

**CITY OF CONCORD, NH
ZONING BOARD OF ADJUSTMENT
AUGUST 10, 2022 MEETING
MINUTES**

Attendees: Chairman Christopher Carley, Andrew Winters, Nicholas Wallner, and Laura Spector-Morgan.

Absent: none

Staff: David Hall, Code Administrator
Robert Nadeau, Code Inspector

Meeting commenced at 7:00 pm.

Chairman Carley announced to the gallery that this evening's hearing is a continuation of the August 3, 2022 agenda, specifically Case Number 46-22, 135 North State Street. It was started at last Wednesday's regular Zoning Board meeting, and recessed to tonight's special meeting. A lot of testimony has already been given and they will pick up where they left off. Public testimony will continue, allowing those speaking in favor, those opposed, then Code. The applicants will be provided an opportunity for rebuttal before public testimony closes and Board deliberations begin.

This case is in regard to a petition to overturn the Code Administrator's ruling of uses at this location.

46-22 135 North State Street: RN-Neighborhood Residential District; by 135NSS LLC, Owner: Applicant seeks review of Administrators Decision regarding the current uses of 135 North State Street in comparison to the permitted uses and current zoning relief for the property. Variances were granted for the principal use of F1 with 3-4 Live/Work units. During a recent review of the property and website, it was determined that the Carriage House is being used in a different classification than general professional business and was classified as Commercial Indoor recreational Facility, use C3.

Testified: Attorney Kelly Ovitt Puc, Fred Potter.

Attorney Puc introduced the owner of the property, Fred Potter. Mr. Potter reviewed the historical timeline relating to the property, showing the integrated parcels and how they were used, they heavily focused on community support uses, up to and including time the property was owned by the Roman Catholic Church of Manchester. At the time of sale, the Church made the determination that the church be demolished. About that time, the pocket neighborhood concept was developed and after a lot of planning, ultimately became a highly integrated development consisting of three properties, 125 North State Street, the pocket neighborhood of Rollins Court, and 135 North State Street.

For almost 20 years, various plans were considered to replace the stair towers on 125. That stair tower is now collapsing and the need to proceed with that portion of the development has triggered the set of events that led to our time today.

As the planning process progressed, the city required that one-way traffic flow should be directed through the developments.

More recently, 5 phases of construction and renovations have taken place. It is the last phase that has drawn the attention of the residents of the pocket neighborhood, leading to why they are here. Some residents seek to limit activities at the surrounding properties. They are imagining future problems and they don't have a complete understanding of the permitting history.

Winters asked if the residents of the pocket neighborhood had concerns if use at 125 exceeded what variances were for? Potter replied, yes. It was a use issue, which turned out not to be the case.

Potter continued with noting that no complaints have been submitted regarding problems with the actual uses, actual parking, actual noise, or actual facts supporting imagined future problems. This project and property have broad community support.

No opposition letters have been submitted. Imagined problems relate to traffic control; the city required that signs be installed to establish one-way traffic through the development. Signs are installed on property owned by 135. Distinction of type of equipment is really irrelevant, whether simulators or not, and do not justify rezoning. Every step along the way, full transparency has been important, that the city knows what they were doing was properly permitted. Confirmation was received that all necessary relief was in place before commencing the carriage house renovation.

Carley asked what was in the carriage house in 2019, at the time these plans were looked at? Potter noted that the yoga mats were still there, two conference rooms on the second floor, garage and community room on first floor. From the very beginning building was seen as being used by others in the community.

Spector-Morgan questioned what it is used for now? Potter replied the same thing, but there has been a change. Structural weakness in the carriage house resulted in the rooms moving around, as the building was not built to support the weight of people on the second level.

Attorney Puc clarified that during construction, it was determined that the carriage house was in a state of near collapse. There was a strong sentiment to keep the historical building. When the problems with the structural support of the carriage house were discovered, that was when they came back to Zoning to modify the use to remove parking within rather than demolishing the carriage house. The garage is removed, and the first floor now consists of a community room and a large meeting room and simulators are located on the second floor. They went to Planning and Zoning staff to determine zoning relief needed prior to coming to zoning with requests for variances.

Spector-Morgan question if when they came back to the Zoning Board in 2020, it was because they needed relief from parking in order to rent the fitness room or community center to the public? Attorney Puc clarified that the reason they needed to come back was because parking was being pulled out of the carriage house.

Spector-Morgan stated that she is unaware that any documents were presented to the Zoning Board stating that any space was to be open for rental by anyone other than the occupants of the building or Rollins Court. Is there any documentation they can provide that would indicate that it was provided? Potter noted that he can only point to years of conversations with Zoning and Planning staff where they confirmed verbally that they were aware that there would be some public rentals, similar to the prior community and church uses. E-mails indicate that all the aspects have been known and discussed with staff meetings, to be certain that all requirements have been met. The only issue that was raised was the need for relief from parking due to changes in the carriage house layout. The rental concept was there, disclosed from the very beginning.

Attorney Puc followed up with clarification that documents in the form of e-mail correspondence between Planning and Zoning staff detailing the intent to have some rentals have been provided in tonight's package and it was well aware all along. There is reference that public use was not significant public use, and that was stated in the zoning meetings. Zoning staff did not indicate any relief was needed to support public use.

Carley questioned if they considered that the e-mail provided gave sufficient guidance that the use was permitted. Attorney Puc noted that the plans were consistent at that time. This correspondence was for an earlier discussion and that public use was not in the plans at that time.

Winters confirmed that documentation referencing rental of space is consistent with what was disclosed and discussed with staff, but was not specifically disclosed to the Zoning Board? Potter confirmed that that is probably correct. Early zoning presentations was handled by John Chorlian and he was open about intent as well. City Planning and Zoning knew the uses we had in mind, including the continuation of Church uses negotiated with the Church and other public uses.

At each point where a change in plans were necessary, we discussed with city staff if the change was consistent with prior variances and that they wouldn't be erased.

Carley questioned was there somewhere in the presentation that reference to meeting space and exercise rooms being used by tenants and residents of the neighborhood. Potter indicated yes, when discussing 125 N State Street. Carley confirmed that at that time mention of public rentals was not made to the Zoning Board. Potter confirmed that looking at the Minutes, that would be correct.

Winters questioned if resources in the carriage house are made available to residents of the pocket neighborhood? Potter confirmed that it is not by contract, but is available just in the same way it is available to the public.

Spector-Morgan questioned if the first-floor large meeting room in the carriage house is advertised for weddings? Potter indicated yes. Winters followed up asking how many people can fit in there? Potter indicated a limit of 50. Life safety plans needed to depict 95 chairs, but there is no way that many could fit in that room, floor plans are taken up by simulators.

Spector-Morgan questioned if anyone can rent the simulators? Potter indicated that it is not a walk-in service, but yes, anyone can rent, by appointment only.

Spector-Morgan questioned if an e-mail is available of discussion with Craig Walker about rentals. Both Potter and Attorney Puc indicated that there is no specific e-mail with Walker, but there is in a report to the Mayor.

Winters questioned if there been a wedding there yet? Potter indicated yes, with 4 people in attendance. Other events have been held, but maximum number of attendants has been 35. Winters followed up with questioning how critical rentals are for the success of the business? Potter indicated that its critical for the historical preservation and maintenance of the building. Office and student rentals do not support the building. There have been remarkable and expensive preservation of the building and rentals to others is critical.

Winters asked for the Craig Walker quote used to define live-work.

In favor: None.

In opposition: Charles Catcher. Mr. Catcher moved into unit 3 of the pocket neighborhood in late June 2020. When he first considered purchasing at this location, in 2019, it was represented that the carriage house would be a fitness room that hopefully be used by residents of the pocket neighborhood. That obviously didn't happen. When he signed his purchase and sale for his property, there were many details on what the property could and couldn't be used for. He realized that construction to address the stairs at 125 North State Street would be taking place, and, despite what Mr. Potter said, that was not what prompted him to make a complaint to Code. He also questioned, with respect to Mr. Hall's letter, why there wasn't a cease and desist order when the letter was sent.

Code Administrator Hall replied that an immediate cease and desist is rarely issued. They typically would allow the appeals process take place to determine the final outcome.

Mr. Catcher further stated that the uses stated were not disclosed and are not as concrete as represented.

Carley questioned what prompted the complaint to Code. Mr. Catcher indicated that looking at the variance and what he saw didn't seem consistent. Carley followed up with asking what was seen. Mr. Catcher replied the events taking place. Also, that Mr. Potter was talking a lot about his desire to expand access to adjacent lots in the rear.

Also in opposition: Nick Holmes. Mr. Holmes lives in the pocket neighborhood, 131 North State Street, Unit 7, next to the carriage house. He followed up from last week's testimony that advertisement on their website shows events that could be held at the carriage house; this is publicly advertised for commercial uses.

Tonight's presentation was different than last week. The Community Center is not a use that the pocket neighborhood uses. Mr. Holmes questioned if the variances granted in 2018 and 2019 are suitable to support the current uses? What was said in 2020 is that spaces in the carriage house are to be used as accessory to occupants of the Manse.

Winters confirmed there has been no burdens to date? Concern is more for potential impacts? Mr. Holmes replied correct. They do hear occasional noise, but no real problems yet. His point is that if they have variances, they must live by the terms of those variances.

Mr. Holmes noted other residents of Rollins Court are in attendance and support the challenge.

Code: Code Administrator Hall requested the Board members refer to the second page of the memo referenced in this evening's presentation. This page confirms that the accessory uses were approved only for occupants of the Manse and live-work students. We don't have the benefit of knowing the specific conversations with Craig Walker, but as Code Administrator trying to interpret what is allowed, he would have agreed with the use as questioned in that e-mail.

Winters asked if the Code Administrator's letter was framed around parking? Hall responded that parking was an issue, but the use is not authorized. Winters then questioned if a public assembly use requires a variance? Hall indicated yes. Hall agreed that the use of the facilities as detailed would not be classified as "Convention Center". It is unknown with certainty how the use was represented to Zoning Administrator Walker for 135 N. State Street. The greater concern is for what is happening in the carriage house. We cannot rely on hallway discussions, we need to refer to ZBA Minutes to detail uses that have been approved.

Winters asked what use would be needed for putting on events. Hall indicate it would probably fall under conventions or banquet, but it would not be under F1 business use, for renting out space. Spector-Morgan followed up with the point that the Zoning Board is not being asked to determine what it is, but rather if the current uses are consistent with the approvals.

Hall understands that COVID was a challenge and was constraining. The website rentals seem to suggest a stretch of the approvals granted. He is uncertain how to consider memberships, or if that is even a factor.

Rebuttal: Potter clarified that memberships are used to control activity; this is a limited use facility under any scenario. It is much smaller of a scale than the previous uses over the last 50 years. No complaints have been received.

Attorney Puc referenced Winters prior question regarding Zoning Administrator's Walker's use of the term "live-work", taken from an audio transcript of the June 13, 2018 hearing, not taken from the Minutes: *"Terminology that is regularly used in different aspects often times it applies to crafts and artists that have a studio they live in. It could be other couple of people living in the residence and living there. You know we looked at this building here and separated the two uses, the residential use versus the office use and we calculated the parking separately too. There are other ways perhaps to look at this as (rooming house) but is not a rooming house because those are open to the general public. These residences here are for people working there and it is still two separate uses."* It is clear that this is not a defined term, it is a classification that Craig and the applicant arrive at during the planning process to help define co-existing of living and working in the same space, but that can take different forms. As a general rule, this space is not available to the public; an opportunity came up to provide unused space to someone in need on a short-term lease. Attorney Puc expanded that the Board did not condition relief to non-rentals. Concerns were for parking; live-work accounted for that use.

Attorney Puc requested that if the Board decides that the living space currently rented is not permitted, that at least time be allowed for the current tenant lease to expire.

It is not relevant whether yoga mats or racing simulators are in the room. What the space is and who is using it is the real issue. What was approved is that spaces were accessory uses for people living-working in the Manse. That is how the services are primarily being used. Occasional public use is typical with most businesses, where rooms are made available for outside use, especially to non-profits; that is how it is at her office.

Carley asked if the use of the space is advertised. Attorney Puc indicated no, and that seems to be an issue.

Spector-Morgan asked if any one can become a member of the club? Potter responded yes, it is a tool to help businesses.

DECISION:

Spector-Morgan: Appreciates what is being done and why. But what was presented to the Zoning Board was a fitness room and meeting room used as accessory by occupants of the Manse. It is not good enough that it is primarily being used. If known to the Board at that time, may have been a different use. No mention of rental of the Manse apartment. Not in favor of either.

Wallner: It was the clear intent of the Board in 2019 that the apartments would be provided for the students and not be offered to the public. Considers a community room be used by immediate area, folks in carriage house and mansion; cannot see any authorized use by the general public.

Winters: Watched the 2018 meeting regarding this property. Representation was accurate, but emphasis was on high-end use offices and live-work basis for parking because of lesser uses. Understands allowance for occasional use of office or conference, but renting to the public in RN district was not given as variances. Understand others in the City may have known intent, but that was not presented to the ZBA. Would consider variances with open mind, if presented down the road, but to say it was part of what was granted is not accurate.

Carley: Great project and hate to see it fail, will keep open mind. But record is clear what we approved. Inclined to support the Code Administrator's interpretation.

A motion to deny the request to review and overturn the Code Administrator's Decision was made by Spector-Morgan, seconded by Winters and passed by a unanimous vote.

July minutes were approved.

Respectfully submitted,
Robert Nadeau for Rose Fife, Clerk