

HAMPTON ZONING BOARD OF ADJUSTMENT
MINUTES - *Draft*
July 20, 2023

Members Present

Bill O'Brien, Chairman
Nichole Duggan
Erica De Vries
Tom McGuirk
Ken Sheffert

Also Present

Paul King, Building Department

Chairman O'Brien called the meeting to order at 7:00 p.m.

The Pledge of Allegiance was said.

Chairman O'Brien introduced the Board.

Chairman O'Brien said he had received a request to move the following item to the beginning of the Agenda. All members of the Board agreed:

One year extension of Zoning Board of Adjustment approval request from September 16, 2023 to September 16, 2024 for Al Fleury/Zoo Properties, 144 Ashworth Ave/6 Riverview Terrace. Property is located on Map 293, Lots 66 and 73.

Attorney Tim Phoenix said they are asking for an extension of one year because they are not quite where they need to be. Chairman O'Brien said due to the Rules of Procedure this Board can grant only to the date the Planning Board agreed to. Attorney Phoenix said that would be fine.

Moved by Ms. DeVries, seconded by Mr. McGuirk, to grant an extension to January 19, 2024 for 144 Ashworth Ave/6 Riverview Terrace.

Vote: 5 yes, 0 no. Motion passed unanimously.

PETITION SESSION

17-23...The petition for relief of Patricia Donald McGowan for the property located at 24 North Shore Road. The applicant is petitioning for a Special Exception from Zoning Ordinance Article 21, Section 21.2. Applicant is seeking relief from the Zoning Board of Adjustment to allow Short Term Rentals at the aforementioned property address. The property is located on Map 131, Lot 8 in the RA Zone.

Patricia McGowan, Applicant, and Attorney Justin Pasay came forward. Attorney Pasay said in June the Board discussed the analysis provided to them revolving around the question of a need to pursue a Special Exception. Attorney Pasay said he felt the McGowan's have a legal non-conforming use under the law. Attorney Pasay said he had also provided all rental records and also a list of current reservations for this summer.

Questions from the Board

Ms. DeVries then said the following:

“According to the applicant, she bought the house in 2018 and she began renting the house in 2019. During that summer, she lived in New York.

At least by April of 2021, the applicant began residing in a loft space over her 24 North Shore Road garage. At the June meeting, Ms. McGowan stated, “Yes, yes, I am there all the time. I don’t go home to visit [to New York]. If there are no guests [in Hampton], I will go home [to New York].”

At the June meeting, this loft space was described as “a finished space”.

Ms. McGowan said that she sleeps in that space above the garage. She has bathroom facilities in that space. She pointed out that it does not have dedicated kitchen space.

Hampton’s Zoning Ordinance defines an Accessory Dwelling Unit in Section 1.6 (page 3) as:
“A residential living unit that is within or attached to a single-family dwelling, and that provides independent living facilities for one to four persons, including provisions for sleeping, eating, cooking, and sanitation on the same parcel of land as the principal dwelling unit it accompanies. A residential living unit located within a detached structure that predates the enactment of Article III-A, and that is already detached from the principal dwelling unit shall also be considered an Accessory Dwelling Unit.” (Adopted March 2017)¹

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In Article 3-A.3 Provisions for Living Facilities, it says, “An Accessory Dwelling Unit must provide independent living facilities for one to four persons including provision for sleeping, eating, cooking (stove, refrigerator and sink) and sanitation (shower/tub, toilet and sink) *on the same parcel of land* (emphasis added) as the principal dwelling unit it accompanies.” Note that this section does not require there be cooking facilities in the Accessory Dwelling Unit.

This space at 24 North Shore Road has never been permitted. It does not show up on the tax cards.

That does not mean, however, that an Accessory Dwelling Unit does not exist. The question turns on how the property is being used.²

The ZBA has to answer the question of whether this loft space above the garage is being used as an Accessory Dwelling Unit. The reason we have to answer it is because under Article III-A.4.C Occupancy Requirements, states “An accessory dwelling unit or principal dwelling unit having an accessory dwelling unit shall not be rented out for less than six (6) months at a time.” Clearly, the Hampton Zoning Ordinance does not allow properties with Accessory Dwelling Units to have short-term rentals in either the primary or accessory units.

The question is not whether an accessory dwelling unit is *allowed* on the applicant’s property. It is whether an accessory dwelling unit *exists* on the property.

If there is an Accessory Dwelling Unit, then it defeats the applicant’s argument that a prior non-conforming use (before passage of the short-term housing overlay zone, which this property is not included in) exists, because having an Accessory Dwelling Unit means that short-term rentals are not allowed, which would mean that the prior short-term rental usage did not comply with Hampton’s Zoning Ordinance.

While the applicant’s space over her garage allegedly does not have permanent kitchen facilities, that does not mean that a person cannot use other cooking options: air fryers, toaster ovens, hot plates, crock pots, pressure cookers. A person can dine out all the time or have food delivered or eat cold sandwiches and salads.

Regardless, Hampton’s Zoning Ordinance does not require that an unattached Accessory Dwelling Unit have cooking facilities. (See 1.6 and 3-A.4.C)

The definition defines an Accessory Dwelling Unit differently according to whether it is attached to or is separate from the single-family dwelling. For the Accessory Dwelling Units Hampton Zoning Board of Adjustment

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that are within or attached to the single-family unit, Hampton's Zoning Ordinance requires that there be cooking provisions. The next sentence with regard to residential living units located in detached structures does not enumerate that there be cooking facilities. According to the NH Supreme Court's *Concord* ruling, we must conclude that the drafters of this definition could have required non-attached Accessory Dwelling Units to have kitchen facilities, but they did not. Therefore, we must conclude that they chose not to require cooking facilities in non-attached Accessory Dwelling Units. Therefore, kitchen units are not required in non-attached Accessory Dwelling Units.

Additionally, in the Conway decision, the NH Supreme Court determined that short-term rentals were residential in nature and not commercial, because of how the property is being used. Similarly, in this fact situation, we also look at how the applicant was using the loft space above the garage. According to the applicant, she resided there, living in the space.

Therefore, we find that Article I.6 Accessory Dwelling Unit definition and Article III-A.4.C. applies in this case. When there is an Accessory Dwelling Unit, there cannot be short-term rentals.

Therefore, since April 2021 when the applicant moved into the loft above the garage, that rendered short-term rentals not allowed. Because we find that the short-term rental use after April 2021 did not comply with Hampton's Zoning Ordinance because of the existence and use of an Accessory Dwelling Unit, the ZBA finds no prior non-conforming use upon which the applicant's continued short-term rentals would be allowable. The short-term rental usage at this property was *not* validly established. Since it was not validly established, the property must come into compliance with the present regulations. Those regulations place this property outside of the Short-Term Rental Overlay District.

The ZBA declines to consider the question of whether – absent an Accessory Dwelling Unit – short-term rentals would have been allowed on this property outside of the 2023 Short-Term Rental Overlay District under the Conway decision.”

Mr. McGuirk said he did not disagree with anything said by Ms. DeVries. Nothing was opinioned based. Mr. Sheffert agreed. Chairman O'Brien said he liked it. Ms. Duggan also agreed.

Moved by Ms. DeVries, seconded by Ms. Duggan, that the Zoning Board of Adjustment does not find a prior non-conforming use on the property at 24 North Shore Road.

Attorney Pasay said he disagreed with Mr. McGuirk. He said he would like to ask for a continuance so that the Board can be briefed on his perspective. Mr. McGuirk said Attorney Pasay should have the opportunity to address this.

A vote was never taken on Ms. DeVries motion.

Ms. DeVries said she also had some thoughts on a Special Exception. Mr. McGuirk said he would never be in favor of a Special Exception.

Comments from the Audience

John McEachern, 20 North Shore Road, said as abutters he and his wife are very much opposed to a continuance.

Back to the Board

Ms. DeVries then addressed the matter of the request for a Special Exception as follows:

“The applicant then asks for a special exception. Six (6) criteria must be met. And the applicant offers 3 conditions for the Board’s consideration. This Board finds that the 6 criteria, all of which must be met, have not been met by the applicant.

The Board finds that the following criteria have not been met:

- a. That the use is so designed, located, and proposed to be operated that the public health, safety, welfare and convenience will be protected.
 1. Abutters in prior hearings reported numerous calls to the police for activities that disturbed their peaceful enjoyment of their properties. These included drinking, drug use, profanity directed at the permanent residents, and fireworks. They also complained that the sewer system is not sufficient to the task of accommodating 10 people on that property and a failed sewer system would threaten their properties.
 2. The Board finds that the applicant’s offer to limit stays to guests staying at least 5 nights does not adequately address the legitimate health, safety, and welfare concerns of abutters.
- b. That the use will be compatible with adjoining development and the proposed character of the zone district where it is to be located.
 1. We agree that the use applicant proposes is residential in nature.
 2. The applicant meets this criterion.
- c. That adequate landscaping and screening is provided as required herein.
 1. We agree that there are wooded sections between the property and abutters.
 2. The applicant meets this criterion.
- d. That adequate off-street parking and loading is provided and ingress and egress is so designed as to cause minimum interference with traffic on abutting streets.
 1. We agree that the parking requirements of the Zoning Ordinance appear to be met through the 5 parking spots.
 2. The applicant meets this criterion.
- e. That the use conforms with all applicable regulations governing the district where located.

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1. The use would *not* conform with all applicable regulations governing the district where located because the applicant still has an Accessory Dwelling Unit. Accessory Dwelling Units cannot have short-term rentals.
 2. The applicant does not meet this criterion.
- f. That if the application is for a use in the Industrial District such exception will not affect the quality of water supplies; constitute a health hazard to the community; or permit temporary structures.
1. This section is not applicable.
- g. The applicant shall demonstrate that handling, storage and containment of any chemical substances defined as “hazardous” will be handled in strict accordance with the regulations and recommendations of the EPA and/or any governmental body charged with enforcing compliance with any laws or statues regarding hazardous substances.
1. This section is not applicable.

The applicant has failed on 2 of the criteria for a Special Exception. The ZBA declines to grant a special exception for short-term housing at this property.”

Chairman O’Brien agreed that the applicant has failed on two of the criteria. He said he would be willing to grant a one-month extension.

Moved by Mr. McGuirk, seconded by Ms. Duggan, to continue Petition 17-23 to the August 2023 meeting.

19-23...The petition for the equitable waiver of dimensional requirement of Andrea R. Checovich Rev. Trust for the property located at 1062 Ocean Blvd. The applicant is petitioning from Article IV, Section 4.5.2 Building 1 and Building 2. The property is located on Map 98, Lot 34/1 in the RA Zone.

Applicants Andrea and Sam Checovich, and Attorney Robert Casassa came forward. Attorney Casassa said the applicants were here about a year ago and received relief to reconstruct two structures at 1062 Ocean Blvd. They then went to the Planning Board, received a Wetlands permit, went through procedure to get relief from deed restrictions. They also worked with the Conservation Commission.

Attorney Casassa said they are asking for equitable waiver for two items where mistakes were made during actual construction. The first is a 6 inch bumpout which was a measurement error of the fireplace. It wasn’t noticed until construction was already in process. The bumpout protrudes into the setback leaving 9 feet, 6 inches where it was planned to be 10 feet. The second item is the placement of the generator. It was placed beside the garage so it protrudes into the setback leaving 7 feet four inches where it was supposed to be 10 feet. It should be noted that the present placement of the generator is much safer and is comparable to the placement of generators in surrounding areas. Attorney Casassa then went through the four criteria and said he felt they had been met.

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Questions from the Board

Ms. DeVries asked about the expense that would be involved in moving the generator. Attorney Casassa said the current placement is much safer and had they known they would have put it there in the first place.

Comments from the Audience

There were no Comments from the Audience.

Back to the Board

Moved by Mr. McGuirk, seconded by Ms. Duggan, to grant the petition for equitable waiver for Petition 19-23.

Chairman O'Brien asked the Board if they felt the four criteria had been met. All members agreed that they had.

Vote: 5 yes, 0 no. Motion passed unanimously.

20-23...The petition for relief of Jeff and Amy Waterhouse for the property located at 63 Langdale Drive. The applicant is petitioning for Variance from Article III-A, Section 3-A.5.e for an addition to existing building. The property is located on Map 87, Lot 26 in the RA Zone.

Jeff and Amy Waterhouse, Applicants, came forward. Ms. Waterhouse said they want to build an ADU on the second story over the existing garage and family room. Ms. Waterhouse went through the five criteria and said she felt they had been met.

Questions from the Board

Ms. DeVries said one of the things the Board has to establish is that there is something unique to the property that would establish a hardship. All five criteria must be met to receive a variance. Ms. DeVries asked where the hardship was in this instance. Ms. Waterhouse said if this was not done the property would be an eyesore.

Chairman O'Brien asked about the length of the garage. Ms. Waterhouse said it was 24 feet. Chairman O'Brien asked about the size of the bedrooms. Ms. Waterhouse said one would be 14' x 20' and the other would be 10' x 20'. Chairman O'Brien said even the 14' x 20' would be 280 square feet. Further relief would have to be sought for over 200 square feet. Ms. DeVries said the applicants would have to re-notice if they want over 200 square feet.

Chairman O'Brien said the plans would have to be refigured before going to the Planning Board. Also two parking spaces should be shown.

Ms. DeVries asked who would be living in the ADU. Ms. Waterhouse said it would be their daughter. Ms. DeVries reminded that this cannot be used as a short-term rental.

Comments from the Audience

There were no Comments from the Audience.

Back to the Board

Moved by Ms. DeVries, seconded by Mr. McGuirk, to grant Petition 20-23 with the requirement that the plans be redrawn to reflect that no bedroom is more than 200 square feet in size and that the plot plan shows two outside parking spaces that are not stacked.

Chairman O'Brien asked the Board if they felt the five criteria had been met. All members agreed that they had.

Vote: 5 yes, 0 no. Motion passed unanimously.

21-23...The petition for relief of Ann M. Dippold Rev. Trust for the property located at 191 Island Path. The applicant is petitioning for a Variance from Article I, Section 1.3 Expansion of nonconforming use; Article II, Sections 2.3.3.A.8.b, 2.3.4.B.3, 2.3.4.C.2 and 2.3.7.C.4; and Article IV, Section 4.9 to raise existing house and move to a new foundation. The property is located on Map 280, Lot 52 in the RCS Zone.

Gary and Ann Dippold, Applicants, and Henry Boyd, Millennial Engineering, came forward. Mr. Boyd said this property is all within the 50 foot buffer. The current house invades the setback on the westerly side. The proposal would be to meet the 7 foot setback. The new structure will be no closer to the marsh. The existing shed will be removed. There will be flood vents so there will be no need for pilings. There is a pervious paver driveway which will be removed. There is plenty of room for parking. At the end of this project it will be more environmentally friendly, more like what FEMA would want and more safe for the Dippolds. There will be no affect on abutting property owners. Mr. Boyd went through the five criteria and said he felt they had been met.

Questions from the Board

Ms. DeVries asked for an explanation about flood vents. Mr. Boyd provided that. He also spoke about VE Zones and piles.

Ms. DeVries asked if the Board grants an exception to everybody, isn't that overturning what has been approved by the voters. Mr. McGuirk said that was not true. Piles are required in the V Zone, but not here. Ms. DeVries said this argument is against the zoning ordinance itself and she said this is problematic for her. She asked Mr. McGuirk if this does Hampton Zoning Board of Adjustment

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constitute a hardship in this case because there will not be that kind of velocity and it is mitigated because of the vents. Mr. McGiirk said he did believe that.

Comments from the Audience

There were no Comments from the Audience.

Back to the Board

Moved by Mr. McGuirk, seconded by Ms. Duggan, to grant Petition 21-23.

Chairman O'Brien asked the Board if they felt the five criteria had been met. All members agreed that they had.

Vote: 5 yes, 0 no. Motion passed unanimously.

22-23...The petition for relief of Maura Pare & Christine Pelkey, Trustee, Maura Pare Family Trust for the property located at 1 Dumas Avenue. The applicant is petitioning for Variance from Article I, Section 1.3 expand nonconforming use; Article II, Sections 2.3.4.B.2, 2.3.7.C.2, and 2.3.7.C.4; Article III, Section 3.3; and Article IV, Sections 4.5.1, 4.5.2, 4.5.3 and 4.9 to remove existing structure and construct a new structure containing two dwelling units. The property is located on Map 256, Lot 1 in the RA Zone.

Attorney Justin Pasay said this is a unique 4,800 square foot property. It is a unique diamond shape. If you look at the property you realize it is dated and needs to be upgraded. This will make it more environmentally sound. The applicants want to raise the existing building and build a new one. They will comply with the flood ordinance and remove the encroachment on state owned property. There will be a 20% reduction in sealed surface. Attorney Pasay discussed the specific variances requested. Chairman O'Brien reminded everyone that when you take down a building and replace it with a new one you must obey all setbacks.

Henry Boyd went over all plans existing and proposed. Attorney Pasay went through the five criteria and said he felt they had been met.

Questions from the Board

Ms. DeVries asked if there was a floor plan. Chairman O'Brien said there was not. Ms. DeVries asked about the square footage of each unit. Attorney Pasay said it was 1,900 square feet each. Ms. DeVries said this is a significant increase in living space and she had concerns about the view impact on abutters.

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Mr. McGuirk asked about the size of the current units. Chairman O'Brien said it is single family with a 400 square foot studio apartment in the basement. Ms. DeVries said this is a sizable increase to what is there now.

Comments from the Audience

John Lyons, Lyons Law Office, Portsmouth, NH, said he represented Mary Doyle Trustee of two trusts 3, 4, and 2.5 Dumas Ave. which abut the applicants' property. Attorney Lyons said he has a petition signed by 40 people who are opposed to this project. There were only 13 letters of support and only one of those were direct abutters. Attorney Lyons said floor plans are missing. This is doubling in size. This is an over intensification and expansion of an existing nonconforming use. Attorney Lyons said he did not believe the five criteria were met. He asked that this petition be denied.

Jackie Cavanagh, 6 Dumas Ave., spoke against the project. She said her view would be ruined and the value of her property diminished. She said 11 variances were too many.

David Lavoie, 10 Sun Surf Ave., spoke against the petition. He cited loss of a view and diminished property values.

Back to the Board

Ms. DeVries addressed the issue of creating a hardship. She asked if the shape of the lot was by choice. Mr. Boyd said he would take issue with the creation of a hardship in this case. He said this lot has existed as it is now since 1982 except for the exchange to the state.

Discussion continued regarding the hardship criteria.

At this time Attorney Pasay said they would like to withdraw.

Moved by Mr. McGuirk, seconded by Mr. Sheffert, to allow Petition 22-23 to be withdrawn without prejudice.

Vote: 5 yes, 0 no. Motion passed unanimously.

BUSINESS SESSION

Approval of Minutes

Moved by Ms. Duggan, seconded by Mr. Sheffert, to approve the Minutes of June 15, 2023 as amended.

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Vote: 5 yes, 0 no. Motion passed unanimously.

Adjournment

There being no further business, the meeting was adjourned at 10:48 p.m.

Respectfully submitted,

Joan Rice
Secretary