

**CITY OF CONCORD, NH  
ZONING BOARD OF ADJUSTMENT  
OCTOBER 6, 2021 MEETING  
DRAFT MINUTES**

Attendees: Nicholas Wallner, Acting Chair, Laura Scott, James Monahan, Andrew Winters and Laura Spector-Morgan (for Case 51-21)

Absent: Christopher Carley

Staff: Ernest Cartier-Creveling, Zoning Administrator  
David Hall, Code Administrator  
Rose Fife, Clerk of the Board

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Meeting commenced at 7:00 pm.

**51-21 John J. Flatley Company: (Recessed Hearing)** Applicant wishes to install a third freestanding sign, proposed to be an Electronic Message Center (EMC sign), and requests the following:

- 1) That the Zoning Board make a determination whether the unshielded illumination from an EMC is prohibited under Article 28-6-7(n), Signs Prohibited, which prohibits an illuminated sign that directs illumination (not reflected light) onto adjacent streets.

Variances to:

- 1) Article 28-6-9(c)(1), Permitted Freestanding Signs, to allow 3 freestanding signs on the property where a maximum of 1 freestanding sign is permitted,
- 2) Article 28-6-7(r), Signs Prohibited, to allow an electronic message center type sign when such type of sign is not allowed,
- 3) Article 28-6-9(a), Table of Maximum Sign Dimensions, to allow a freestanding sign (EMC sign) with a height of 50' and area of 220 s.f., where a maximum height of 20' and maximum area of 100 s.f. is allowed,
- 4) Article 28-6-9(c)(3), Permitted Freestanding Signs, to allow a freestanding sign to have a horizontal dimension of 22', when a maximum horizontal dimension of 16' is allowed, and
- 5) Article 28-6-7(n), Signs Prohibited, to permit an illuminated sign that directs illumination (not reflected light) onto adjacent streets. (If ZBA determines relief is necessary),  
for property located at 10 Ferry Street on the portion of the property located in an OCP Opportunity Corridor Performance District.

A motion to recess to the November 3, 2021 meeting was made by Scott, seconded by Monahan and passed by a unanimous vote.

**55-21 Continental Paving:** Applicant wishes to utilize a road on its property as part of its excavation/quarry business and future development of an asphalt plant on an adjacent property located in the Town of Pembroke, New Hampshire and requests that the Zoning Board overturn the Zoning Administrator's determination that:

- 1) There is no legal non-conforming right/vested right to utilize the existing private driveway on the property to provide ingress and egress to the existing excavation site and quarry on adjacent land under the same ownership in Pembroke, as it is neither a permitted use in the GWP District nor is there evidence that a legal right to use the property as such was ever established; and
  - 2) There is no legal non-conforming right/vested right to utilize the existing private driveway on the property to provide ingress and egress to a proposed asphalt manufacturing plant on adjacent land under the same ownership in Pembroke, as it is neither a permitted use in the GWP District nor is there evidence that a legal right to use the property as such was ever established,
- for property located at 320 Sheep Davis Road in a GWP Gateway Performance District.

If the Board upholds the Zoning Administrator's decision the applicant request the following:

- 1) Variance to Article 28-2-4(j), Table of Principal Uses, (principal use L-9) to allow an existing private driveway to be used as access to and in support of an existing earth materials excavation and quarry site on adjacent

property located in the Town of Pembroke, when the Excavation of earth materials or quarrying of stone is a use that is not allowed and has not been established on the subject property, and

- 2) Variance to Article 28-2-4(j), Table of Principal Uses, (principal use L-4) to allow an existing private driveway to be used as access to and in support of a proposed asphalt manufacturing plant on adjacent property located in the Town of Pembroke, when Materials recycling and processing is a use that is not allowed and has not been established on the subject property, for property located at 320 Sheep Davis Road in a GWP Gateway Performance District.

A motion to recess the case to the November 3, 2021 meeting was made by Scott, seconded by Spector-Morgan and passed by a unanimous vote.

**57-21 20-22 Church Street, LLC:** Applicant wishes to merge two adjoining lots, 20-22 Church Street and 26 Church Street, resulting in a single lot maintaining two existing principal residential uses and maintaining the existing number of driveways. Further, the applicant wishes to expand the use of the merged lot to create a new parking area for the benefit of the residents, their guests, and to nearby property owners. Therefore, the applicant requests variances to:

- 1) Article 28-2-4(h), Multiple Principal Uses on a Single Lot, to allow a merged lot that contains two existing principal uses, a Single-family detached dwelling (principal use 28-2-4(j), use A-1) and a 4-unit, legal non-conforming Multi-family dwelling (principal use 28-2-4(j), use A-4), where one principal use is allowed,
- 2) Article 28-7-8(b), Separation of Driveways in Residential Districts, to allow the continued use of three driveways on the merged lot, where only two driveways are allowed, and
- 3) Article 28-4-1(h), Table of Dimensional Regulations, to allow a maximum lot coverage of 52%, where a maximum lot coverage of 50% is allowed, and
- 4) Article 28-2-4(h), Multiple Principal Uses on a Single Lot, to allow an additional (third) principal use on the merged lot to provide for the proposed establishment of a Public or commercial parking lot (principal use 28-2-4(j), use K1), where only one principal use is allowed,
- 5) Article 28-2-4(j), Table of Principal Uses, to allow for the operation of a Public or commercial parking lot (principal use K1), where such a use is not allowed, and
- 6) Article 28-7-7(h), Surfacing and Drainage, to allow the use of an alternative to the paved surface, where a paved surface is required,

For property resulting from the merger of 20-22 Church Street and 26 Church Street, in an RN Neighborhood Residential District.

Testified: Attorney Peter Imse, of Solloway and Hollis. Also available to testify was Fred Potter, principal and manager of 20-22 Church Street LLC.

Attorney Imse explained that one lot is a single family residence and one lot has a Multi-family building on it. For Phase I, they would like to merge the 2 lots and create condominiums. Phase II would be to create a parking lot and pave it with pervious pavers. They gave an overview of the properties as they exist. The rear of both lots is open and is just green space. Abutting to the rear of both properties is the Old North Cemetery. 20-22 Church Street frontage is largely paved. He had submitted photos with the packet showing the relationship of the properties and the large parking area to the right of 20-22 Church Street and the 26 Church Street property. They also submitted 2 concept plans with the application. There will be no physical changes to the buildings, etc. Phase II is a proposal to build a parking lot between the two buildings and into the back of the property. Right now, there are 3 different access points, but they will combine and have 2 access points going forward. There is very little landscaping on the property right now. Their client has spoken to the abutters/neighbors. One resident from Rollins Court has submitted a letter of support and a letter from the people who are purchasing 25 Church Street. They have also talked to a number of abutters and neighbors and it is reported they are in support of the proposal. Their applications asked for 5 specific variances but staff noticed they needed one more.

Phase I variances relate solely to combining the two lots. These are triggered as this is a district where only 1 principal use is allowed on a lot. By combining the lots, they have 2 principal uses. The combined lot would only allow for 2 driveways but they want 3 driveways. There will be no changes other than the combination of the two lot. They are really asking for relief to keep using the property as it is. There is a statute that you cannot treat condominiums any differently than privately owned structures.

Phase II variances relate to the proposed parking lot. There was a parking lot plan submitted with the application. This will straddle the two lot lines. It will be for 30 parking spaces. It will serve the people in the condominiums. It will eliminate the driveway on 26 Church Street. Landscaping will be provided in the setback area. The parking lot, as proposed, would

cause the total lot coverage to be exceeded by 690 s.f. They would like to pave this excess area with the pervious pavers. The applicant has been up front with the City. One of the reasons he is building it this large is because he would like to make that parking available to the center at 135 North State Street rather than parking up and down Church Street. The parking lot will cause lot coverage to be 690 s.f., however, to balance that, the proposal is that it would be paved with pervious pavers. Lot coverage request is to control storm water run off by using the pavers. The last 2 variances deal with allowing the applicant to build a parking lot on the site. They will allow user of 135 N. State Street to use this property. It was determined by the City that because parking is not a permitted use as a stand alone use, they need a variance to establish the parking lot. This will create a 3<sup>rd</sup> principal use on the lot; the single family use, the multifamily use and the parking lot use. This is not a public parking lot as noticed or a commercial parking lot. It will be there and available for users for 135 N. State Street or other properties owned by the applicant on an overflow basis. The parking lot will reduce access points on the street. It will add vegetation and screening. The screening will reduce the amount of parking seen from the street. It will alleviate on street parking. It will reduce congestion in the neighborhood. Overall the applicant feels strongly that the positive aspects will be a positive impact on the neighborhood and will increase property values. Under the Zoning Ordinance, parties proposing new projects are able to satisfy parking requirements by finding other parking and entering into an agreement.

Winters asked attorney Imse if he had seen the letter submitted from Craig and Mary Walker. The letter questions the 2018 approval the board gave 135 N. State Street related to the development there and the letter stated that they needed to consider the fact that at that time the parking would not be needed at 135 N State Street as long as that variance was in effect. The letter is asking the Board to consider that fact. The 2018 variance was granted based on the knowledge that the parking would not be needed and now, in conjunction, this application is saying they want to develop this parcel to support 135 N State Street. Attorney Peter Imse explained that 135 N State Street needed several variances to proceed and there were variances related to parking which included parking in the setback and to allow stacked parking. He doesn't recall if that relief was for less spaces.

Spector-Morgan asked how many parking spaces are required for the residential uses. David Hall answered 10 spaces.

Scott didn't hear what the hardship was for Phase I. It sounds like it all leads up to Phase II. What is the hardship for the merger. Attorney Imse explained that the hardship comes from the fact that you have an existing situation but if they merge them they have to get rid of a driveway and build a new parking lot and with the 2 uses on the lot, they would be saying they couldn't use one of those uses anymore. The hardship is that they would have to tear down one building to comply with the ordinance.

In favor: none.

In opposition: Lyndsay Harrington and Natalie Balletta of 19 Church Street testified. The new entrance to the parking lot will be directly across the street from them. Ms. Harrington explained that they moved in a year ago. They have great neighbors. The applicant hadn't thought of this before? August 7, 2018 is when they asked for relief for 14 parking spaces when 50 are required at 135 N State Street. What is their hardship on this property? If they don't merge the lots they don't create the problem. She works from home and is there 5 days a week. No one has spoken to them about this proposal. She sees the street from her office and it isn't congested and they do not have an issue with people parking in the street. They are concerned that the parking lot would back up to the cemetery. There would be a lot of pavement and run off and a lot of snow. She is concerned with her property value. They didn't have a chance to contact their realtor. They bought their house during the peak of the pandemic property sales. It's a narrow street. If people are going in and out of the main entrance across the street from their house, how will they back out of their driveway? The letters of support are not direct abutters of this property like she and her wife are. Their front bedroom window will stare at the parking lot. It will change the character of the neighborhood for them. They purchased their property in July of 2020.

James Dougherty 28 Church Street. He is an abutter to 26 Church Street. He has had contact with Mr. Potter. Where he lives to the west, he doesn't see into that yard. He has a fence. There is no landscape view of what it will look like. He's not concerned that it won't be aesthetically pleasing. At times there are parking situations on the street, but not often. In the winter the street gets very narrow. How far back will the parking lot extend to the cemetery. He would like to see what it will look like. Spector-Morgan explained that it will be about 8 feet to the fence. His concern is that it will not be an overt parking destination other than when there are functions at 135 N State Street. He's not here to oppose it. If it is done correctly it could be fine. Monahan asked him if things were to change over time and the lot were used on a daily basis would it change his view Mr. Dougherty said it might if it were to be used all the time. But from what he was told it would be used occasionally.

Letters in favor: Dr. Ronald & Maureen Oliver, 131 N State Street. David & Sharon Pinkney, 35 Church Street.

Letter in opposition: Craig & Mary Walker of 94 Warren Street. Laura Spector-Morgan summarized the letter. They have an interest in 14-20 Church Street. They contest if there is a need for the parking. The variance for Rollins Mansion was granted without having on site parking. Property at 131-135 N State Street was at one time one lot. This is a unique case, it is not due to physical or uniqueness of the property. The property allowed for fully compliant parking prior to the subdivision. They had said that due to the proposed uses of the building they would not need more parking on site at 135 N State Street. There is nothing unique about the property. There is no substantial justice. It is contrary to the public interest.

Rebuttal: Atty Imse spoke regarding drainage and snow removal. If the parking proposal continues to move forward, they will need to go to site plan review. He will not challenge comments made regarding variances on N State Street. Taking down the church, developing the pocket community and saving the mansion was a unique project. It took flexibility on the City's part. Assumptions were made at that time about sufficient parking and it turns out maybe it was not enough. This really is an effort on the part of the applicant to be pro active and address it in a positive way. Mr. Potter asked to share with the board that when they developed 135 N State Street one of the reliefs they received at that time was to build slightly fewer parking spaces and to get a Conditional Use permit. No one wants to pave the front yard of the Mansion after all the work done on it. He explained what it would look like if they are approved. Mr. Potter apologized to the residences at 19 Church Street for not connecting with them. There will be trees there. He explained the driveway in the condo is one way. All the parking has to go around the block and head up Church Street for 135 N State Street. They will have a grand opening 10.19.21. They did not pave the front yard at 135 N State Street which they would be required to do if there were stress on the neighborhood. They are trying to avoid parking problem.

Monahan commented that there is a lot of information about 135 N State Street instead of the Church Street property. He's not comfortable acting on what is before him now until he knows what uses or changes will be for 135 N State Street. Spector-Morgan would like to hear from the City's attorney.

Winters felt it would be helpful to have the information from the last meeting.

Monahan would like to recess.

Scott felt that what was before the Board should stand on its own. 135 N. State Street isn't operational yet. She doesn't know if having the record for another property with other variances should play into what is before them today to make a parking area that will only ever be used forever for that one piece of property overflow. If the applicant wants to withdraw, that is one thing, but the record of variances that was done years ago should not bear on this case. She is having a hard time that this variance on this property is predicated on variances granted on another property.

Winters thought they were a little out of order. He thinks the applicants should conclude and deliberate.

Atty Imse would rather the Board be comfortable with what they are looking at. They are happy to agree to a voluntary recess to next month.

#### DECISION:

Winters: He's not sure, is it relevant. They aren't disputing what was stated when they got variances for 135 N State Street. They said they didn't need the requisite number of spaces on that property. Now they are seeking this parking to support 135 N. State Street.

Spector-Morgan thinks it's relevant. She'd like the City's attorney Jim Kennedy weigh in on it. Are those representations implied conditions of approval? She is in favor of continuing it for another month to get information.

Scott has no objection to continuing it. They are creating an off site leased parking lot. It is not an allowed use.

Monahan is trying to give the applicant a fair shake.

Winters is not sure if the prior minutes are relevant or not, but it wouldn't hurt to get those Minutes.

A motion to recess this case to the November 3, 2021 meeting was made by Monahan and seconded by Scott. Spector-Morgan amended the motion asking for the City Attorney to weigh in on whether the variance approval for reduced parking at 135 N State Street is relevant to this variance. Both Monahan and Scott agreed to the amendment. The motion passed by a unanimous vote.

**58-21 Wadleigh, Starr & Peters, P.L.L.C for Andrew Werchniak and Tracy Crews:** Applicant wishes to construct a 2<sup>nd</sup> detached dwelling on a single lot and requests a Variance to Article 28-2-4(h), Multiple Principal Uses on a Single Lot, to permit 2 single-family detached dwellings on a single lot when no more than 1 detached single-family dwelling is allowed on a single lot for property located at 63 Broad Cove Drive in an RO Open Space Residential District.

Testified: Attorney William Reddington, of Wadleigh Starr & Peters. Tracy Crews, property owner testified as well as Matt Moore, Engineer. Attorney Reddington explained that this request is for a variance for a second detached dwelling to be

built on property that has an existing single family home for Tracy Crews parents. It is a large 22 acre parcel with extended frontage on Broad Cove Drive.

Tracy Crews testified. This is a place where 6 generations of her family have been. Hardship is the uniqueness of the topography. They looked at subdividing the property. They worked with 2 engineers and a representative from Engineering and Fire came out and look at the property with them. The unique nature of property is the extensive wetlands and steep grade all of which made it an impossibility. A power point presentation was made regarding the home, the topography, the grade, etc. Attaching an addition to the front of her home due to the grade will impede river views and will not allow her to have access to their front door. The other side of the lot is their leach field and septic. The northeast side has a steep grade going up, a stone wall and is the only access to get to their well. They couldn't feasibly attach an addition. She worked with Tim Bernier. They brought out the wetland people. They are looking right now up the hill behind some trees to allow to build the unit.

Matt Moore, Engineer testified. They tried to avoid wetlands as much as they could. To the southwest of the property, there is a knoll on the top and then it goes down hill so you are chasing the 10% grade so the driveway would become longer. It would be a long road of switchbacks to make a box that is buildable. Their existing driveway is 12.8% grade, but if they tried to make it 10% they wouldn't be able to use their garage. They would like to maintain and use their existing driveway and add on a driveway that meets code. They showed the area where they would like to put the driveway. This is a 3-4 foot slope. They do not want to cause any erosion next to the river. Once through the woods you come into a field. The plan that he showed is the worst case scenario which shows a driveway with 10% slope. They showed photos of their driveway, and their property.

Atty Reddington testified. Denial would result in hardship. There are special conditions on property. There is extensive wetlands and steep grade. Ms. Crews made every effort to work with code. The property's unique features makes it unsubdividable. A dwelling unit cannot be attached to her home. A viable location is up in the clearing. This will not be contrary to the spirit and intent of the ordinance. A second unit will not alter the character of the neighborhood. This use will not be contrary to public interest as it will not have an adverse effect on the community. It is a large 22 acre parcel. There will be no added strain on municipal resources. Substantial justice will be done as her father and mother will be able to live on site with her. There is no gain to the public by denying the variance. It will not diminish surrounding property values. It is a residential use and is consistent with the character of neighborhood.

Spector-Morgan asked how large they would build the house. Ms. Crews stated it would be single floor living and possibly 1500 s.f. Spector-Morgan asked how large their existing home is now. Ms. Crew said her home is about 3,000 s.f. Spector-Morgan understands why she doesn't want to disturb her view. Is there another area that would not be their patio? Ms. Crews said her septic is in that area so she cannot build there. Spector-Morgan asked staff from code Administration how large an ADU can be. David Hall answered 750 s.f. but it has to be attached.

In favor: none.

In opposition: none.

Code: none.

#### DECISION:

Winters: A second unit would not be out of character with the neighborhood. It will not impact neighbors. He would be in favor of granting. He is, however, concerned there is no plan for the size of it. He is unsure if the Board should condition the size of the second dwelling.

Scott has no concerns. The applicant showed the length they went through to meet the Ordinance requirements. She is concerned with creating a second home on a property. It is not a small cottage. Not sure if they could condition it so it wouldn't be rented out ever.

Monahan appreciates the work put into it. He is generally supportive but has concerns that it is a detached unit for a family member.

Spector-Morgan is concerned with size and use of second home. She proposed two conditions of approval. One of the units has to be occupied by the owner of the property and put a size limitation. She would propose 750 s.f., which is what the ordinance allows for an attached ADU.

Monahan has concerns about the size being detached.

Spector Morgan is not comfortable approving without a square footage limitation.

Winters thought that if they asked for 1500 s.f. he would look favorable on. He thought that was reasonable. The limitation placed for the owner to occupy one of the units he is in favor of. He's not sure if it is enforceable though.

Scott is in favor of one of the units being owner occupied. She is in favor of the structure being no larger than 1500 s.f. of living space.

A motion to approve the request with the condition that at least one of the units is occupied by the owner and that the new dwelling unit has no more than 1500 s.f. of living space was made by Scott, seconded by Spector-Morgan and passed by a unanimous vote.

**56-21 Dustin Rose:** Applicant wishes to operate a personal training business and requests variances to:

- 1) Article 28-2-4(j), Table of Principal Uses to allow a Privately owned indoor health and personal fitness use (principal use C-4) to be established where such use is not otherwise permitted, and
- 2) Article 28-7-2(e) Table of Off-Street Parking Requirement, (category C – Services – Entertainment and Recreation, Indoor Health and Fitness Center) to allow 3 on-site parking spaces where 22 are required, For property located at 85 South State Street in a UT Urban Transitional District.

Testified: Attorney Ari Pollack of Gallagher Callahan and Gartrell. Also available to testify is Dustin Rose owner of Capital Fitness.

Attorney Pollack testified. There are next to no non-residential uses allowed by right in the area of 85 S. State Street. The use proposed is not allowed and he is seeking a variance from off street parking requirements. Mr. Rose has owned a business in Concord for 10 years. He has operated in a unit under Bagel Works on Phoenix Ave. with a month to month lease. The property is an existing commercial building. Riverbend rents the 5,000 s.f. building. Mr. Rose would like to lease the ground floor but Riverbend would use the basement area for meeting purposes. There will be no changes to the exterior of the building. Signage, most likely, would be decals. He would be a sub tenant of Riverbend. Usage is similar to what he has at his present location. He conducts small personal training sessions. This will not become the next Planet Fitness. This is a smaller more intimate setting for personal training. It is an unnecessary hardship as this district is fully built out. The parking ratio for fitness, if ordinance were honored, would be 22 spaces on site for a 2600 s.f. space. He will have more than sufficient parking as it stands. They submitted a screen shot of the GIS for this property. He explained the layout. The Legion gave Mr. Rose a letter allowing him to use 5 parking spaces on their lot. Riverbend is authorizing him to use 15 parking spaces of theirs. There is also on street public parking available. This can be a use that occupies an existing building without ever knowing it is there. The 3 spaces on site and public parking would be more than adequate. It is a reasonable use. It can't be used for any nonresidential purpose without some relief from the parking and loading requirements. They are proposing a combination of on site and off street and on street parking. It would allow a reasonable use to relocate in the community. It is not contrary to public interest as this area is fully developed. Substantial justice would be done. It is an existing building. It will not diminish surrounding property values. He will be a sub tenant of the leasee. It is a .1 acre lot in a heavily developed area of the City. The building footprint is close to the size of the lot. The lot coverage will not be altered.

Wallner asked how many employees he would have. Mr. Rose said it would just be him and he does have on trainer that rents from him, so two. Wallner asked how many clients? Mr. Rose said 2 at a time with the other trainer there. Wallner asked about hours of operation? Mr. Rose explained that it all depended on his client's needs. It would not be all day. Winters asked if the members could come and go. Mr. Rose explained that it would not happen as these are private sessions.

In favor: none.

In opposition: none.

Code: none.

**DECISION:**

Winters: The surrounding buildings are mostly all multi-family and this building is unique. This use is consistent with neighborhood.

Scott: Agrees. Already being used for group meetings.

Monahan: Agrees.

Spector-Morgan: Agrees.

A motion to approve both requests was made by Spector-Morgan, seconded by Winters and passed by a unanimous vote.

Minutes: A motion to approve the Minutes from September 1, 2021 was made by Monahan, seconded by Winters and passed by a unanimous vote.

*Respectfully submitted,  
Rose M. Fife, Clerk of the Board*