

**MINUTES OF THE BOARD OF ADJUSTMENT WORK SESSION
PORTSMOUTH, NEW HAMPSHIRE**

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

March 27, 2012

MEMBERS PRESENT: Chairman David Witham, Vice-Chairman Arthur Parrott, Susan Chamberlin, Derek Durbin, Charles LeMay, Alternates: Patrick Moretti, Robin Rousseau

EXCUSED: None

ALSO PRESENT: Deputy City Manager Cindy Hayden, City Attorney Robert Sullivan

I. STAFF REPORTS

Chairman Witham called the work session to order, noting that the topic would be staff reports. They would start the evening with a presentation from Ms. Cindy Hayden, the Deputy City Manager and Attorney Robert Sullivan. After their presentation he would like to move on and provide each Board member roughly five minutes for feedback and comments with regard to staff reports. That should allow a few minutes at the end to wrap it up.

A. Staff Presentation 7:00 p.m. to 7:15 p.m.

Deputy City Manager Cindy Hayden introduced herself. She stated that she, along with City Attorney Bob Sullivan, wanted to try and address the questions the Board had about staff reports over the past several months. She stated that the Planning Department was one of the departments that she directly oversaw with Rick Taintor and Nick Cracknell reporting to her and all of them working for the City Manager. She wanted to explain to the Board why the City Manager and she would direct the Planning Department to produce staff reports.

Ms. Hayden stated that the first reason was to assist applicants through the land application process. They tried very hard to treat all applicants to the land use boards fairly and equitably, noting that some needed more assistance than others. Over the years, she had seen really three types of applicants. There was the inexperienced homeowner who didn't have a lawyer and was trying to navigate the land use process. The staff was there to act as a resource for them, answer questions and help them fill out the application – help them get to whichever Board or Commission they needed to go before.

The second type of applicant or application was where she felt staff reports were very useful and these were the complex ones involving issues that may have been long-standing and/or involving multiple parties. An example that came to mind for this particular Board was the application for Dearborn Street. She felt that staff reports played a really useful role in that type of situation. The third type of applicant was the more experienced developer with attorneys and engineers, really a whole team that was working on their project. Those more complex projects might need to go to multiple Boards.

Ms. Hayden stated that the second reason for the generation of reports was that their responsibility as City staff was to provide information and guidance to the Boards so that everyone was acting in the best interest of the City. In the case of the staff reports, that guidance sometimes took the form of information, sometimes the form of specific recommendations. She noted that the staff reports, information and recommendations were provided not just to this Board but to others as well. As the City Manager's Ex-Officio Designate to the Planning Board, she was a voting member of that Board and very familiar with the reports they received. They were a little different from those for this Board but were very detailed and included recommendations. Since site plans were often involved, they also had very detailed stipulations. She noted that the Planning Board did not always follow the recommendations. They might be modified based on new information heard or just because the Board thought differently from the planning staff. She reiterated that those were the reasons reports were done, to assist applicants through what could be a difficult process and to help the process be one that was in the best interest of the City, whether it was a project or an individual homeowner trying to do something on their own property.

Addressing the issue of what other towns did, Ms. Hayden noted that, while a lot of towns didn't do any staff reports at all, some were far more directive. There were examples in the packet of the Dovers and Somersworths that were even more detailed, different from the reports generated here, but more directive in their recommendations and with more involvement from staff. She stated that they really ran the whole gamut. She added that the City Attorney might want to add a few comments.

City Attorney Robert Sullivan introduced himself, noting that he was acquainted with most of the Board. He stated that he had been in his position since 1982 primarily responsible for the legal work regarding all aspects of land use in the City. Previously, he had worked with Planning and Boards of Adjustment for the City of Nashua. At that time, staff reports were very detailed and he had a lot of experience, not only in working with the Boards with staff reports, but also litigating zoning cases where staff reports sometimes supported the decision reached by the Zoning Board and sometimes not. He noted that the decisions were ultimately always made by the Board and anything staff did was purely by way of assistance to the Board in reaching its decision.

Attorney Sullivan stated that the Deputy City Manager had asked him to clarify whether there was any law that governed anyone's conduct in this matter. With regard to the preparation and presentation of staff reports, there was none - no law that compelled the staff to do these reports - no law that said the staff could not do the reports. As the Board had heard on numerous occasions, as recently as a few minutes ago and going back to September of 2010 when it was written to them, different municipalities in the State adopted different approaches, from no staff reports to very detailed staff reports. It was totally a matter to be worked out within the particular municipality. There was no overall State governance.

Attorney Sullivan stated that the issue had continued to percolate around since 2010. In January of this year, he had written again on the topic and provided some samples from municipalities. He read what he considered the most important paragraph of his most recent writing, which stated that staff reports and recommendations did not affect the Board's quasi judicial role and were not intended to bias the Board. They were for support and informational purposes and the decision making authority remained with the Board and not the staff.

Attorney Sullivan concluded that was the situation they were there to discuss with the Board. He thought it was important to keep in mind that they were all on the same side. The staff, the Board, he and the Deputy City Manager, they were all part of a land use regulatory process in the City that existed for very important public benefit purposes. They all had a role to play and they all needed to play that role together in a cooperative fashion for the system to work for the best benefit of the citizens as a whole. That was why they were there to speak with them and answer any questions the Board might have.

B. Board Discussion 7:15 p.m. to 8:00 p.m.

Chairman Witham stated that he would like to go around and give everyone roughly five minutes to provide their thoughts, comments and feedback on the issue of staff reports. He would like them to also take the opportunity to direct any questions to Ms. Cindy Hayden and Attorney Bob Sullivan. Ms. Rousseau stated that she needed ten minutes as she had a presentation that needed to be read in its entirety and it hadn't been communicated that there would be a time limit on her presentation.

Chairman Witham stated that they might have ten minutes. He would briefly start by saying that he felt the feedback would be most productive if they looked at this in the broad scope of the entire staff report and not get bogged down strictly in the issue of recommendations. He noted that the Planning Department had been in a bit of transition and they probably had five different authors of staff reports in the last two and a half years so consistency hadn't been really established. He felt they were now on the right path.

Staff Reports – General - He was happy with the new look and direction. The photos and colored maps were helpful. He found the history of past actions with the property very helpful. Any description in terms of the interactions with the Planning Department and the picture of the project itself and what other Boards it might have to go to, he found helpful. In the past, it had helped him when the planner who had been there during the development of the Ordinance, would provide insight on the intent of the Ordinance. The intent and reasoning behind setbacks was clear but a little history in terms of the intent of sections that were not as clear would be helpful.

Staff Reports – Recommendations - To him, it was a non-issue. He felt, at best, it maybe happened once year out of 100 applications when the staff said, "We recommend that..." He felt the Board acted on its own and was not influenced by recommendations. He welcomed the recommendations with regard to stipulations where the Planning Department might see the bigger picture or know more about the project. For example, the report might say, "If this is approved,

the Planning Department recommends..” The Board adopted some of the stipulation recommendations and some they didn’t feel they needed to add to the motion, but he found them helpful in thinking about the bigger picture and what the effect could be of granting a variance.

Packets – He would prefer the individual staff report on top of each exhibit. It was tricky last month with a consolidated staff report covering all the petitions. Regarding the content of the exhibits, they always varied greatly, from detailed engineered plans to a homeowner trying to work with graph paper. The dimensions might be correct but the scale might be off. He felt that, as long as he understood what the applicants were trying to convey, they could move forward. Occasionally, some applications needed to be filtered better and the applicant requested to come back and add details. When they had to table something for a piece of information, it added time to the whole process. He also mentioned, although it was pretty minor, that sometimes the packet came first followed by the staff report.

In a later discussion with Mr. LeMay, he suggested that a part of the application could be a listing of the criteria with an opportunity to fill in a sentence or two under each or write “attached” if there was a ten page attorney letter. It would be an opportunity to get the information before the Board before the meeting.

Mr. Durbin

Staff Reports – General – He liked the maps and, while it helped to be able to see the property from the ground, being able to see an aerial view showing the dimensions of the property was great because that was one of the things they considered as part of the criteria for a variance. As far as the information on intent, if the institutional knowledge was available and could be provided on certain Ordinances, that would be a bonus.

Staff Reports – Recommendations – He didn’t feel passionately one way or the other. He hadn’t seen any case law on it in New Hampshire and really didn’t have a problem with it. He looked at what was there and listened to the presentation to see if it changed his opinion from what he had seen on paper. The staff recommendation didn’t persuade him one way or the other.

Packets – He felt it was a little confusing to have the staff report separate from the exhibits. It seemed like people were shuffling around a little bit.

Mr. Moretti

Staff Reports – General – The history was wonderful. Not having seen this part of the building industry of been a part of the Boards, the history helped him narrow down what the property had gone through and what he was looking at. It was a part of his decision making process. He liked the maps and the aerial views, particularly the last map showing the positions on the street. He had been on the other side of the fence, with properties requiring variances and could appreciate the help given to a homeowner walking in with very little information and very little knowledge of how the process worked. His reason for being on the Board was because he had gone through that process a couple of times (accepted once and denied once) and he felt he could understand both sides.

Staff Reports – Recommendations – He found them very helpful and didn't think they influenced his vote in any way. Being new, it gave him some insight on what everybody was thinking. He felt that listening to the applicants and the people on the Board talking was more of an influence than the recommendations. He appreciated the information about possible changes to the Ordinances, such as with the sign petition several sessions ago. They didn't want to turn someone down and then, a few months after find that the Ordinance had changed. The stipulations were also a very helpful tool from his point of view. This all helped in getting him adjusted and in his understanding of the whole process.

Mr. LeMay

Staff Reports – General - He felt whatever could give them context, such as maps and aerial views and maybe a note regarding what was happening in the area was appropriate. The history was good and the maps were useful, but he referenced recent inclusion of proposed plans of a new building which he termed virtually unreadable. They were already contained in the material from the applicant so the time putting them together was not well spent.

Staff Reports – Recommendations – Conveying what was known about the situation was helpful, but the reports shouldn't cross the line into judgments. Logistical guidance as had happened in the Dearborn Street petition was fine. Maybe a suggestion on a condition but nothing that smacked of, "We think the hardship is 'x'." That was up to the applicant. He acknowledged that the recent report was well organized and contained no "thou shalt" recommendations.

Packets – He felt the effort was needed in the basics such as getting the Minutes out earlier, well before the next meeting. They were important and should be reviewed while the Board could remember what had gone on. He appreciated that the staff was helping the applicants get their application together, but he didn't feel there was anything in the packet with arguments presented by the applicants with regard to their application. It tended to be very sketchy from individuals as opposed to attorneys. It would be helpful to guide them in getting that together, helping them focus on the criteria in the context of what they were applying for. He acknowledged Chairman Witham's comment that homeowners tended to present their plans in advance and their criteria at the meeting but felt that there could be a place on the application where they could be encouraged to address the criteria. He felt it would help applicants in their presentation to have thought about the criteria and what they meant. He would like to hear these things in the applicant's words first and would like to see a copy of the application included as a cover sheet for the exhibits. Regarding the placement of the report in the packet, what they had before was more user friendly with the report and supporting information for each petition in one package. He also had a problem with applicant exhibits that were stapled in the wrong corner and had pages facing the wrong way. He found it a challenge to have to flip through them, stating, "let's get these things organized."

Ms. Hayden stated that the points raised had been good ones. She noted, regarding his last comment, that the applicant produced the application and exhibits which would include the one he had referenced. They were required to provide all the assembled copies. Some applicants did better jobs than others, but they would work on that. Mr. LeMay stated that explained it,

Mr. Parrott

Staff Reports – General - He felt that factual requirements were what counted and, if there were a question on a fact's relevance, throw it in and the Board would judge whether or not it was relevant to that case. He asked that the staff, to the extent that they knew, advise the Board if there were code violations on the property. It either should not come before them or, if it did, there should be a clear paragraph in the report that there were outstanding violations. He noted that City code said that the Board should not grant a variance if there were outstanding violations unless the purpose of the variance was to cure those violations. He felt the staff work lately had been good they should be commended. As he had advised people over the years, the staff should be used more by the public for whatever help they could provide.

Staff Reports – Recommendations – His perception was that land use boards were stand-alone entities, operating under State statute and modified by case law. Because they operated independently of outside influence didn't mean they shouldn't take advantage of staff services. With his background, he was a little less sensitive to the language used to indicate, "You should do this or shouldn't do that." At the end of the day, he felt the staff should stop short of saying "You should vote this way or that way" as that was what the Board had been appointed to do by the City Council.

Packets - He felt that there had been cases where staff had let material come to them in an incomplete fashion knowing that it was but trying to support the applicant. The requirements were on the back of the application form but they had too many things in the past year with missing or incomplete dimensions. He had found it necessary to scale things off and make estimates, which they shouldn't be doing. He felt that, if required critical information as indicated in the rules and regulations was missing, the application should have to wait to get to the Board. While that might be hard, it was fair to the applicant, the neighbors, and whoever else had an interest in that critical information. Otherwise everybody's time was being wasted. He cited the recent Dearborn Street case where the dimensions were incorrect, noting that two attorneys were involved. His point might seem petty, but it was critical in that case.

Ms. Rousseau

Staff Reports – General - She stated that the meeting had not come about because of staff reports. The photographs, the background history, the factual information all were fine, but they were not the issue. It was the Planning Department, making recommendations to the ZBA. She wanted to differentiate between the Planning Department and the Planning Board, which some members of the public thought was making the recommendations.

Staff Reports – Recommendations - She didn't want the Planning Department taking a position on ZBA cases such as listing the variance criteria and stating whether or not they were met or "we recommend." She wanted the Board to take a position on whether or not they wanted the Planning Department to take a position on hearing cases. She had questioned the Planning Departments of several communities and read the return e-mails she had received. The representatives from the cities of Manchester, Nashua, and Durham stated they did not make recommendations but provided factual history and technical support. The staff of the City of Laconia did not write a staff report but just ensured the ZBA understood how the application related to the criteria.

She then asked them if a recommendation from a Planning Department to pass or deny a request affected the quasi judicial role of the Board and if a recommendation would likely influence or bias the Zoning Board decision. The representative from Manchester stated that they would, adding that a variance should stand or fall on the five part test. A report could be helpful in determining if the applicant had done so, but a pass/fail recommendation should play no part. The representative from Nashua supported that same position and the representative from Durham stated yes to both questions. She felt that the major cities in the State had best practices in place and were not in a position to influence Board decisions.

Ms. Rousseau detailed her six reasons for not accepting Planning Board(sic) recommendations or positions: 1) They were not an interested party to a hearing case but were purely administrative support to the Board. The Board, as elected officials, was the City of Portsmouth or the interested party in those cases; 2) The opinion of the Planning Department would prejudice a hearing case before the applicant had been able to fairly present the facts of their case, thus tainting the quasi judicial process; 3) The Reasonable Person's Standards question couldn't be met. 4) No citizen of Portsmouth should have to fight City Hall for a variance or special exception; 5) Planning Department employees had the power to make applicants change their design plans rather than presenting their ideas unencumbered by Planning Department positions; and, 6) Allowing the Planning Department to take a position exposed the City to the risk of fraud "when a Planning Department employee sells their recommendation to applicants on the side. If an applicant chooses not to pay them, they risk a negative recommendation." In summary, the Board needed to hold the stakes to the highest standards and best practices in the State of New Hampshire regardless of how other cities chose to do their business.

Ms. Chamberlin

Staff Reports – General – Ms. Chamberlin found the reports helpful. The maps were helpful and they needed to know about any violations. Her one concern was the public nature of the materials and she questioned whether the information was made available to the applicant and, if so, when. She noted that, with Dearborn Street where the parties were doing a settlement, they seemed to have all the information.

Staff Reports – Recommendations – She had reviewed the Rules to see if there was anything to prohibit them from getting the information and there wasn't any. As long as it was grounded in fact so they could see how one thing flowed from the other, she didn't see a risk of improper influence, fraud or corruption or any of the negatives that everyone was concerned about. If the facts didn't add up or the recommendation was way off scale, then they might have a concern. She saw no evidence of that and was not concerned. Overall, she thought City staff did have a legitimate interest in upholding planning and zoning and that they could, as the Deputy City Manager was saying, certainly assist everyone with their process and putting it together. She felt that perfectly appropriate. If everyone wanted to say no "thou shalt," she had no problem with that being the rule, with them having everything up to that, because she felt it was useful.

Packets – She liked having it all together and it was helpful to be able to sit up there and go through it in order.

Chairman Witham asked if Ms. Hayden would like to address the question of what was accessible to the public. Ms. Hayden stated that it was all public record as soon as the packet was complete and it went out to the Board. As a general practice, they came to see what had been put together. Sometimes the report would be requested and they faxed it over. The same was true for the Planning Board or any Boards where they were writing recommendations.

Ms. Rousseau asked Chairman Witham what the end result would be of their meeting. Were they going to make a motion at their next meeting? Were they going to give them direction as to how the Board felt about their opinion on ZBA matters? She maintained they were all in agreement that factual data was fine with maybe some improvement on how it was put together and reiterated her position on recommendations of the Planning Department.

Chairman Witham acknowledged Ms. Hayden who stated that she would like to respond. She had heard a number of good things such as getting the packets in better order, things they liked and didn't like. She noted they were constantly working with applicants to provide complete applications and would continue to do so. Definitely, the order of the packet would be addressed. She wasn't sure why that changed but it could be restored to the previous form. She felt it was really good to get the input. In terms of the content of the staff reports, as she had earlier stated, Rick Taintor and Nick Cracknell worked for her and the City Manager and, while they were a resource to the Board, they did not work for, or take direction from, the Board. That being said, they had heard the Board's views that evening and she felt a lot of good information came out of the meeting.

Chairman Witham also responded to Ms. Rousseau's question by stating that he didn't foresee a motion in terms of recommendations. He also felt that a listener to the proceedings would conclude from the way she had presented it that every staff report, had a recommendation. Ms. Rousseau stated a lot did, not just one in the past year. Chairman Witham maintained that few had, although there were some recommendations in terms of stipulations. Speaking over him, Ms. Rousseau stated that was not true. Chairman Witham concluded that he felt the Board made their own decision and a lot of the members had said they were not influenced by it.

Mr. LeMay felt that the question was agreeing on what they wanted to see going forward and he reiterated his opposition to specific recommendations. Ms. Rousseau asked if they were in agreement as she had heard different positions. Chairman Witham stated he didn't feel the staff was telling them how to think. Citing the recent petition regarding parking, he reiterated the importance of knowing the intent of the Ordinance. Ms. Rousseau stated that the intent of the Ordinances was in the Ordinances. She felt he should be able to make that decision without having a Planning Board(sic), a Planning Department member tell him the intent. She stated that he was independent and could decide what the intent was - he was the resident of the City of Portsmouth - he was the official making that decision. Chairman Witham thanked her for clarifying that.

Chairman Witham asked for any other comments and was continuing his statement when Ms. Rousseau interrupted to say that she had understood from Ms. Hayden's comments that Ms. Hayden was going to decide what she was going to give them, and not have the Board decide what was given to them. She stated, "We want factual information only. That's what we're telling you and that's what we're going to accept, not whether or not you feel like doing it. That's what we want, nothing different." Chairman Witham stated they were being told they didn't have that

power and was continuing when Ms. Rousseau spoke over him, “We don’t have that power? As a Board? To tell our support staff what we want or what we don’t want?” Chairman Witham stated it was his understanding that it was their prerogative to provide staff reports. Ms. Rousseau responded that, “We’re going to give the Planning Department the power to give us stuff or not or make an opinion or not? We should be giving them the direction.” When Chairman Witham stated that they had said they wanted to work with the Board, she commented, “Great.” He continued that the staff had heard what the Board wanted and he felt they could expect that the staff reports would be adjusted accordingly.

Ms. Hayden stated that she had heard a variety of input that evening and had heard a variety of legal opinions. She noted that she and the City Manager followed the legal advice of the City Attorney and the rest of the Legal Department. She wouldn’t say there was a clear consensus on anything that evening other than that they would like staff reports in general to have information. She advised Ms. Rousseau that, not to put too fine a point on it but, the Planning staff worked for the City Manager and herself and they directed them on what to do. Ms. Rousseau responded that she understood that staff worked for the Board because the Board members were residents of the City of Portsmouth and they were officials. Ms. Hayden stated that, in the grand scheme, they worked for all of the residents but the way that the City Charter functioned was that the City staff reported to the City Manager. They were a resource to all the land use Boards but did not work for this Board and they couldn’t direct staff on what to do.

Ms. Chamberlin stated that she would like to point out that the Board members didn’t have to agree with the report. They didn’t have to vote on it. They didn’t even have to read it. She felt the staff could present what they thought was appropriate and the Board had the freedom to do with it what they felt was appropriate. Chairman Witham agreed. Ms. Rousseau stated that it sounded like another level of discussion was required. Chairman Witham began a statement when Ms. Rousseau interrupted to say that, if the Board got something that they asked not to have, that would require another level of discussion. Ms. Chamberlin reiterated that they didn’t have to read it. Ms. Rousseau maintained that someone else might read it and be influenced by their position. Chairman Witham asked for further comment with no response. He thanked everyone for their time in coming, noting that there was a lot to sort through but he felt it was minor tweaks and they were close.

Ms. Hayden thanked the Board for having them. They appreciated the input and would be working to continue to improve. As some of them were aware, they were stretched thin but would try to get the Minutes out sooner and the packets in an order that was more useful to them.

II. ADJOURNMENT 8:00 p.m.

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 8:05 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk