

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

7:00 P.M.

JANUARY 17, 2018

MEMBERS PRESENT: Chairman David Rheume, Vice Chairman Jeremiah Johnson, Patrick Moretti, Arthur Parrott, Jim Lee, Peter McDonell, Christopher Mulligan, Alternate John Formella

MEMBERS EXCUSED: None

ALSO PRESENT: Peter Stith, Planning Department

Chairman Rheume announced that the celebration for retiring Vice-Chair Charles LeMay was postponed to the February meeting. He also stated that Case 12-8, 86 Emery Street, was withdrawn and Case 1-1, 996 Maplewood Avenue was postponed.

I. APPROVAL OF MINUTES

A) December 19, 2017

*It was moved, seconded, and unanimously passed (7-0) to **approve** the December 19, 2017 minutes as amended.*

II. OLD BUSINESS

Mr. Mulligan recused himself from the petition, and Alternate John Formella assumed his voting seat.

A) Request for Rehearing regarding property located at 278 State Street.

Chairman Rheume read the petition into the record and stated that it was an appeal of the Historic District Commission (HDC) to deny the issuance of a demolition permit to the applicant. He said the HDC chose to deny it in part but allowed for partial demolition of the structure so that the State Street and Church Street facades would remain.

Vice-Chair Johnson said that he read some other engineering reports and that it didn't play much with him because one engineering report had been submitted by the City for the actual zone

hearing. He said the Board struggled with how to arrive at what was a difficult decision and felt that the applicant was given the due process they deserved with the ability that the Board had in front of them. Mr. Moretti said he agreed that the additional engineering was important but didn't know whether it would have swayed his vote. He said it was a very tough decision on something the HDC had been working on for many months, and he felt that the Board pursued the best course of action with what they had to work with and that he didn't believe there was any other way they could have voted. Mr. Parrott said he agreed with both Mr. Moretti and Vice-Chair Johnson. He said he re-read the reports and thought the Board had been very thorough. He said the grounds for appeal were very specific and it wasn't a case of going back over the same arguments. He concluded that the Board came to a reasonable and logical conclusion based on the information in front of them.

Chairman Rheume stated that there were some procedural errors noted, and one issue was that there were a few additional engineering reports. He said the City provided the Board with the report that the HDC had asked for in response to some of the information that the applicant had provided, and that the City paid for half or more of that report. He said the Planning Department thought that the Board should have the same information that the HDC had, in terms of what they had requested. He said he had presumed that the applicant had provided all the engineering information that they were responsible for and didn't see anything significantly different from the information the Board had from the application. He said the Board recognized that there were engineering opinions on both sides as to whether or not the building could be re-used, and that it centered on the economics of being able to do that, which the Board struggled with as well. He asked whether the economics should have played into the HDC's decision or the Board's decision, and he concluded that it was an element but not the most critical element. As far as partial approval, he said he didn't think that the Board partially approved it but rather simply denied some elements of the request and recognized that there might be a need to demolish some of the structure. He noted that partial approval was usually for a project that took a long period of time and had many elements to it, in which the applicant would request approval for one element while waiting for the rest of the approval. He said he didn't think that was the situation the Board found themselves in, so he felt it didn't have a lot of merit. He said that the description of how the Board compared the criteria to the application could potentially be the area that might call for a rehearing in the sense that the Board wasn't used to that criteria, but he felt that it was adequate under the circumstances and thought the Board covered it well enough that they could move forward without hearing that aspect due to their lack of experience in dealing with those criteria as well as trying to summarize the historical elements and comparing them against their Zoning Ordinance criteria.

*Mr. Moretti moved to **deny** the rehearing, and Mr. Parrott seconded.*

Mr. Moretti stated that the case was probably one of the more struggle-filled hearings the Board had had since he was a Board member but thought they gave it its due diligence. He said it wasn't something that the Board dealt with daily, and he felt that the Board covered all their bases and did their best to come up with the answers they did. Mr. Parrott concurred with Mr. Moretti and also concurred with the comments on the process issue. He said the issue was whether the Board upheld the HDC's request to demolish the building, and he felt that they did. He said that the Board's action was clear, that all the discussion before the decision was

pertinent, and that everyone had a fair shot of presenting their views on all sides. Chairman Rheume said the Board upheld the HDC's decision that the building had to be preserved and modified a bit. Mr. Parrott agreed, noting that they tried to help the developer by keeping two of the facades and demolishing the other two.

*The motion to deny the rehearing **passed** by unanimous vote, 7-0.*

B) Case 12-8

Petitioner: Kathryn Michele Arbour

Property: 86 Emery Street

Assessor Plan: Map 220, Lot 87-1

Zoning District: Single Residence B

Description: Second free-standing dwelling on a lot.

Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:

1. A Variance from Section 10.513 to allow a second free-standing dwelling on a lot. (*This petition was tabled at the December 19, 2017 meeting.*)

DECISION OF THE BOARD

Chairman Rheume noted that the petition was withdrawn.

III. PUBLIC HEARINGS - NEW BUSINESS

Mr. Mulligan and Mr. Formella recused themselves from the vote.

1) Case 1-1.

Petitioner: James M. Fernald, Appellant

Property: 996 Maplewood Avenue

Assessor Plan: Map 219, Lot 4

Zoning District: Single Residence B District

Description: Appeal

Request: Appeal from an Administrative Decision regarding the issuance of a building permit for Unit C of the above property.

Chairman Rheume explained that the applicant was appealing the decision regarding the issuance of a building permit for Unit C of the property. He said there was an approval made by the Board, and the applicant was appealing the fact that the ultimate building permit issued by the City based on the Board's approvals as well as the Planning Board's approval resulted in a structure that was of a different size than what was indicated in some original plans.

DECISION OF THE BOARD

*Mr. Parrott moved to **postpone** the petition to the February meeting, and Mr. Lee seconded.*

Mr. Parrott stated that it was normally the Board’s practice to allow a petition to be postponed, especially if it was a good request. He said it met the criteria and the Board’s custom and was something that the applicant was entitled to. Mr. Lee concurred with Mr. Parrott and had nothing to add. Chairman Rheume said the case was a bit different in that it was an appeal, and that normally when the Board postponed an application, it was because someone was doing something to their own property. He said it was okay to wait the additional month due to the nature of the appeal, and if there was an issue a month later, it wouldn’t have a negative impact on the developers.

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

2) Case 1-2

Petitioners: Bursaw’s Pantry, LLC, owner and Robert and Kathleen Dockham, applicants
 Property: 3020 Lafayette Road
 Assessor Plan: Map 292, Lot 152
 Zoning District: Mixed Residential B District
 Description: Expand an existing building to contain three upper story dwelling units and a ground floor office with a parking lot landing.
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:

1. Variances from Section 10.521 to allow the following: a) 3,938± s.f. lot area per dwelling unit where 7,500 s.f. is required; and b) a 5.5’± left side yard where 10’ is required.
2. A Variance from Section 10.533 to allow a building or structure to be located 54’± from the centerline of Lafayette Road where a minimum of 80’ is required.

Mr. Mulligan recused himself from the petition, and Mr. Formella assumed his voting seat.

SPEAKING IN FAVOR OF THE PETITION

Attorney John Bosen was present on behalf of the applicant to speak to the petition. He introduced the applicants Robert and Kathleen Dockham and noted that they were also the owners of Dockham Builders. He also introduced the project engineer John Chagnon and the project architect Tim Brochu.

Attorney Bosen stated that the Dockhams were under contract to purchase the property and that the structure did not meet code, so they were seeking several variances to renovate the structure. He noted that the first floor would be commercial use for Dockham Builders, the second floor would be two apartment units, and the third floor would be one apartment. He described the surrounding properties and reviewed the property’s history. He asked the Board to consider the application as a last opportunity to develop the site in the manner requested, noting that the property could be sold and developed into more intense uses. He reviewed the criteria and said they would be met.

Mr. McDonell asked whether the applicant had considered two units instead of three. Attorney Bosen said the number of units was necessary to support the investment in renovating the property and that they felt that it was the highest and best use. Mr. Lee asked whether the lower floor would be used for administration functions only. Attorney Bosen said that it would be for office use only and would involve four employees and the occasional customer, which would be a far less intense use than the prior one. He said there would be no construction materials on site.

In response to Chairman Rheaume's questions, Attorney Bosen said the existing foundation would be re-used in its entirety and the footprint would not be expanded. Mr. Dockham said that a structural engineer validated that the structure could be built up a little higher. Chairman Rheaume noted that the structure was bigger than some of the surrounding homes, yet Attorney Bosen had stated that it would be in keeping with the neighborhood's character. He asked whether there were other large surrounding buildings that would make the Board feel better about the size of the structure. Attorney Bosen said the problem was that there were several surrounding competing zones. He said the restaurant Jitto's was a similarly-sized structure and that the residential neighborhood behind the structure had bigger lots. He emphasized that the structure was on Lafayette Road, where there were larger structures, and thought it was the best use for their lot given its zone.

Jonathan Bursaw stated that he was the current property owner and that he believed it was the highest and best use for the property, and he asked the Board to approve the project.

SPEAKING IN OPPOSITION TO THE PETITION

Kaley Weeks (no address given) said she was the owner of the abutting property and had concerns about how parking and lighting would affect her property. She also said that the notification indicated that a variance was required for a setback change.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Bosen said the project met all the City's parking requirements and would have dark-sky lighting. He noted that both issues would be vetted at the site review. He said the setback was currently violated because one side was non-compliant, so they were requesting the same variance but were not expanding the footprint.

No else rose to speak, and Chairman Rheaume closed the public hearing.

DECISION OF THE BOARD

*Mr. Parrott moved to **grant** the variances as presented and advertised, and Mr. McDonell seconded.*

Mr. Parrott said it seemed to be a very appropriate re-use of the property, considering the site and location, especially since it was a mixed-use neighborhood. He said that, of the different proposals that had previously come before the Board, it struck him as the most suitable for the property and felt that it should be suitable for the neighbors. Mr. Parrott said that granting the

variances would not be contrary to the public interest and would observe the spirit of the Ordinance. He said the Board considered how the project comported with things like the Master Plan and considerations of neighbors with respect to air, light, safety, etc. and he felt that it clearly met those criteria. He said he drove by the property often and never saw a lot of traffic or pedestrians, so he felt that the proposed use for the first floor as a business office would be less busy than the former convenience store, especially with the small number of office personnel. He said that converting the upper units to apartments seemed to be a very appropriate use. He said granting the variances would do substantial justice because it was hard to see any conflicting or overriding public interest, so the tip went to the proposed use and to the proposal. He said granting the variances would not diminish the value of surrounding properties because they would be completely unaffected. He said he thought it might be a small improvement and wouldn't have any effect across the street, and that the nearby residential properties going down the street would benefit from the proposed use rather than the empty building and that the new building would be an attractive addition to the neighborhood. Mr. Parrott said that, relating to the unnecessary hardship test, the property had special conditions, including the odd way it became zoned as it was, its small size, and having lost a good part of it to the State's expansion of the highway, and he felt that those conditions would satisfy the criteria.

Mr. McDonnell concurred with Mr. Parrott, adding that he was at first a bit concerned about the intensity of the residential use, but felt that the use was reasonable because it was in the transition zone from the Gateway to the residential zones, and allowing the uses was reasonable.

Chairman Rheaume said he would support the motion, even though he had some reservations. He said it was a good-sized building and, when completed, would stand out in that corner due to its elevation. He said there surrounding structures that had the same height, like Jitto's across the street, but he also noted that Jitto's was in a recessed area and the applicant's property was on a hill and right up against the road. He said the structure would appear to be fairly large but would still serve as a transition to the neighborhood behind it. He said it was close enough to Lafayette Road and the corner of the property, with the arranged parking, the building siting, and the lot topography, so it would look big but would not be over the top. He said it was probably the best proposal that the Board had seen to re-use the lot. He said the building would also be close to the back lot line at the corner but noted that it was a wide lot on Lafayette Road and that the rest of the building in the back end was fully compliant.

The motion passed by unanimous vote, 7-0.

Mr. Mulligan resumed his voting seat, and Mr. Formella resumed his alternate status.

3) Case 1-3.

Petitioners: Goodman Family Realty Trust, owner and Aroma Joe's Coffee, LLC, applicant
 Property: 1850 Woodbury Avenue
 Assessor Plan: Map 239, Lot 9
 Zoning District: Gateway Neighborhood Mixed Use Corridor (G1)
 Description: Construct and operate a drive-through take-out restaurant

- Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:
1. A Variance from Section 10.5B.34.90 to allow a building with no street facing entrance.
 2. A Variance from Section 10.5B.41.80 to allow no community space coverage to be provided where 10% of the total site area is required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant to speak to the petition and introduced the property owner Marty Goodman, Marty McKenna of Aroma Joe's, and the project engineer Eric Weinrieb.

Attorney Phoenix noted that the applicant had been before the Board the previous March and received some variances. He reviewed the petition, noting that the project went through site review and before the Technical Advisory Committee (TAC), which led to some minor changes and recommendations relating mostly to accessibility. He emphasized that the lot was previously in a different zone but was now in the Gateway Zone (G1) due to the recent zone changes and had a few additional requirements that the project had to meet, namely a front entry and community space of 5500 square feet. Attorney Phoenix said there was no customer access to the inside of the building so it wouldn't make sense to have the entry at the front. He said they were also requesting not to have community space because there was no reasonable place to put it and the area had a high percentage of vehicle traffic. He explained why the suggested community spaces, including parks, gardens, and so on, did not apply to their site. He noted that the patio they intended to have could qualify for community space but would be used only by patrons and not the overall community. He reviewed the criteria and said they would be met.

Mr. Lee asked whether the original stipulation that a fence be erected would be included, and Attorney Phoenix agreed that it would be done.

Mr. Mulligan noted that the applicant said the application was essentially the same that was approved the previous year and asked why the new zoning applied and whether the applicant applied for a building permit. Attorney Phoenix said the zoning ordinance application and the building permit were an anomaly because the applicant was vested if the first public hearing was published before a zoning change. Mr. Weinrieb said the zoning changed before they appeared before the Planning Board, so they needed the zoning relief because they weren't vested.

Mr. Mulligan said what troubled him about the application was the spirit of the Ordinance because there was a new Ordinance and a new zone that the applicant was in. He asked how the applicant met the purpose of the Gateway Zone in encouraging walkability, which seemed to go against the applicant's business entirely because it was 100 percent auto-dependent. Attorney Phoenix said he questioned the reasonability of making that particular stretch of Woodbury Avenue the Gateway Zone because of the way it was already developed, and he thought there was no use that would comply with the current zoning. He said the change in zoning made sense for a vacant lot and its redevelopment, but the applicant's site was already developed, with parking access ways, and so on, and no other use could go there. He said the lot was small with a

very small building and the use was permitted, which was the driving factor, and he felt it was fair to let the project go forward. Mr. Weinrieb noted that, even though there was no front entrance, there was the walk-up window on the side and they were doing the pedestrian link from the sidewalk to that window. He said that, other than the two residential areas across the street from the site, there would be no pedestrians crossing Woodbury Avenue to the site.

Mr. McDonell said the Board had discussed closing the back off with a fence, and that he was concerned about headlights. He asked whether the walkway from the housing development to the lot still existed. Mr. Goodman said there was currently a fence along the entire perimeter of the property. Attorney Phoenix said the Portsmouth Housing Authority didn't want their residents cutting through that area and wanted the public to use the existing sidewalks.

Mr. Moretti said the snow storage area looked like there was grass on it and asked whether it could be greenspace. Attorney Phoenix said there was a little greenspace but that it didn't make sense to consider that community space because it didn't meet the intent of the Ordinance. Mr. Stith agreed that it could not count as community space but said it could count as open space.

SPEAKING IN OPPOSITION TO THE PETITION AND/OR SPEAKING TO, FOR, OR AGAINST THE PETITION

No one rose to speak, and Chairman Rheume closed the public hearing.

DECISION OF THE BOARD

The Board discussed the petition. Mr. Lee said it was unfortunate that the applicant got caught in the middle of the zoning change. Chairman Rheume said the Ordinance was trying to be proactive. He said the neighborhood came about in the 1970s when the car was king, and the City wanted to redevelop the area to have the type of businesses that would attract vehicular traffic, like the Newington Mall. He said at the time that the City also wanted a mall downtown, but 40 years later, that vision changed for the Gateway area. He said that currently the traffic patterns were not conducive to pedestrians but the future vision for the next 40 years could include a demand for reducing traffic lanes and having affordable housing, and so on. He said that the application was probably one of the last of the more vehicle-centric ones to go before the Board as the neighborhood transformed itself. After more discussion, he concluded that he was supportive of the application going forward since it was started before the new vision and felt that the applicant got stuck in the amount of time it took to present before the Board. He said the real spirit of the Ordinance was that the City was trying to transform that area over time.

*Mr. Lee moved to **grant** the variances as presented and advertised, and Mr. Parrott seconded.*

Mr. Lee said that granting the variances would not alter the essential character of the neighborhood, would pose no threat to the public's health, safety, and welfare or be contrary to the public interest, and would observe the spirit of the Ordinance. He said that, due to special conditions of the property, it could not be used in strict conformance with the Ordinance.

Mr. Parrott concurred with Mr. Lee, adding that the project was designed to attract traffic, was in a commercial district on both sides, and was a commercial use. He said it was a small-scale operation and thought it was unlikely that people would add to the traffic on the street due to the amount of other opportunities in the City to get coffee. He said the applicant's business would come from existing traffic and that it would unlikely add extra traffic to the street.

Mr. Lee asked that the stipulation about the fence carry over into the motion. Mr. Parrott concurred and noted that it was on site plan as well.

Chairman Rheaume said he would support the motion, noting that the spirit of the Ordinance was a bit trickier than normal but the intent was to transform the neighborhood, and the application was begun prior to that. He said the project was not out of character with the neighborhood and was a reasonable and unique use. He said that community space was perhaps the most visionary aspect of what the Board was trying to get out of the Ordinance, but that it could be overlooked for that particular site because the project was still in keeping with the spirit of the Ordinance. He noted that the unique thing was that the current building was all the way over on one side, and what was proposed was for use on the remaining portion of the property. He said the applicant met all the requirements the previous time he appeared before the Board, and the two additional requirements didn't add an undue burden that would outweigh the public's interest in trying to adhere to the new zoning relative to what the applicant was attempting to accomplish.

*The motion **passed** by unanimous vote, 7-0.*

IV. ADJOURNMENT

*At 8:20, it was moved, seconded, and passed by unanimous vote (7-0) to **adjourn** the meeting.*

Respectfully submitted,

Joann Breault
BOA Recording Secretary