

**MINUTES of the
BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE**

Remote Meeting via Zoom Conference Call

Per NH RSA 91-A:2, III (b) the Chair has declared the COVID-19 outbreak an emergency and has waived the requirement that a quorum be physically present at the meeting pursuant to the Governor's Executive Order 2020-04, Section 8, as extended by Executive Order 2021-01, and Emergency Order #12, Section 3. Members will be participating remotely and will identify their location and any person present with them at that location. All votes will be by roll call.

7:00 P.M.

May 18, 2021

MEMBERS PRESENT: Vice-Chairman Peter McDonell, Jim Lee, Christopher Mulligan, David MacDonald, Arthur Parrott, and John Formella

MEMBERS EXCUSED: Chairman David Rheaume, Alternates Phyllis Eldridge and Chase Hagaman

ALSO PRESENT: Peter Stith, Planning Department

I. APPROVAL OF MINUTES

A) Approval of the minutes of the April 20, 2021 meeting.

The minutes were **approved** as presented by unanimous vote, 6-0.

Acting-Chair McDonell stated that the applicants for Petitions A and B postponed to the June 15 meeting due to the reduced number of Board members present.

II. OLD BUSINESS

- A) Petition of **John McMahon & Jessica Kaiser, Owners**, for property located at **30 Spring Street** whereas relief is needed from the Zoning Ordinance to remove existing front entry and construct new front porch which requires the following: 1) Variances from Section 10.521 to allow a) a 5 inch front yard where 15 feet is required; b) a 4 foot right side yard where 10 feet is required; and c) 29% building coverage where 25% is required. 2) A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on Assessor Map 130 Lot 13 and lies within the General Residence A (GRA) District.

DECISION

*The petition was **postponed** to the June 15, 2021 meeting.*

- B) Petition of **Spaulding Group, LLC, Owner**, for property located at **180 Spaulding Turnpike** whereas relief is needed from the Zoning Ordinance to for the partial demolition of the existing showroom and construction of new showroom which requires the following: 1) A Variance from Section 10.531 to allow a 15 foot rear yard where 50 feet is required. 2) A Variance from Section 10.591 to allow a structure to be setback 15 feet from a parcel in a Residential district where 100 feet is required. 3) A Variance from Section 10.592.20 to allow the sale, rental, leasing, distribution and repair of vehicles be located adjacent to a Residential district where a minimum of 200 feet is required. 4) A Variance from Section 10.321 to allow a nonconforming building or structure to extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. 5) A Variance from Section 10.1113.20 to allow seven off-street parking spaces to be located in the front yard and between the principal building and a street where parking spaces are not allowed. Said property is shown on Assessor Map 236 Lot 39 and lies within the General Business (GB) District.

DECISION

*The petition was **postponed** to the June 15, 2021 meeting.*

- C) Petition of **John & Chelsea Chapin, Owners**, for property located at **1281 Islington Street** whereas relief was needed from the Zoning Ordinance for the keeping of chickens which requires the following: 1) A Special Exception from Section 10.440 Use #17.20 to allow the keeping of farm animals where the use is permitted by Special Exception. Said property is shown on Assessor Map 233 Lot 120 and lies within the Single Residence B (SRB) District.

SPEAKING TO THE PETITION

The applicant Chelsea Chapin was present to review the petition. She said she wanted a few chickens and a small coop that would be placed in the backyard. She said her adjacent neighbors were fine with the proposal. She referred to her previously-submitted criteria.

In response to Mr. MacDonald's question, the applicant said she had reviewed the Special Exception criteria and intended to meet all of them.

Acting-Chair McDonell opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

*Mr. Mulligan moved to **grant** the Special Exception for the petition as presented and advertised, with the following stipulation:*

- *That the relief be limited to no more than six hens, and no roosters.*

Mr. Parrott seconded the motion.

Mr. Mulligan said the petition met all the Special Exception criteria. He said it was a use permitted in the zone and that the chickens would pose no hazard to the public or adjacent properties on account of fire, explosion, or the release of toxic materials. He said it would pose no detriment to property values in the vicinity or a change in the essential characteristics of any areas as a result of the location or scale of buildings or other structures, noise, pollutants, gas, odors, unsightly outdoor storage and so on because none of those things were implicated. He said there was no indication of a traffic safety hazard or an increase in traffic congestion because it was a residential use. He said keeping a half-dozen chickens in the backyard would pose no demand on municipal services nor pose an issue with significant increase of stormwater runoff onto adjacent properties because the property was very large and abutted an old railroad right-of-way. He said the proposal met all the criteria and should be granted with the stipulation as noted.

Mr. Parrott concurred and had nothing to add.

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

Acting-Chair McDonell said the applicant for Petition B, One Harding Road, requested to postpone so that he could confer with City Staff. He asked that the petition be taken out of order so that it could be voted on.

*It was moved, seconded, and unanimously **passed** to take Petition B out of order.*

(See Petition B, One Harding Road).

III. PUBLIC HEARINGS – NEW BUSINESS

- A) Petition of **Rigz Enterprises LLC, Owner**, and **Dennis Stoddard, Applicant** for property located at **806 US Route 1 Bypass** whereas relief was needed from the Zoning Ordinance to Replace existing freestanding sign with new free standing sign which requires the following:
- 1) A Variance from Section 10.1253.10 to allow a 1' front and a 1' side yard setback for a freestanding sign where 20' is required for each. Said property is shown on Assessor Map 161 Lot 43 and lies within the Business (B) District.

SPEAKING TO THE PETITION

The applicant Dennis Stoddard was present to review the petition. He said he bought Gary's Beverage and that the existing sign was on the corner of the bypass. He said the new ordinance required that the sign be placed 20 feet from the front and side setbacks, which would put the

new sign in the middle of the parking lot, so he needed a variance to place it in its proposed location. He reviewed the criteria and said they would be met.

In response to Mr. Lee's questions, the applicant said the sign would be internally lit and that, although it was capable of being animated, he would comply with the City's regulations. Mr. Stith noted that the City did not permit animated signs. In response to Mr. MacDonald's questions, the applicant said the new business would still be a retail store that offered beer, wine, and tobacco products, with no manufacturing or any hazardous activities. As to whether the sign would be lit just during the hours of operation or constantly, the applicant said he would review the City's guidelines and abide by them.

Acting-Chair McDonell opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

*Mr. Lee moved to **grant** the variance for the application as presented, and Mr. Mulligan seconded.*

Mr. Lee said the request was to just replace the existing sign with a more modern look and that the new sign would remain in the same location but would be raised up a bit. He said granting the variance would not be contrary to the public interest or to the spirit of the ordinance. He said substantial justice would be done because the benefit to the applicant was not outweighed by any harm to the general public, and the values of surrounding properties would not be diminished because the sign would be in a commercial area with a few residences behind the area. He said that literal enforcement of the ordinance would result in unnecessary hardship because the existing hardship was that the applicant would be required to move the sign back to the original setbacks in the middle of the parking lot, which would entail substantial costs in redoing the parking lot. He said the variance should be granted, for those reasons.

Mr. Mulligan concurred. He said the property also had unique characteristics because it shared ingress and egress from the bypass with the gas station next door, so requiring the sign to meet the setbacks would not only be an unnecessary hardship but would likely be a very dangerous situation. He said the petition met all the criteria and should be approved.

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

B) Petition of **Arun Naredla, Owner**, for property located at **1 Harding Road** whereas relief is needed from the Zoning Ordinance to construct a 6' tall fence within the front yard which requires the following: 1) A Variance from Section 10.515.13 to allow a 6' tall fence within the front yard where a 4' tall fence is the maximum allowed. Said property is shown on Assessor Map 247 Lot 45 and lies within the Single Residence B (SRB) District.

Acting-Chair McDonell read the petition into the record. Mr. Stith explained that the applicant had reviewed his proposal with Public Works personnel and discovered that the intersection had poor sightlines, and there were concerns that the tall fence in the front yard would make the situation worse. He said the applicant would meet with the City to discuss other options of how to screen the property and that more information would be provided to the Board.

*Mr. Mulligan moved to **postpone** the petition to the June 15 meeting, and Mr. Formella seconded.*

Mr. Mulligan the City flagged a concern and the applicant would rather address it proactively than try to force it. He said it was a reasonable way to resolve the issue and that it made sense to postpone the petition. Mr. Formella concurred and had nothing to add.

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

C) Petition of **The Edmunds Shirley A Revocable Trust of 2000, Owner, and Tatum Brown, Applicant** for property located at **102 Martha Terrace** whereas relief was needed from the Zoning Ordinance for the keeping of chickens which requires the following: 1) A Special Exception from Section 10.440 Use #17.20 to allow the keeping of farm animals where the use is permitted by special exception. Said property is shown on Assessor Map 283 Lot 27 and lies within the Single Residence A (SRA) District.

SPEAKING TO THE PETITION

The applicant Tatum Brown stated that her family currently lived in Hampton and already had six chickens but were moving to Portsmouth and wanted permission to keep the chickens. She said all the chickens were hens and made very little noise. She said the coop was small and would be kept in the back corner of the lot. She reviewed the criteria and said they would be met.

Mr. MacDonald said he drove through the neighborhood and found that the houses were fairly close and the lots were small. He asked the applicant if she received any input from the neighbors. Ms. Brown said she hadn't physically been to the property yet, but that her property maintenance liaison spoke to the back neighbor, who was not opposed. Acting-Chair McDonell said the Board received an abutter's letter from 104 Martha Terrace in opposition and said the abutters were concerned about odors and the coop enclosure. Ms. Brown said that, since she already had experience with the chickens, she knew the odor was very minimal. She said the chickens might balk a bit early in the morning but were quiet the rest of the time and wouldn't do any damage to abutting properties because they wouldn't be free-range chickens. She said the shed was made out of wood and very small. Mr. Lee said that, based on his experience with both free-range and cooped-up chickens, the hens cackled a bit when laying eggs and the odor was non-existent. He said he approved the proposal.

Acting-Chair McDonell noted that there was a statement by the property owner giving authorization for a 10-square foot coop. The applicant said the coop wasn't ten feet in size and that the owner knew how big the coop really was.

Acting-Chair McDonell opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

Mr. Lee said he wanted to ensure that the property owner and the abutter who wrote the letter in opposition were aware that the variance, if granted, would go to the house and not the applicant. Acting-Chair McDonell agreed that it would be granted in perpetuity.

*Mr. Formella moved to **grant** the Special Exception, with the following stipulation:*

- *That there be no more than six hens, and no roosters.*

Mr. Lee seconded the motion.

Mr. Formella said it was a reasonable request that had been granted in similar neighborhoods in the City. He said the ordinance permitted chickens to be kept in a coop, so the first criteria was met. He said granting the Special Exception and having chickens on the property would pose no hazard to the public on account of fire, explosion, or release of toxic materials. He said it would pose no detriment to property values in the vicinity or change in the essential characteristics in the area on account of parking areas, the location of the coop, odors, and so on. He said the main concern was noise, but since roosters weren't allowed, it wouldn't be an issue, and there were no concerns that nearby property values would be negatively affected. He said granting the Special Exception would not create a traffic safety hazard or substantial increase in the level of traffic, pose an excessive demand on municipal services, or increase stormwater onto adjacent properties or streets because there was nothing about a coop or chickens that would do so. He said the petition met all the criteria and should be approved.

Mr. Lee concurred and had nothing to add.

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

- D) Petition of **Thomas M. Penaskovic and Emily B. Penaskovic, Owners**, for property located at **29 Burkitt Street** whereas relief was needed from the Zoning Ordinance to demolish existing rear deck and construct two-story addition which requires the following: 1) Variances from Section 10.521 to allow a) a 9' left side yard where 10' is required; and b) 26% building coverage where 25% is the maximum allowed. 2) A Variance from Section 10.515.14 to allow an 8' setback where 10' is required for a condenser. 3) An after-the-fact variance from Section 10.515.14 to allow a 6' setback where 10' is required for a condenser. 4) A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on Assessor Map 160 Lot 19 and lies within the General Residence A (GRA) District.

SPEAKING TO THE PETITION

The applicant Tom Penaskovic reviewed the petition. He said the existing footprint would be kept and that the neighbors supported the project. He reviewed the criteria.

Mr. MacDonald asked if the new mini split unit would only support air conditioning. Mr. Penaskovic said it would support both cooling and heating. He also noted that he mistakenly asked for 26 percent total lot coverage that wasn't needed because he was previously approved for 28 percent coverage when he did his garage.

Acting-Chair McDonell opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

Mr. Parrott said the proposal was really a vertical expansion because it was in the same footprint. Mr. Stith said the City recommended a 29 percent total lot coverage because they were very specific to the decimal point for what was previously approved.

*Mr. Parrott moved to **grant** the variances for the petition, with the following stipulation:*

- *That the maximum allowed building coverage shall be 29 percent.*

Mr. Lee seconded the motion.

Mr. Parrott said it was a vertical expansion of the back of the existing house in the middle of the lot. He said the houses in the neighborhood were fairly close together, which was significant because the applicant's lot was small, so it was important to place the addition in the proposed location to minimize any impact on adjacent properties. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said it would not change the essential character of the neighborhood not threaten the public's health, safety, or welfare or injure public rights. He said substantial justice would be done because the benefit to the applicant was not outweighed by any harm to the public. He said the project would be a nice addition to the property and would enhance the neighborhood and not be detrimental to the other properties. He said literal enforcement of the ordinance would result in unnecessary hardship due to the special conditions of the property. He said the lot was fairly small and the nearby property lines were close, and the proposal was to simply build on the footprint of an existing structure, so it would be of no concern to anyone in the neighborhood. He said there was no connection between the application and the general conditions of the property, and the proposed use was reasonable. He said the petition easily passed all the tests and should be approved.

Mr. Lee concurred and had nothing to add.

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

- E) Petition of **Brian J. Wazlaw Revocable Trust of 2006** and **Roxanne R. Wazlaw Revocable Trust of 2006, Owners**, and **Brian Wazlaw, Applicant** for property located at **89 Sagamore Avenue** whereas relief was needed from the Zoning Ordinance to remove existing 8' x 12' shed and replace with new 8' x 12' shed in the same location which requires the following: 1) Variance from Section 10.521 to allow 29.5% building coverage where 25% is the maximum allowed 2) A Variance from Section 10.573.10 to allow a 1.5' side setback where 5' is required. 3) A Variance from Section 10.321 to allow a non-conforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on Assessor Map 221 Lot 28 and lies within the General Residence A (GRA) District.

SPEAKING TO THE PETITION

The applicant Brian Wazlaw reviewed the petition. He said the new shed would be in the same location, size, and style as the existing shed and on cinderblocks. He said the existing shed had been in the same location for 36 years and needed to be replaced, and that he needed a shed because he didn't have a garage or outdoor storage. He said the abutting neighbor had no problem with it. He reviewed the criteria and said they would be met.

Acting-Chair McDonell asked what special conditions were on the property that made it reasonable for the Board to grant a 1.5-ft side setback instead of a 3-ft one. The applicant said there was about two feet at the west end and the shortest difference was 1-1/2 feet. He said he didn't want to push the shed any further from the property line because it would be difficult to get access to the deck, bulkhead, and dog house.

Acting-Chair McDonell opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

*Mr. Mulligan moved to **grant** the variances for the petition as presented and advertised, and Mr. Parrott seconded.*

Mr. Mulligan said it was a straightforward and very minor request of simply replacing the existing nonconforming structure with an exact replica of it. He said the lot coverage nonconformity would not be expanded in any way and the side yard setback would be the same existing nonconformity. He said the applicant made a persuasive case for why it wouldn't make sense to move the shed away from the setback to get more compliance, noting that it would frustrate the existing built conditions and wouldn't benefit anyone. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said the essential character of the neighborhood would remain a residential one and the public's health, safety, and welfare would not be threatened. He said granting the variances would do substantial justice because the loss to the applicant would be much higher than any gain to the public if the Board required strict compliance with the lot coverage and

setback requirements, especially considering that the applicant wasn't proposing to increase the existing nonconformities. He said it would not diminish the values of surrounding properties but rather, would be an improvement to the applicant's property and have a positive effect on surrounding property values. He said the hardship was the special conditions of the property, including the existing nonconformity of the lot coverage and side yard setbacks. He said there was no fair and substantial relationship between the purpose of those requirements and their application to the property because the shed had been in its existing condition for more than 30 years and the purposes of the ordinance had not been frustrated by it. He said it was a reasonable use, a residential use in a residential zone, and met all the criteria and should be granted.

Mr. Parrott concurred. He said the adjacent house on Broad Street was on a lot that was twice as wide as the applicant's lot, and the house was set quite a bit further from the property line, so he didn't see any concern about having the shed very close to the property line. He said he was satisfied that it met all the criteria.

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

Mr. Mulligan recused himself from the following petition. The applicant said he would still present in spite of there being only five Board members present.

F) Petition of **OMJ Realty LLC, Owner**, for property located at **581 Lafayette Road** whereas relief was needed from the Zoning Ordinance to add indoor golf simulators in an existing restaurant which requires the following: 1) A Special Exception from Section 10.440 Use #4.30 to allow an indoor recreation use where the use is permitted by Special Exception. Said property is shown on Assessor Map 229 Lot 8B and lies within the Gateway (G1) District.

SPEAKING TO THE PETITION

Project architect Mark Gianniny was present on behalf of the applicant to review the petition. He said the property was the old Tuscan Kitchen restaurant and that the Special Exception was needed for indoor recreation. He reviewed the petition and criteria and said there would be no change to the footprint or the site plan.

Mr. MacDonald noted that the new restaurant and recreation space had the potential for large crowds. He asked if there were any safety standards for customers, like protection against flying golf balls. Mr. Gianniny said there was a wall that separated the dining area from the recreation area and that the golf simulators had baffles and netting that were safety features. He said the simulator system was designed to take the full impact of the golf balls. Mr. MacDonald asked if there was an industry standard. Mr. Gianniny said they were working with a reputable company that installed the simulators all over the country and that safety was taken into account.

Mr. Lee asked if there would be other recreation uses, like pinball machines, if the golf simulators didn't work out. Mr. Stith said the applicant was asking for the specific use of golf simulators and that it wasn't a catch-all for every recreational use.

Acting-Chair McDonell opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

*Mr. Parrott moved to **grant** the Special Exception for the petition as proposed, and Mr. Formella seconded.*

Mr. Parrot said it was a straightforward proposal for a new use of for the building and that the golf simulators would change the interior but not the exterior of the building, so it would look the same to people driving by. He said that part of town was a mixed-use area, so the proposal would fit right in. He emphasized that his motion was for five indoor golf simulators and no more. He said granting the Special Exception would pose no hazard to the public or adjacent properties on account of fire, explosion, or release of toxic materials. He said the use was an inside benign one and that the adjacent buildings weren't that close. He said there would be no detriment to the property values in the vicinity or any change in the essential characteristics of the area, noting that there would be no change to the building's exterior. He said granting the Special Exception would cause no odors, smoke, gas, dust or other pollutants, no noise, heat, vibration, or unsightly storage of outdoor equipment because everything would be inside the building. He said there would be no outside storage of materials or extra parking requirements because the new business would accommodate fewer people than the previous restaurant. He said there would be no creation of a traffic safety hazard or a potential increase in the level of traffic congestion in the vicinity because fewer people would access the new business. He said it would pose no significant increase of stormwater onto adjacent properties or streets because there were no exterior changes. He said the proposal met all the criteria and should be approved.

Mr. Formella concurred and had nothing to add.

*The motion **passed** by unanimous vote, 5-0*

IV. OTHER BUSINESS

It was Mr. Formella's last night as a Board member because of his new position as New Hampshire Attorney General. The Board congratulated him and wished him well.

V. ADJOURNMENT

The meeting was adjourned at 8:40 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary