



BUILDING AND FIRE CODE BOARD OF APPEALS MEETING MINUTES

**JANUARY 4TH, 2024
2:30PM**

THIRD FLOOR AUDITORIUM - NASHUA CITY HALL - NASHUA, NH

Members Present: Jaron Slattery, Scott Cote, Carl Dubois

Staff Present: William McKinney (Building Official), Mark Collins (Deputy Building Official), Matt Sullivan (Community Development Director)

Appellant Representative: Owen Graham, Attorney

Permittee Representative: Andy Prolman, Attorney

1. Call to Order

Matt Sullivan, Community Development Director called the meeting to order at 2:35PM.

M. Sullivan asked for Board members to provide an introduction and those were provided by all members present.

M. Sullivan asked to reorder the agenda to consider the Rules of Procedure before the Election of a Chair and Vice-Chair person

2. Review and Adoption of Rules of Procedure

M. Sullivan provided an overview of all sections of the rules of procedure. *The Rules of Procedure are attached to the meeting minutes as a part of the formal record of the meeting.*

Motion by Carl Dubois to adopt the Rules of Procedures as presented, seconded by Scott Cote. All in favor. The Rules of procedure were adopted by a vote of 3-0.

3. Election of Chairperson

M. Sullivan reviewed the role of the Chair and Vice-Chair as defined by the adopted Rules of Procedure.

M. Sullivan indicated that S. Cote had expressed a willingness to serve as the chairperson, pending the interest of any other member.

Motion by C. Dubois to elect S. Cote as the Chair, seconded by Jaron Slattery. All in favor. The motion passed 3-0.

Motion by S. Cote to elect J. Slattery as the Vice-Chair, seconded by C. Dubois. All in favor. The motion passed 3-0.

M. Sullivan provided an overview of the procedure for reading the first case into the record, open the hearing of the appeal, and then allow affected parties to speak, along with rebuttal by relevant parties.



4. Case #1: Appeal by Regent Park Associates (Applicant) of Building Permit #23-2381 - NEH Realty LLC & Gate City Crematory, LLC (Owner) - 91 Deerwood Drive (Sheet H, Lot 90) - Appeal of Building Official's requirement for third-party review of Building Permit under NRO 105-9(B).

Chair, S. Cote read Case #1 into the record. The case is an appeal by Regent Park Associates (Applicant) of Building Permit #23-2381 - NEH Realty LLC & Gate City Crematory, LLC (Owner) - 91 Deerwood Drive (Sheet H, Lot 90) of the Building Official's requirement for third-party review of Building Permit under NRO 105-9(B).

M. Sullivan noted that he will be producing statutorily compliant meeting minutes, though they will not be verbatim.

S. Cote requested that the appellant provide their name and address for the record.

Attorney Owen Graham, for the appellant, address is 650 Elm Street, Manchester, New Hampshire 3101. With the firm Hinkley Allen, representing Regent Park Associates.

*****The following comments are generally transcribed as verbatim for the purposes of the record, with some modifications for readability. A recording of the hearing can be provided upon request. The narratives submitted by the appellant, building official, and permittee are included as an attachment to these minutes as a matter of record.*

I'll keep my remarks relatively brief. I think the Board has already been provided with our narrative in support of the appeal. I think, as indicated, there's really three sort of bases for the appeal.

One is procedural. One is related to the zoning issue of the apartment on the first floor of the building. The other is the issue of the third-party review.

Relative to the procedural appeal, as is indicated by the applicant submission, and also as referenced in the building manager's submission, is largely playing out before the zoning board. The zoning board has recently denied our request for a rehearing on that, and we provided you with our submission on the rehearing request. And that is now in the process of being appealed to the Superior Court.

So that process continues to play out. What I would say for the purposes of today is, we feel as though, to borrow from a sort of legal turn of phrase, this building permit is somewhat the fruit of a poisonous tree at this point. It is based upon an administrative procedure, an administrative approval process that was flawed, which deprived my client, from having a say in the process.

And I think the fact, the foundation for believing that we are supposed to have a say in the process is bolstered by RSA 325, relating to notice to be provided to abutters when a crematorium is to be created. That statute requires notice. We submit that the required notice is for a reason, and it's for the purpose of allowing abutters to voice their concerns.

As we've indicated in our submission, there are public health concerns, frankly, about what crematoriums can cause. Not just the physical health of folks in the surrounding, but also mental health, the fact of it being located in proximity to a residential housing facility. Again, I won't want to spend too much time on that, but I do want to highlight to the Board that those procedural components.

Those concerns undergird our appeal in a real way here. As for the first flood dwelling unit, I'm not going to spend any time on that.

But I will briefly mention the third point, the third-party review. This is specifically with regard to the Commercial Building Code, which authorizes third party peer review. I understand the position of the applicant and the building manager that the examples for when third party review is appropriate under that code are a little bit different than what we are faced with here.

They name things such as high-rise structures, elaborate framing systems, extensive retaining walls, things like that. But I do think that there's a recognition, at least in one of the pleadings, that the environmental concerns are there. I think there's a suggestion that they're more appropriately considered by Department of Environmental Services.

But I think it's fair to say that because those complications are part of this project and because there's an exhaust pipe being installed, that may, depending on how it's installed, play into those environmental concerns. I think it would be appropriate in this case to have that third-party review, and it would make it a more buttoned up approach to the project. I think that's where I'll leave it, and I'm happy to answer any questions of the board.



S. Cote asked the Board if there were any questions.

S. Cote asked the Appellant if they would agree that none of the three items identified fall into the purview of the Board. S. Cote stated that he did not feel that they did.

O. Graham responded. Honestly, Mr. Chair, I would say that again RSA 325 relates to issuance of a building permit for crematorium. That's what we're here today to talk about. And that statute, based in a process whereby an abutter is supposed to have an opportunity to be heard. Just because we're at the end of a process here doesn't mean that the process that got us here can't have been flawed. And that flaw then, like I said, poisons the fruit of that tree. So I do think that that brings it within your purview. And I think that at the very least, the Board should allow that process, with us challenging to superior court, to play out before it allows anything further to happen with the building permit. I think that's within your purview. And then again, to the third-party review that comes squarely from the building code itself.

S. Cote confirmed there were no other questions from the Board.

S. Cote asked the Building Official to provide a statement.

William (Bill) McKinney, Building Official introduced himself as the Building Official for the City of Nashua. I've been employed by the City of Nashua and in this capacity since 2012. In my opinion, the appeal by the appellant for the Building and Fire Code Board of Appeals has no merit.

The foundation of the appeal is primarily focused on the zoning ordinance and planning site plan regulations relative to the crematory and administrative decisions by the Nashua Planning Department Manager. The exhaust chimney proposed and the environmental concerns that are brought up by the appellant's appeal are best addressed by the Nashua Public Health Department, Environmental Health, New Hampshire Department of Health and Human Services, Department of Environmental Services, Air Resources Division, and I don't believe any of that discussion is germane to the appeal of the Building or Fire codes. The only matter possible for appeal to the Board of Building and Fire Codes is whether the third-party peer review should have been required by the Building Official.

Third party peer review is not required by Chapter 105, Article II, 105-9(B). That section of that chapter amends Section 107, Subsection 107.3 of the International Building Code Chapter 105, Article II, 105-9(B)

Chapter 105, Article II, 105-9(B) grants authority to the Building Official to require third party peer review when the Building Official deems it necessary. Third-party peer review is not a requirement under ordinance and based upon the submitted documents that were provided that provide enough clarity for the installation. With the building permit application, it was determined the installation of the proposed equipment and chimney did not reach a level of complexity or unusual design warranting third-party peer review.

I'll save you the time of reading 107.3 or the amendment. Or if you prefer, I can enlighten everyone on those sections.

S. Cote and J. Slattery asked for a review of the sections referenced.

W. McKinney stated that 107.3 in the International Building Code, Examination of Documents states that the Building Official shall examine or cause to be examined the accompanying construction documents and shall ascertain by such examination whether the construction indicated and described is in accordance with the requirements of this code and other pertinent laws and ordinances. The City of Nashua further amends this section to state that the Building Official is authorized to require third-party peer review where applications for unusual designs or magnitude of construction are filed, such as high-rise structures, elaborate framing systems, extensive retaining walls, and complicated foundation designs.

It shall be the Building Official's responsibility to determine when third party peer review shall be required. The applicant shall pay all fees and costs related to the performance of third party peer review. Issuance of the building permit for the crematory was granted by the Building Official after the property owner entered the legal process with the Nashua Zoning Board to remedy residential violations and they received Planning Department approval.

It is standard practice for the Building Department, when a zoning violation exists, to withhold permits while the Planning Department review or for the Planning Department to directly withhold their approval of the permit until agreements are made to do so. The Building Official determined that withholding the building permit for an unrelated zoning violation would go beyond the authority granted by the building code. Neither of the governing codes, be it commercial or residential, grants authority to the building official to withhold permits based upon a local zoning violation. The building permit applicant was



following state statute, specifically New Hampshire RSA 325 A as abutters to 91 Deerwood Drive were provided with written notice on or about June 26, 2023 that an application for a building permit of a crematory would be applied for. Permit #23-2381 was issued on July 21, 2023. RSA 325 A, under building and location requirements, that a crematory shall conform to all building codes and environmental regulations, a crematory may be constructed at any location consistent with applicable zoning and environmental regulations, and that a person intending to construct a crematory shall, upon application for a building permit, provide notice of intent to the owners of the property within 250' of the proposed crematory by verified mail.

In closing, the building permit was issued in accordance with the authority granted by the New Hampshire State Building Code and the City Ordinances for Nashua relative to building construction. The applicant was following state statutes relative to proper notification. There is no unusual design or magnitude of construction that warranted third-party peer review. And for that reason, I ask the Board to please deny the appeal - I'll entertain any questions.

S. Scott stated - I have a question and it's centered around the comments about there not being appropriate notification. But I'm reading all the documentation and I'm seeing something very different than that. So I'm not sure the question is really appropriate for you, but I've read this several different times and I'm hearing that didn't happen. But in fact, looking at it, it appears as though it did. Is that your understanding.

W. McKinney stated that his statement on or about June 26, 2023 was right out of the appellant's filing. That's in their documents. It's their language.

M. Sullivan asked the Chair if he would like to request clarification from the Appellant on whether their position is that the notification was not statutorily compliant. M. Sullivan does not believe that the appellant is challenging whether the required notification under 325 A was provided. Is that the appellant's position? (Attorney Graham visually indicated affirmatively).

M. Sullivan indicated to the Chair that the Board may wish to hear rebuttals or provide an opportunity for any interested parties.

Attorney Graham clarified the appellant's position further. The first notice that we receive, Regent Park receives, is that a crematorium is being constructed is the 325 A notice that was provided by the applicant. By that time, some eight months prior, the Planning Department here had decided to administratively approve a site plan rather than having to go through site plan approval. And so our opportunity at that point to challenge the underlying site plan that needs approval for building permit to actually go into place was effectively destroyed. So, that is the procedural error that we are wrestling with and are bringing to not just the Zoning Board, but also now the Supreme Court to say this really didn't effectuate the intent of 325 A. The intent of 325 A is to allow abutters the opportunity to challenge if they have concerns. Recognizing that crematoria are somewhat fraught, there's concerns that an abutter may have that purpose was not effectuated by the process that was at play here. And again, I would just submit that what we're requesting is at least put the building permit on hold until we figure out whether the process that underlies the planning approval process was appropriate or not. Hopefully that answers your question.

C. Dubois asked even if the planning application was approved administratively by Planning, normal procedure that a notice is at least posted on site, the green signs - was that done?

M. Sullivan responded saying he would like to provide a couple of clarifications, and that he does think Attorney Graham has appropriately described this. The site plan was, in fact, administratively approved by the Planning Department. We do have Planning Manager Sam Durfee here, too, if there are technical questions about that process. But the Administrative Review process is clearly spelled out in the City's Land Use Code, a separate body of rules and regulations from what this board is considering. But that was approved many, many months ago. Notification was not provided because under that section, it's considered a minor site plan review, and essentially there's no abutter notification in that process. However, the appellant is correct that under 325 A that there is this requirement for notification, but it reads that a person intending to construct a crematory shall, upon application for a building permit, provide notice of intent to all property owners. So clearly that notice is not required until the building permit is filed. But I think what the appellant is making an appropriate argument about is perhaps an issue with the statute, as it were, that perhaps that notification should happen earlier, but the statute reads as it does, and I think the appellant would also agree that that notification was provided. I think the appellant's argument is more that the building permit should not have been issued if this other land use based issues were in process from a legal perspective. I think that's what's being argued. So, I think there's no argument that 325 A is not being followed. There's an argument about the intent of the statute that may not be under the purview of this board. And in the event of a building permits, they would be required to post all applicable permits on site.

S. Cote inquired if there were any other members of audience wishing to speak in regards to the appeal.



Attorney Andy Prolman, attorney with Prunier and Prolman of Nashua, NH introduced himself. He introduced Bob Macintosh, the owner of NEH Realty, which owns 91 Deerwood Drive. Mr. Macintosh also owns Gate City Crematorium which will hopefully be the tenant at 91 Deerwood. Attorney Prolman acknowledge the letter dated December 29, 2023 that was submitted as a matter of record.

Attorney Prolman stated: We agree with Mr. McKinney pursuant to his December 1, 2023 letter, and we don't believe there's much of any merit whatsoever in the building permits appeal. And I just want to say just one thing. We did everything right on our side. You can't say we did anything wrong, what we went through. We did our due diligence. Before Bob went to his bank, after moving on a loan to buy this property, we went to the city. We got the administrative approval for this crematory. Then Bob gets his loan closed on the property, and we then are subject to a series of appeals. So, we followed his local statute of local ordinances here in Nashua. The state statute did everything right. We don't see any merit to building permit appeal.

S. Cote asked if any other attendees wished to speak. None indicated such.

M. Sullivan noted that there are a few matters before the Board, although ultimately, only one motion may be necessary, depending upon whether feeling inclined to approve the appeal or deny the appeal. One, is a question of jurisdiction that you may want to formally discuss as a group. And that is whether or not there is sort of 'poisoned tree' based on the land use appeals outstanding. It is advised that the Board make a finding on that matter. The second, but perhaps more important matter, is the real crux of the appeal, and that is the third-party review of the technical documentation. I would ask that the Board have some discussion on that matter and make a finding as to whether or not you feel that that third-party review was, in fact, necessary based on the testimony you've heard today. Once you've done both of those things, I think that a motion would absolutely be appropriate, and I can help you craft that if needed.

S. Cote stated that the question of the jurisdiction of this board was the first question asked, and whether this was falls in the authority of this board. He indicated he was struggling with that because his belief is that the Board should be looking at building code itself and how that process is applied.

J. Slattery stated that the Board received the packet some time ago. He went through in pretty lengthy detail and highlighted all correspondence, made notes related to the case, which I'd say 75% to 80% of what we received, maybe even 90%, really was related to zoning and planning matters. As a matter of fact, when it came in via scan, he printed it all out and started assembling it. When he actually went through it from back to where we are with the latest correspondence. The entire time I was reading through the 70 pages, he kept saying, how is this related to this Board? How is this related to this Board? Then when reviewing the very last two communications, and those two communications highlighted those exact same thoughts. He indicated that he understood the balance of issues here. He does not think it's related to this board and found himself looking at this saying, that this kept looking like a 'we asked mom, we didn't get the answer we wanted, we asked dad, we went back to mom.' It kept going down the line. It has fallen upon this Board because maybe it's, for lack of a better term, maybe a last resort. He indicated that he did not happen to believe that it is the purview of this Board. He did not believe that there was a need for third party inspections, based upon the submittals, which were provided in the submittal packets as well. The nature of the construction does not by any means raised to the level of third-party inspections being required here. He further represented that Mr. McKinney and his jurisdiction made the appropriate move in waiving the third-party inspections.

C. Dubois stated that in going through it and looking at the documentation that was were providing, He would have come to the same conclusion that there's no need for a third-party review based on the complexity of the project. Some of which, if you replace a toilet, you don't even need a building permit and it comes under maintenance, general maintenance. Understanding it's a crematorium bringing in a self-sustaining unit, it still doesn't rise to the level of the determination that needed to be made. The application is fairly straightforward, falls within the guidelines of the codes, with the way that everything is written. So, he concurred there was no need for third party review. Now, the appellant can certainly pursue an alternative remedy as it's been addressed in the documentation. It can be addressed it with the Department of Health or DES, concerns of particular contaminants possibly coming from the exhaust. He represented that he is no expert at any of that, but it is a self-contained unit brought in on the skid and connected. But the actual work within the premises itself, much like the administrative review, is fairly straightforward. There were no parking requirement changes. There's none of that that really formulates the need to have a full formal hearing. If there was an addition going on the building, that would initiate that. Certain things act as triggers in order for the Planning Department to do what they need to do under their jurisdiction. In review of all the documentation, I didn't see that anything, in my opinion, truly violated. Granted, there was no notice, but based on the complexity of the project, it didn't warrant that type of notification. He can understand the appellant in the sensitivity of what this is, but under the Board's jurisdiction and under what Building Department has done, there is no clear issue from his perspective.



S. Cote noted that there's a clearly spelled out process that the Building Official must follow, and in the review of the documentation there was a level of confusion. But, it remains his opinion that the Building Official followed the process according based on the documentation presented. He articulated that he believes the process was followed.

C. Dubois commented on third-party review experience in his career, it's an interesting situation that usually arises that's beyond the expertise of the Building Officials. The other reason for this is that a lot of small towns in New Hampshire, part time building inspection services, that type of thing, and they rely on third-party review to make sure that everything complies with code. We're fortunate in Nashua to have professional review staff. When something comes up as a third-party review, it's usually something brand new, a like new technology that's come out. It may be a particular situation that the City wants to make sure that the engineers of record have 'dotted their I's and crossed their t's', and they'll bring in a third party to get another viewpoint on that. Based on the complexity of what's here, excluding the fact that it's a self-contained crematorium, it didn't warrant that level of review. The other avenue, as I said earlier, would be Department of Health Services, that type of thing, to talk about the concern, maybe with the stack. He commented that the stack is literally a self-contained chimney that self-supported, right from the unit, approximately 60" above the roof level. It's no higher than a normal chimney. So, again, looking back, there is no need for a third-party review for this particular application.

J. Slattery indicated interest in making a motion.

M. Sullivan indicated that he could assist the board with a motion and provided a draft motion for the Board's consideration based on the discussion. The draft motion being *to deny to the appeal of Building Permit #23-2381, on the basis that components of the appeal are not within the jurisdiction of the Building and Fire Code Board of Appeals, and that a third-party review of the building permit application was not warranted under Chapter 105, Article II, 105-9(B) based on the criteria contained therein.*

S. Cote asked for the motion to be read again into the record.

M. Sullivan restated:

A motion to deny to the appeal of Building Permit #23-2381, on the basis that components of the appeal are not within the jurisdiction of the Building and Fire Code Board of Appeals, and that a third-party review of the building permit application was not warranted under Chapter 105, Article II, 105-9(B) based on the criteria contained therein.

M. Sullivan stated that in totality, you'll be denying the appeal is submitted. But, I would suggest adding these citations so that it's clear both to the appellant and to the permittee what the basis of the appeal is.

S. Cote made a motion to deny the appeal of Building Permit #23-2381, on the basis that components of the appeal are not within the jurisdiction of the Building and Fire Code Board of Appeals, and third-party review of the building application, was not required under Chapter 105, Article II, 105-9(B).

M. Sullivan confirmed the motion was made by S. Cote. *Motion seconded by C. Dubois, All in favor of denial. 3-0.*

The meeting adjourned at 3:15PM.

