger, by 148 square feet, at 210 Oriental Gardens. On March 3, 2023, the Director of Planning and Sustainability (“Director”) determined that the increased square footage would be an expansion of a non-conforming structure in violation of sec 10.321. It is important to note that Oriental Gardens constitutes one lot and meets all required size and setback criteria. This proposed change has no impact on these requirements. Further the unit is an interior unit which cannot be seen by the general public. Nor does it add a bedroom such that occupancy may be increased. Thus the proposed change has absolutely no effect on the public.

The Directors decision was legally incorrect for several reasons. First, the table of uses applies only to manufactured housing **parks**, not individual structures. The Director confused there structures within the park with the park itself. A manufactured housing park is a lot with designated areas of the lot to be used for individual homes and yards. The proposed change did nothing to change or expand the use of the entire property as a manufactured housing park. It

still had the same roadway network and designated spacing of homes. More importantly, the use and its limitation in the ordinance says nothing about the structures contained within the park. That is because the structures are irrelevant to the use as a park. As long as the structures are manufactured housing they are fully consistent with and do not expand the use.

This leads to the second error, when the Director determined the home at 210 Oriental Gardens was a non-conforming structure. As long as the use was grandfathered and the size of the structure considered irrelevant to the use, the structure was conforming and therefore could be enlarged without enlarging the use as a manufactured housing park. Indeed there were no prohibitions in zoning concerning the size of structure and certainly no size restrictions in the use prohibitions. This is further confirmed by the ordinance itself. Indeed 10.816.10 sets out dimensional requirements for manufactured housing. All homes within Oriental Gardens meet these requirements and are fully conforming.

Third, while the additional share footage of the home increases its size, it decreases the size of the lawn which was also being used as part of a mobile home park. Whether lawn or home, the use remains identical as structures cannot be separated from consideration of the other parts of the property and their use as integral to the operation of a manufactured housing park. The amount of the property used for a manufactured housing park is unaltered by this change.

Fourth, the Director abused his discretion in upholding the denial of the building permit. As noted above, the proposed change has no effect on the public and is de minimus when considered in the overall context of the entire park. There was no basis too consider this an engagement or either a non-conforming use or structure.

Fifth, the Planning Department has historically interpreted the ordinance to allow replacement mobile homes to be larger, in some instances much larger than the homes they were replacing. See building permits attached to letter from SMH. An agency's historical interpretation of a statute or ordinance should be given great deference. *In re: Carrier*, 165 N.H. 719 (2013), *Genworth Life Insurance Company v. NH Dept. of Insurance*, 174 N.H. 78 (2021). Here without any reason, the Director has repudiated the Planning Department, contended it was wrong for years and advanced an unlawful interpretation of the ordinance instead. The Planning's Department's historical interpretation should have been given deference.

Finally, and most importantly, the Director illegally failed to consider NH RSA 674:19 which precludes application of zoning to existing structures and uses unless there is a proposal for a substantially different use or structure. He made no findings in that regard. *Town of Salem v. Wickson*, 140 N.H. 139 (1995) sets out the tests for making this determination. "In determining whether there has been a substantial change in the nature or purpose of the pre-existing nonconforming use, "we consider: (1) the extent the use in question reflects the nature and purpose of the prevailing nonconforming use; (2) whether the use at issue is merely a different manner of utilizing the same use or constitutes a use different in character, nature, and kind; and (3) whether the use will have a substantially different effect on the neighborhood."

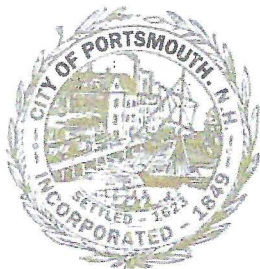
Hurley, 143 N.H. at 571–72, 729 A.2d 998.” When these factors are applied, it is patently clear that adding some square footage does not constitute a substantial change. The change is consistent with the pre-existing non-conforming use. It is merely a slightly different manner of using the existing use of a manufactured home in a park. Lastly, as noted above, it has no impact on the neighborhood. Since the proposed home meets all of these tests and is not substantially different than the existing home, the zoning ordinance cannot preclude the proposal as a matter of law. See also: *Ray’s Stateliness Market, Inc., v. Town of Pelham*, 140 N.H. 139 (1995).

Although not a legal basis as such calling for reversal, the Board should also consider policy. If variances are required for every time a mobile home is modified or replaced, it will radically drive up the cost. Thus, it is directly negatively impacting affordable housing which is desperately needed. In prior years, the city did not require such variances. This is the first instance where it reversed past practice. This blow to the sustainability of affordable housing should not be allowed.

Sincerely,

/s/ John Kuzinevich

John Kuzinevich



CITY OF PORTSMOUTH

Community Development Department
(603) 610-7281

Planning Department
(603) 610-7216

Mr. Glenn Gidley
Salem Manufactured Homes, LLC
PO Box 54
Salem, NH 03079

March 3, 2023

Dear Glenn:

This letter is in response to your letter of February 17, 2023 regarding installation of a replacement home at the Oriental Gardens Mobile Home Park. The application is to replace the home with a new home that is 148 square feet larger than the existing home. The home in question is located in an Office Research zone. According to the Table of uses in Article 4 section 10.440 use 1.80 Manufactured Housing Park is a prohibited use in the Office Research Zone. While the existing homes are lawful nonconforming uses within this park the expansion of a home inside the park is not allowed as it is an expansion of a non-conforming structure according to the definition in our zoning ordinance, Section 10.321 in Article 3 of our Zoning Ordinance.

A lawful nonconforming building or structure may continue and be maintained or repaired, but may not be extended, reconstructed or enlarged unless such extension, reconstruction or enlargement conforms to all the regulations of the district in which it is located.

While I understand your desire to improve the property at this location it is our determination that in order to allow the expansion of a non-conforming structure a variance would be required. If you do not agree with this interpretation you have an avenue for an appeal of this administrative decision to the Board of Adjustment.

If you have questions or need additional information, please do not hesitate to contact me at (603)610-7215 or by email at plbritz@cityofportsmouth.com.

Sincerely,

Peter Britz

Director of Planning and Sustainability

Cc: Susan Morell, City Attorney
Trevor McCourt, Assistant City Attorney
Kate Homet, Associate Environmental Planner

**SALEM MANUFACTURED HOMES, LLC
PO BOX 54
SALEM, NH 03079
(603) 898-2144**

February 17, 2023

Kate Homet
Peter Britz
City of Portsmouth
Planning Department
Portsmouth, NH 03801

RE: 210 Oriental Gardens
Replacement of Manufactured Home Permit

Dear Kate and Peter,

I have reviewed your correspondence with Darlene Gidley at our Portsmouth Office regarding the above captioned matter and would like to point out that the new manufactured home applied for in our permit application is 148 square feet larger, including steps, than the prior home. This however does not translate to an expansion of a non-conforming use which requires a variance per your prior conversations. In this case, the use is the same as the previous use. Oriental Gardens is a manufactured home park in existence since the 1950's, the current use predates current zoning. The proposed manufactured home replacement meets the setbacks for current zoning. The use of the new proposed manufactured home is the same as the prior manufactured home; a 2-bedroom manufactured home.

I would also like to point out, this permit application must be approved based on Article 3-10.320 of the zoning ordinance because the manufactured home complies with the regulations in the current district. Additionally, and more importantly, the NH RSA 674:19 clearly states that applicability of the current zoning in this case simply does not apply, because the new home is not substantially different from the use to which the prior home was.

Please consult with your Planning Director regarding this matter and approve the permit application as this has been the practice for previous permits applied for recently at Oriental Gardens which I have been involved. I am enclosing copies of 2 permits for replacement homes at Oriental Gardens which were as much as 25% larger than the original footprint which did not require a variance. If we are required to file a variance by your Department, we will seek an administrative appeal with the Zoning Board of Adjustment instead, due to the flawed interpretation by Planning Department thus far.

We have had a decade long relationship, constructively working with the Planning Department as it pertains to Manufactured Housing and would like to continue same, without the expense and awkwardness of an appeal. If yourself or Peter would like to discuss this in a timely manner, prior to an appeal being filed, please contact me at (603) 898-2144.

Thank you,

Glenn Gidley
Enclosure

TITLE LXIV
PLANNING AND ZONING

CHAPTER 674
LOCAL LAND USE PLANNING AND REGULATORY POWERS

Zoning

Section 674:19

674:19 Applicability of Zoning Ordinance. -- A zoning ordinance adopted under RSA 674:16 shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration.

Source, 1983, 447:1, eff. Jan. 1, 1984.



City of Portsmouth Building Permit

Inspection Department
1 Junkins Avenue
Portsmouth, NH 03801
603-610-7243

Permit Number:
31947
Date of Issue:
August 02, 2018
Expires:
Fri Aug 02 2019 13:55:30
GMT+0000 (UTC)
Const. Cost:
\$40000

Owner: CLARK PRISCILLA
Applicant: Darlene Gidley
Contractor: Glenn Gidley, Salem Manufactured Homes Phone #: 603-896-2144
Location: 315 ORIENTAL GDNS

Description of Work: New Residential Manufactured Home: New 13'8" x 48'0" Single-wide home with entry landing and deck.
Project to include:
Install 13'8" x 48'0" new manufactured home with required slab and tie downs. Also to install a 4x6 PT free-standing deck and an 8x10 PT free-standing deck.

Zoning: Garden Apartment / Mobile Home Park
(GA/MH)

Map/Lot: 0215-0009-0001-

Design Occupant Load:

Total # of Dwelling Units: 1

Use Group: New Dwelling Unit
Const. Type: N/A
Bldg. Code: IRC Edition: 2009

Remarks:

STREET NUMBER

* Per City Ord. Sec. 11.502 (F) Street/Unit Number must be affixed to Main Structure as to be plainly visible from the street. Construction sites must post the address clearly on the property. No site activity allowed before 7:00AM or after 6:00PM. No weekend construction allowed.

* Separate electrical, plumbing and mechanical permits required.

* ELECTRIC SERVICE BONDING NOTE: The National Electrical Code requires a "Concrete Encased Electrode" (NEC Art. 250.50) to be provided by the electrician. Electrode must be installed during concrete foundation placement if new electric service is being installed.

* All stairs, handrails and guard systems shall be constructed to building code requirements for strength, geometry, graspability, fall protection and other code required dimensional features. NOTE: Contractor assumes all responsibility for code conformance.

* Deck ledger shall be attached to house band joists per IRC Section R502.2.2 and Table R502.2.2.1 or shall be freestanding and structurally independent of house.

MOBILE HOME ANCHORED

* Manufactured home shall be installed and anchored by certified installers per New Hampshire Manufactured Housing State Law. State certification documents required upon completion.

You must contact Dig Safe by calling 811 or visiting www.digsafe.com prior to starting construction

The PERMIT HOLDER has read this permit, the permit application, and the Building Official's marked-up plans and agrees to perform the work authorized including any conditions or requirements indicated thereon; and any stipulations imposed by a Land Use Board in conjunction with the project. The CONTRACTOR shall be responsible for notifying the Inspection Department 48 hours in advance, for FOUNDATION, FRAMING, and FINAL inspections. A Certificate of Occupancy is required for all Building Permits. Buildings shall not be occupied until ALL inspections (BUILDING, ELECTRICAL, PLUMBING, MECHANICAL, and FIRE) are complete and Occupancy



City of Portsmouth Building Permit

Inspection Department
1 Junkins Avenue
Portsmouth, NH 03801
603-610-7243

Permit Number:
BLDG-19-709
Date of Issue:
October 02, 2019
Expires:
October 01, 2020
Const. Cost:
\$70000

Owner: SALEM MANUFACTURED HOMES LLC
Applicant: Darlene Gidley
Contractor: Glenn Gidley, Salem Manufactured Homes Phone #: 603-427-8373
Location: 215 ORIENTAL GDNS

Description of Work: New Single Family Manufactured Home, Utility Shed, and Deck
Project to Include:

install a new 20' x 44' manufactured home. Manufactured Home shall be installed on an approved slab with tie downs. Install a new 6' x 8' Utility Storage shed; Construct a free standing 8' x 12' deck as well as a 6' x 6' landing and steps.
Manufactured Home, deck and utility shed Shall be located in approved location and with approved setbacks.

Map/Lot: 215-9-16-
Design Occupancy Load: Single Family
Total # of Dwelling Units: 1

Use Group: New Dwelling Unit Misc.: Tanks, pools, sheds, tents
Constr. Type: Other
Bldg. Code: IRC Edition: 2009

Remarks:

- * Per City Ord. Sec. 11.502 (F) Street/Unit Number must be affixed to Main Structure as to be plainly visible from the street. Construction sites must post the address clearly on the property. No site activity allowed before 7:00AM or after 6:00PM. No weekend construction allowed.
- * Separate electrical, plumbing and mechanical permits required.
- * ELECTRIC SERVICE BONDING NOTE: The National Electrical Code requires a "Concrete Encased Electrode" (NEC Art. 250.50) to be provided by the electrician. Electrode must be installed during concrete foundation placement if new electric service is being installed.
- * All stairs, handrails and guard systems shall be constructed to building code requirements for strength, geometry, graspability, fall protection and other code required dimensional features. NOTE: Contractor assumes all responsibility for code conformance.
- * Deck ledger shall be attached to house band joists per IRC Section R502.2.2 and Table R502.2.2.1 or shall be freestanding and structurally independent of house.
- * Manufactured home shall be installed and anchored by certified installers per New Hampshire Manufactured Housing State Law. State certification documents required upon completion.
- * Additions shall be designed and constructed to conform with the applicable provisions of the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. Section 5401, et seq.)
- * Dryer Duct termination shall be as per Section M1502.3 and Table M1502.4.4.1. Where the exhaust duct is concealed the length shall be identified on a permanent label as per Section M1502.4.5. Clothes Dryers shall be exhausted in accordance with the manufacturer's instructions.

The PERMIT HOLDER has read this permit, the permit application, and the Building Official's marked-up plans and agrees to perform the work authorized including any conditions or requirements indicated thereon; and any stipulations imposed by a Land Use Board in conjunction with the project. The CONTRACTOR shall be responsible for notifying the Inspection Department 48 hours in advance, for FOUNDATION, FRAMING, and FINAL inspections. A Certificate of Occupancy is required for all Building Permits. Buildings shall not be occupied until ALL inspections (BUILDING, ELECTRICAL, PLUMBING, MECHANICAL, and FIRE) are complete and Occupancy has been issued. By signing this permit, the owner or his/her representative (Permit Holder), authorizes property access by city officials to conduct interior and exterior inspections and property tax assessments during and/or after the construction process.

The Permit Card Shall Be Posted and Visible From the Street During Construction.

Code Official:

This is an e-permit. To learn more, scan this barcode or
visit portsmouthnh.viewpointcloud.com/records/39288

