

**Pembroke Planning Board
Pembroke Zoning Board
Joint Meeting Minutes
July 11, 2023**

Approved July 25, 2023

PLANNING BOARD MEMBERS PRESENT: Brian Seaworth, Chairman; Robert Bourque, Vice Chairman; Rick Frederickson, Selectmen's Rep; Kathy Cruson, Brent Edmonds, Clint Hanson, Kevin Foss

ZONING BOARD OF ADJUSTMENT MEMBERS PRESENT: Bruce Kudrick, Chair; Dana Carlucci, Robert Bourque, Blakely Miner III, Wendy Chase

ZBA MEMBERS EXCUSED: Thomas Hebert, Vice Chairman; Natalie Glisson, Paul Paradis

PB ALTERNATES PRESENT: Bryan Christiansen

STAFF PRESENT: Carolyn Cronin, Town Planner; Paul Bacon, Code Enforcement Officer; Susan Gifford Recording Secretary

Chairman Seaworth called the meeting to order at 6:30 pm. Seven Planning Board members and one alternate member were present. Two Zoning Board of Adjustment members and three alternate members were present.

Business

1. Discussion of Accessory Dwelling Units (ADUs)

Chairman Seaworth explained the agenda is to bring the Zoning Board of Adjustment (ZBA) up to speed on where the Planning Board discussion of ADUs left off and see where the Zoning Board had issues with the ordinance. Discussion of any changes that need to be made will follow, and then any other issues where zoning ordinance has caused problems will be discussed. Vice Chairman Bourque explained that he brought the issue to Planning Board as a ZBA issue. With the new state law, any ADU that meets all our specifications receives almost automatic approval from ZBA. Town ordinance requires application for Special Exception. ADUs that meet our specifications could go through the permit process with town staff. Are there any changes to the ADU ordinance the ZBA would like to make to match your experience with ADUs and fit what is needed?

ZBA Chairman Kudrick stated that approval of detached ADUs are an area that could be changed to work better. An email sent from ZBA Vice Chair Hebert addresses a 24 ft. by 24 ft. garage attached to house with a second story ADU. The ZBA is getting mostly detached ADU applications recently. These range from thirty feet away from the primary residence to 800-1,200 feet away from the primary residence. ADUs are supposed to be for taking care of an elderly person or family member. Having the ADU located so far away does not meet the intent. If a proposed ADU is less than 750 square feet with no changes from town ordinance specifications, the Building Inspector or Town Planner may be able to permit them. However, in the future when the elderly person passes, the unit could be turned into rental units or condominiums or sold. Chairman Kudrick looked at past Town of Hooksett minutes and related a concern that the town would not notify sewer and water departments of approved ADUs. Water and sewer would lose \$35 per quarter fee on the additional unit. Right now, the Town of Hooksett is giving all permits to the sewer department for review. Another concern is that a Certificate of Occupancy was supposed to be withheld until the owner paid fees owed to the sewer department. The Certificate of

Occupancy was granted, and the sewer department had to file a tax lien to be paid. Sometimes things slip by. With a Pembroke Special Exception application, all boards are notified. The ZBA has had variance requests from ADU requirements. The ZBA needs guidance on detached ADU issues. Sometimes the condition of the land would put an ADU in the setbacks, off the banking, or prohibit physical connection to the primary residence. One applicant had a long term plan that placed the ADU 150 feet from the residence. With the planned house extension and pool, that barn will turn into a pool house in the future. With a ZBA hearing the decision is made by five people rather than one person. A state approved septic system adequate for the added ADU is required with ADU application. The requirements of Zoning Section 143-21 say the building inspector can accept the state approved septic plan. This discrepancy should be clarified.

Planner Cronin read the email sent by ZBA Vice Chair Hebert with comments for this meeting. He refers to 143-18.1, Item D, Special Exception septic system design/capacity shall be provided to the town. There is a redundancy that the ZBA requires the applicant to demonstrate the ADU can be supported by the existing septic system at the Special Exception hearing. As with all septic systems, if it fails, it must be replaced with a system that accommodates the entire site. For any new lot construction, the septic must be in the contiguous buildable area. This should clarify it is a pre State DES submittal. Chairman Kudrick stated that an existing two bedroom capacity septic system may not be designed to support an added ADU. Vice Chairman Bourque stated applicant must prove the existing system can support the added ADU, and have a plan approved by the state for the future if the septic system fails. Vice Chairman Bourque asked what the boards would like to see. Chairman Kudrick would like proof that the septic system can accommodate the ADU. Chairman Seaworth would like to see a plan for a new system if the existing septic is inadequate. Code Enforcement Officer Bacon stated that NH RSA is clear that a property owner does not have to install a new septic system until the current system fails. Chairman Kudrick stated that many septic systems in a rural area start to fail and impact abutters before a correction is made. If an expansion of an ADU is allowed, Chairman Kudrick would like to make sure everything is correct. He would like to see property owners take out one loan to do all improvements at once to protect neighbors.

Code Enforcement Officer read the NH RSA regarding adequate water supply and sewer system prior to construction, which requires application to NH DES for a replacement system in case the existing septic needs repair or replacement. Chairman Seaworth stated that State RSA prohibits towns from requiring the property owner to put in new septic upon creation of an ADU. A state approved plan is required for the future. Selectmen's Rep Frederickson summarized that property owners can use the septic system in place. If it fails, the approved plan is for a septic system that can handle what is proposed. Chairman Seaworth stated a failed septic system must be replaced with a properly designed system.

Member Cruson stated that there are costs for engineering fees the homeowner would pay for septic design. If the applicant has the original septic design, it is easier to revise the document. Member Hanson agreed that a homeowner could use an existing plan to show an upgraded design to support an additional unit. Inadequate septic system would be a reason to deny ADU. Member Foss stated that septic design plans are subjective, and different soils impact the plan. Chairman Kudrick would like to see an engineered septic design plan approved by the State of NH. The Code Enforcement Officer stated the

applicant can describe the existing septic system. If that system is for four bedrooms, and the home has three bedrooms, it can accommodate the additional ADU. Applicant can bring a current or new septic design plan. Chairman Seaworth stated a document must be provided that the septic system supports both the house and the ADU. Chairman Kudrick agreed and stated the document must be provided with the ADU request. A checklist could include providing a NH DES approved septic plan to cover the town. The Code Enforcement Officer stated that if a septic system fails, it is mandatory to repair it. Member Edmonds stated if a failed septic system is reported to NH DES, they will take enforcement action. Member Foss stated an applicant needs a state approved septic design. If it is not adequate for the proposed ADU, they need a second septic design. Chairman Kudrick noted that he had to deal with a bad septic system put in by a poor contractor. The septic system was not deep enough. He connected to the town sewer at the first opportunity.

The Code Enforcement Officer asked if the boards wanted ADU to go to Special Exception process or be permitted by right if they meet all town ADU requirements. Chairman Kudrick state if all town departments are notified of a cookie cutter ADU, he would still like it to come to ZBA for checks and balances. Over many decades, the State, TF Moran, and other engineering firms have provided information to the boards that is helpful to local oversight. We have the burden of making town decisions. The Special Exception process should be for all ADUs and variances for any that vary from the ordinance.

Vice Chairman Bourque stated I do not agree. State RSA 674:72 allows ADU as a matter of right to any single family lot. If an ADU is built in the interior, or attached to the primary house, it meets Pembroke ADU ordinance. Any other ADU request is a variance. Dana Carlucci noted that gallonage overuse of sewer by residential units is preventing commercial development of a hair salon due to lack of sewer capacity. Eleven people are living in a unit and are using three times the allotted gallonage. The Code Enforcement Officer stated that sewer capacity should be left out of ADU consideration. Chairman Kudrick stated Pembroke has had moratorium on new sewer access at times, due to a set gallonage capacity. The Code Enforcement Officer stated the Pembroke Sewer Department has access to all building permits. Sewer situation is a separate issue. Kevin Foss asked how do you differentiate between a cookie cutter ADU on town sewer or on a septic system? We need to see documentation. If there is sewer capacity issues does the ADU get denied? Chairman Kudrick stated that the ZBA has seldom turned down an ADU application.

Vice Chairman Bourque stated an applicant should seek a variance for any alteration to the ADU regulations. This would save the applicant money by allowing an ADU by right. Chairman Seaworth stated that is a good argument. State law allows ADU by right or Special Exception. Dana Carlucci stated there are reasons to deny a Special Exception other than adequate water and sewer. Either way, the Town of Pembroke is following state law. We could add items needed to obtain a permit for an ADU. We are going to approve most of them but need to reserve a chance to prevent a problem. Chairman Kudrick stated that approving ADU by permit means abutters do not get notified. Code Enforcement Officer Bacon stated abutters do not get notified about a two story garage on a single family lot, or a chance to comment. Chairman Seaworth stated you can hear comments, but if you cannot do anything about abutter concerns it is not useful on something so simple it has to be approved. Chairman Kudrick stated a meeting allows

discussion of health and safety concerns, valid or not. Vice Chairman Bourque stated if I wanted to expand my kitchen ten feet, I am within my rights and would just get a town permit. If I follow 143-18.1 exactly, I would get an ADU permit. If an applicant for an ADU wants to change anything, they would put in a variance application. Code Enforcement Officer Bacon agreed that permitting ADUs would mean fewer cases would come to ZBA.

Chairman Seaworth stated that we have not reached a conclusion on the question of allowing some form of ADU by permit. The question of detached ADUs may depend on the answer to the first question. If everything is a variance, why have guidance for detached ADUs? Chairman Kudrick stated that ADUs could become rental units, or apartments rented to other than family members. I received a letter from the Town after my mother in law passed reminding me that I could not rent the in law apartment. Vice Chairman Bourque stated that there was no state law on ADU during the time of in law apartments. At the time, many towns had concerns about in law apartments becoming rental units. State law has changed the requirement that ADUs be occupied by relatives. State law overrides town ordinance in this instance. Selectmen's Rep Frederickson asked why not rent an ADU when there is a need for rental properties? Vice Chairman Bourque stated an owner could rent both the primary house and the ADU. Alternate Member Christiansen noted state law prevents condominium form of ownership for an ADU. Planner Cronin noted state law prohibits subdivisions of ADUs, but towns decide condominium ownership.

Member Foss stated that ADUs are not in law apartments. More ADUs are used by adult children. It should not matter who is living in the ADU. Vice Chairman Bourque stated that ZBA has included conditions of approval on ADUs that one unit must be owner occupied. Planner Cronin asked if that should be a condition or codified? Chairman Seaworth noted that state law allows the town to make a condition like that, but what happens generations later when the property is sold? Member Foss asked why do we care who is living there? Vice Chairman Bourque stated we do not want two separate residences on one property. Chairman Seaworth stated right now the Town of Pembroke does not allow detached ADUs. Blakely Miner noted based on state law we are allowed to approve detached ADUs by variance. Planner Cronin stated anything not allowed or mentioned in the Zoning is a variance. Chairman Kudrick gave two examples of proposed detached ADUs. Chairman Seaworth noted town ordinance allows ADU "either within or attached to" the primary residence. Can we get clearer? Chairman Kudrick stated if the septic system and well are adequate, a recent applicant could attach a proposed ADU to a million dollar house. The applicant went through three variance applications and eventually subdivided the lot. Vice Chairman Bourque suggested that the town keep the ADU ordinance as it is and make request for detached ADU a variance based on conditions of property.

Chairman Seaworth said let us imagine an application meets all the town ADU regulations. Do we permit that ADU and set guidelines for a variance? Do we define another category within x number of feet from the primary house? How can the Planning Board help the ZBA with the variance process? Chairman Kudrick stated all applicants have been family members. Locating an ADU hundreds of feet away from the primary residence is a concern.

Chairman Seaworth noted that reading between the lines of state RSA on ADUs has caused heated arguments in college towns. By law you cannot base ADU approval on family relationships. Attached ADUs focus on the original intent of helping a family member. There is the ability for towns to define intent. You are also correct that the town can revisit intent at any time. Given the nature of the Pembroke town ordinance on ADUs right now, is there something wrong with the process? Chairman Kudrick stated it is possible ADUs could expand like cabins. Vice Chairman Bourque stated my thought is to leave the ordinance alone and let the ZBA determine requests for detached ADUs on a case by case basis. Selectmen's Rep Frederickson asked if there is a consensus on parameters for detached ADUs. Vice Chairman Bourque stated detached ADU factors are topography, distance from primary house, and shared utilities with the main residence. Selectmen's Rep Frederickson stated the town cannot restrict use of detached ADU as a rental. Vice Chairman Bourque stated the ZBA has approved two detached ADU requests and denied two detached ADU requests.

Vice Chairman Bourque stated that in some cases, the ZBA does not receive a layout of the detached ADU plan. Code Enforcement Officer Bacon stated most ADU applications do provide a sketch of the layout. Chairman Kudrick said it would be beneficial for the ZBA to have detailed information on all applications. Selectmen's Rep Frederickson stated that at a minimum, the ZBA should get a plot plan with size and location using town maps. Chairman Kudrick stated sometimes an application is lacking information. Planner Cronin stated the ZBA can ask the applicant to provide further specific information before deciding. Chairman Seaworth noted that Planning Board checklists are in the site plan regulations. State RSA prescribes completeness of Planning Board applications. Planner Cronin will check with legal on items ZBA can require on an application, including a sketch or drawing of the plan. Member Cruson asked if there was a checklist for issuing a Certificate of Occupancy. Planner Cronin stated that involves building code and is different. Planner Cronin stated that typically there are no professional building or site plans provided to ZBA, simply a sketch on a copy of a tax map. The applicant has the burden of proof to provide sufficient information. Code Enforcement Officer Bacon agreed it is up to the ZBA applicant to make the case. If the applicant wants approval, they will be prepared.

Chairman Kudrick stated that he considers town residents his customer and explains why information is needed. For example, an eight inch main is required for future subdivision and connection to town sewer. Planner Cronin stated that she is hearing that town employees are not giving applicants enough information about minimum requirements. In fact, we do a lot of work and research on behalf of the applicant to obtain a positive result. Chairman Kudrick apologized if his comments sounded like criticism. He only meant that some applicants arrive at the hearing with insufficient information for an informed decision. Planner Cronin stated we can only prepare people for their hearing to the extent they are willing to provide the necessary information. The perception that applicants are not being treated appropriately is wrong. Code Enforcement Officer Bacon stated that town staff walk applicants step by step through the process. Vice Chairman Bourque asked does this mean we are going to try to develop a ZBA checklist to assist applicants with providing adequate information and have legal review it? Member Hanson suggested that the ZBA use a work session to create a checklist of information they would like to have, and then have legal review it.

Chairman Seaworth stated that the consensus is that in terms of requests for detached ADUs, the current process is working as well as anything else. Vice Chairman Bourque stated it would be difficult to list all circumstances that might arise and require further review. Chairman Seaworth stated that no consensus was reached on whether cookie cutter ADUs should be allowed by permit. There are people on both sides of this issue. Vice Chairman Bourque stated any change from the cookie cutter ADU would require either a Special Exception or a variance. Code Enforcement Officer Bacon stated things like checking in with town water and sewer departments are already in the process of reviewing an application for a 750 square foot compliant ADU. Chairman Kudrick would like to see a letter from water or sewer confirming capacity given to the Code Enforcement Officer or a written email for a cookie cutter ADU. Member Foss asked if a hypothetical two bedroom home on town water and sewer wanted to add two bedrooms, does water and sewer weigh in? Code Enforcement Officer Bacon stated that he checks with the water and sewer departments in that instance. Alternate Member Christiansen stated that he is concerned about having to measure well capacity and flow rate to provide water for an ADU request allowed by right. Does the town require a letter confirming the capacity to add an additional bedroom to a home on a private well? Chairman Seaworth asked is there a cookie cutter ADU the town could approve by permit? Can we define it? Chairman Kudrick stated an ADU would not exceed 750 square feet and water/sewer capacity is available. Member Foss stated that water/sewer capacity may be an overreach of authority by ZBA. Code Enforcement Officer Bacon stated Pembroke Water Works does not get involved with ADUs now. It was noted there is still some ZBA opposition to approving cookie cutter ADUs by permit. Chairman Seaworth stated he wants any March Town Meeting ballot changes to zoning to be something the ZBA wants and supports. Chairman Kudrick will put a discussion on ADUs on the next ZBA work session agenda. ZBA Member Miner stated he was opposed to cookie cutter ADU by permit at the start of the meeting and is now on the fence. ZBA Vice Chairman Hebert is in favor of the Special Exception process for all ADUs as explained in his email.

Chairman Seaworth will leave discussion of the ADU issue at this point and wait for direction from the ZBA. If needed, the board will work back and forth on details and schedule another joint meeting if warranted.

2. Discussion of Other Items for Future Zoning Changes

Chairman Seaworth noted that Vice Chairman Bourque brought to his and the Planning Board's attention a condition of approval of Phase 2 of the golf course project that tied the hands of Planning Board at site plan review. Applicants were granted relief from all dimensional requirements. Inadvertently, that decision meant the Planning Board could not reduce the number of residences down from sixty-two multi-family units. Code Enforcement Officer Bacon stated he does not remember blanket approval being given for that section. A misinterpretation occurred and a variance cannot be changed once approved. Member Foss recalled that case and read the minutes of the July 26, 2023 ZBA meeting. Application was for sixty-five units on 15.5 acres: sixty two multi-family and three single family residences. The decision is clear and must be upheld. Chairman Kudrick stated lesson was learned if a similar case were to come in. Chairman Seaworth noted that the Planning Board does not get to weigh in on housing density except through

minimum lot requirements in subdivision regulations. Nothing in the regulations prescribes how many units are allowed in a space.

Chairman Seaworth noted that development approved through Open Space Development ordinance was found not to be in the spirit of the ordinance and the Town of Pembroke repealed it. This left two applications relying on open space development not submitted. The ZBA can grant a variance to any regulation. One application was waived, and one was not.

Member Cruson noted that state RSA lays out most of what the Planning Board does. Member Cruson asked Chairman Seaworth to explain more about innovative land use law for the benefit of all in attendance. The ZBA is used to dealing with specific details but not open space in the ordinance or the Master Plan. Innovative land use laws are broad and vague. Chairman Seaworth noted that conventional zoning forces unaesthetic solutions. Innovative land use includes waivers of all kinds for village, cluster, environmentally-friendly, and low energy options. Innovative land use laws allow the Planning Board to create mixed use rules. It allows the Planning Board to bend or waive regulations to allow both commercial and residential use on one property. Member Cruson thanked Chairman Seaworth for the information. Chairman Kudrick stated it was never the ZBA intent to complicate the golf course decision. Vice Chairman Bourque stated the golf course project was out of the norm for Planning Board/Zoning Board of Adjustment responsibility.

Chairman Seaworth thanked everyone for their attendance and participation in this joint meeting.

MOTION: Selectmen's Rep Frederickson moved to adjourn the meeting. Seconded by Vice Chairman Bourque. Without objection the meeting was adjourned at 8:48 p.m.

Respectfully submitted, Susan Gifford, Recording Secretary