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## TOWN OF ROCKLAND ZONING BOARD OF APPEALS

Town Hall - 242 Union Street  
Rockland, Massachusetts 02370  
Phone: 781-871-0154, ext. 1195

### **FINDINGS AND DECISION OF THE ZONING BOARD OF APPEALS**

Decision: Denial of Use Variance

Applicant: Andrew Shanahan, Manager, BNS, LLC

Property Address: 18-20 East Water Street, Rockland, Massachusetts 02370

Case No.: 2023-01

The Rockland Zoning Board of Appeals has considered the application of Andrew Shanahan, Manager, BNS, LLC, with regards to the property located at: 18-20 East Water Street, Rockland MA 02370 for a Use Variance pursuant to §415-21.2(E)(3)(c), Downtown Rockland Revitalization Overlay District, and §415-89.1, Zoning Variances. The petitioner is proposing, if approved, to legalize an existing first floor rear residential unit. The property is located in the B-1, Business I Zoning District, §415-13 of the Bylaw, and is further identified as Lot 068, Map 45, on the Rockland Assessor's Maps. The owner of the property is BNS, LLC, Attn: Craig Borghesani, 1146 Oliver Ave., #C, San Diego, CA 92109.

The Board certifies that it has complied with all statutory requirements relative to notice to abutters and new publication of notice of the public hearing and has filed copies of this decision and all plans referred to herein with the Town Clerk, Planning Board, and the Building Department pursuant to Mass. Gen. L. c. 40A, Section 11.

Advertised: December 8, 2022, and December 15, 2022, in the Patriot Ledger.

The Board lastly has taken into consideration testimony of the applicant, the application materials, plans and revised plans, and communications from various Town boards, abutters, and with interested parties, all of which are incorporated herein by reference.

A Public Hearing was conducted remotely in accordance with the law at 7:30 P.M. on January 3, 2023, and a continuance public hearing was conducted remotely at 7:33 P.M. on February 7, 2023.

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**ATTENDANCE:**

**Board Members: Gregory Tansey, Timothy Haynes, Robert Baker, Sr., Robert Baker, Jr., Stephen Galley, (alt). and Nicole Clement-Gomez (alt.). Robert C. Rosa, III, was absent and Gregory Tansey acted as Chairman.**

**Also present: Land Use Counsel Robert W. Galvin, Building Commissioner/Zoning Enforcement Officer Thomas Ruble, Fire Chief Scott Duffey, and Board of Health Agent Delshaune Flipp.**

**(All Board members were participating remotely)**

**MEMBERS VOTING: Chairman Gregory Tansey, Timothy Haynes, Robert Baker, Jr., Robert Baker, Sr. and Stephen Galley**

**DISCUSSION ON JANUARY 3, 2023**

The Chairman of the Zoning Board introduced the members of the board advising the public that all are participating remotely and that the hearing is being recorded.

The Chairman asked the members of the ZBA for a roll call vote to open the public meeting. The ZBA members then took a roll call vote: Gregory Tansey – Yes, Timothy Haynes – Yes, Robert Baker, Sr. - Yes, Robert Baker, Jr – Yes, Stephen Galley – Yes, Nicole Clement-Gomez – Yes. The vote was unanimous, and the public hearing was opened.

The Chairman read the advertised notice in the Patriot Ledger and Stephen Galley was appointed to take Robert C. Rosa, III's voting place.

The petitioner's attorney, James S. Timmins of 53 Willard Street, Quincy, Massachusetts, testified that the applicant claims to have pre-existing rights in the building in the rear unit on the first floor that is being used for residential purposes. The property is in the recently created Downtown Rockland Revitalization Overlay District and for that reason the legality of the unit was called into question. He stated that the variance requested would not cause any detriment to the public good, and that the overlay district was to create business uses on the first floor and also to allow for the provision of housing in the downtown area. He further stated that this building is suited for that with the exception of the rear unit which has no front facing space. He stated that when the current owners tried to engage with commercial users, they were unable to get any takers. He believes that there has been a residential unit on the first floor since 1993.

The Chairman then asked Mr. Haynes if he had any questions.

Mr. Haynes questioned the permit history to legally create this unit as a residential unit.

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Attorney Timmins stated that he had an application which was not previously submitted because it was undated. He then called on Mr. Ruble for further amplification. He also stated he had a MLS listing from November, 1993, and that document indicates that there is a mixed used with 5 residential units.

Mr. Haynes reiterated that he wanted to know if the unit legally pre-existed or if someone had illegally converted the unit to a residential apartment. He tabled his question until Mr. Ruble, the Zoning Enforcement officer, spoke on the matter.

Mr. Baker, Sr. asked how many parking spaces were required per the Zoning Bylaw for this building.

Attorney Timmins stated there were 5 striped spaces in the rear. He further stated that because this was pre-existing, that the number of spaces there are compliant due to non-conforming rights but that the current zoning requires 1.5 or 2 spaces per unit but certainly more than 5.

Off street parking was then discussed and it was noted that this was not allowed during the winter and during snow removal. Attorney Timmins advised that the applicant did own other property in the area where vehicles could be moved to.

Mr. Galley had no questions.

Ms. Clement-Gomez had no questions.

Mr. Tansey asked if the unit was presently being used as a residential use and Attorney Timmins stated it has been used as a residential unit since BNS purchased the property.

Mr. Baker, Jr. had no questions.

The Chairman then asked Attorney Galvin if he had any questions or comments as his concern was what would constitute a legal use of that space. Attorney Galvin opined that if someone issued a permit for that use more than 10 year ago that may have some bearing on the ability to have the unit removed if it existed and that either Mr. Ruble or the Fire Chief could speak on that.

The Chairman then asked Fire Chief Scott Duffey if he had any comments. The Fire Chief stated that there was a substantial fire in that building in 2019 he believed and that the building remained vacant for quite some time while repairs were made. Upon completion of the repairs, a Certificate of Occupancy was issued for businesses only on the first floor and residential on floors 2 and 3. It was also relayed to the previous owner by Deputy Fire Chief Thomas Heaney and himself that if any type of residential use was added to the first floor an automatic fire sprinkler system be added to the property in accordance with NFPA 13.

The Chairman then asked Health Agent Delshaune Flipp if she had any comments and she stated that the requirements of CMR 410 and her concerns if the unit does not meet the requirements for human habitation.

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Mr. Baker, Sr. then asked if the property had a dumpster and if they were fenced in. The Health Agent stated that in the spring all dumpsters would have to be enclosed pursuant to new regulations.

Mr. Ruble asked who the building inspector was on the application he had. There was no building official's name. The number 2469 was hand-written on it. He then explained the history of the building going back to the 1960s. He further stated that he had no knowledge of how the residential unit in the back was ever converted or permitted. He further stated that when the previous owner remodeled the building he told him that the apartment on the first floor was not allowed. He further stated that he agrees with the Fire Chief.

The Chairman then opened the meeting to the audience. No one spoke in favor. No one spoke in opposition.

He then asked Attorney Timmins if he had any further questions or statements. He wanted confirmation that Mr. Ruble did not agree that it was a residential unit back in the 60s and 70s and if he would have a problem if the Board did grant the relief sought. Mr. Ruble requested that the June, 2021, Occupancy Permit be shown and that it stated first floor retail and commercial, second and third floor residential; 4 residential units.

Mr. Baker, Jr. then asked Attorney Galvin what standard would have to be met for this variance and Attorney Galvin opined that it is the same standard as for a dimensional variance.

Mr. Haynes then asked about the fire and rebuilding of the property and if it was residential only on the second and third floors and Mr. Ruble answered that the owner at that time was told by both building and the Fire Department that the first floor was only to be commercial. There was a kitchen and a bathroom for an office that was turned into an apartment. The Fire Chief then stated that after the repairs after the fire that if there was a fifth residential unit added the building would have to have a fire sprinkler system as per state law but that was not done because it was only permitted for four units.

Mr. Galley asked Attorney Galvin about the overlay district and whether it stated the first floor had to be commercial and the upper floors could be residential. Mr. Haynes stated it was the same as B1, multi-family residences except on street level or below floors. Attorney Galvin stated that the district did allow multi-family dwellings and the conversion could be allowed and mixed-used development projects were discussed as well as residential development projects.

Attorney Timmins requested a continuance so that he could further discuss this with Mr. Ruble and Attorney Galvin.

Mr. Baker, Sr. then asked Chief Duffey if there was an apartment when the fire occurred and was told that a family lived there and Mr. Baker, Sr. then stated that it was an illegal apartment for many years. The Fire Chief also stated that the front unit was also being used as an illegal apartment as well.

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Mr. Haynes then stated that if granted a variance they would need to make a variance level of finding and Attorney Galvin stated variance standards are always vigorous standards and that variances have been granted in the past, although sparingly.

Mr. Tansey asked if there were other questions from the Board and hearing none, asked if the Board would consider the request for a continuance. Mr. Baker, Jr. stated he had no objection to granting a continuance as he did not see how the requirements can be met based on the presentation made to allow the variance.

Mr. Baker, Sr. makes a motion to continue the public hearing at the request of the applicant until the February 7, 2023, meeting.

Seconded by Mr. Baker, Jr.

Mr. Baker, Sr. also requested that the applicant speak with the Fire Chief about what type of system would have to be installed in the building if the variance was granted.

The ZBA members then took a roll call vote: Gregory Tansey – Yes, Timothy Haynes – Yes, Robert Baker, Sr. – Yes, Robert Baker, Jr – Yes, Stephen Galley – Yes, Nicole Clement-Gomez – Yes. The vote was unanimous, and the public hearing is continued.

## **DISCUSSION ON FEBRUARY 7, 2023**

### **ATTENDANCE:**

**Board Members: Chairman Robert C. Rosa, III, Gregory Tansey, Timothy Haynes, Robert Baker, Sr., Robert Baker, Jr., and Stephen Galley (alt.).**

**MEMBERS VOTING: Gregory Tansey, Timothy Haynes, Robert Baker, Jr., Robert Baker, Sr. and Stephen Galley.**

**Also present: Building Commissioner/Zoning Enforcement Officer Thomas Ruble, Deputy Fire Chief Thomas Heaney and Assistant Land Use Counsel Anthony Riley.**

**(All Board members were participating remotely)**

The Chairman introduced the members of the board advising the public that all are participating remotely.

The Chairman entertained a motion to open the public hearing which was seconded by Robert Baker, Jr. The members of the ZBA take a roll call vote to open the public meeting. Gregory Tansey – Yes, Timothy Haynes – Yes, Robert Baker, Sr. – Yes, Robert Baker, Jr – Yes, Stephen Galley – Yes. The vote was unanimous, and the public hearing was reopened.

The Chairman read the legal notice.

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Mr. Rosa then turned the Chairmanship of the meeting over to Mr. Tansey and stated that he would be an associate member for the rest of the hearing.

Chairman Tansey asked who the voting members were. He then asked Attorney Timmins to explain what had developed over the past couple of weeks.

Attorney Timmins stated the applicant spoke to the Fire Chief about the building being sprinklered and applicant agreed to do so if the relief was granted. He further stated that eliminating the commercial use and creating a residential property was reviewed by the applicant, who does not want to do that. As far as the variance standard, he feels that under the ordinance Rockland specifically allows use variances and that he feels that it is the applicant's position that he cannot attract a commercial tenant for the unit in the rear due to the shape of the building. The owners would like to keep the rear unit residential and that prior history has been that it has been used as a residential property and there is substantial evidence that the rear unit has been used for residential purposes. He also agrees that the residential unit may or may not be legal. He also discussed prior applications and building permits. He asked for relief legalizing the rear unit as a residential use and if granted it is consistent with the existing zoning for the district.

The Chairman opened the hearing to the Board.

Mr. Haynes asked for descriptions of the driveway and parking and describing access and the number of parking spaces.

Attorney Timmins stated there were 2 driveways; one is for access and on the other side is a common driveway to exit from the property and the parking is in the rear. 5 parking spaces, 1 vehicle per unit, and on-street parking for the commercial use.

Mr. Rosa stated that he reviewed the site plan and researched the old right of way but does not show parking on the left hand side. On the right hand side there is no existing easement for access to utilize that area as there is nothing in writing to grant it. He also asked about required parking. Attorney Timmins answered that they regard the parking to be pre-existing and not current to existing zoning regulations and that both driveways are common driveways.

Mr. Rosa then asked Deputy Fire Chief Heaney if he would be okay with this if the building was fully sprinklered if the unit in the back was approved.

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The Deputy Fire Chief said that after the fire, the owner did not want to sprinkler the building and that was how the fire alarm system was laid out. Mr. Shanahan was advised of that when he went to purchase the property but still moved a residential tenant into the unit. The Deputy Fire Chief also had a conversation with the applicant when he was in the process of moving in another residential tenant after the prior one had moved out and told him he could not move anyone into that back unit. He stated that applicant called him the other day about putting in a sprinkler system in the building.

Mr. Rosa then asked Mr. Ruble for comment. Mr. Ruble agreed that the first floor residential unit is not allowed. He stated that they also had to take out the front residential unit prior to the applicant owning the building. He discussed prior applications and building permits.

Mr. Ruble then asked Attorney Timmins whether the tenant would stay while the building is being sprinklered or does the building get sprinklered and then a tenant is allowed to move in. Attorney Timmins stated fire extinguishers could be provided.

Mr. Galley asked about the 5 units and if anything states the 5 units are legal. He also asked about the parking spaces and whether if the fifth residential unit is approved, would the current parking spaces be sufficient. This led to a discussion about parking and off street parking under the current Zoning Bylaws.

Attorney Riley stated current requirements are 3 spaces per unit in the B1 for a multi-family building.

Mr. Rosa stated the matter before the board is whether the use variance is appropriate for this property and that is the only thing to be taken into consideration and does a use variance work for this particular piece of property. This was confirmed by Attorney Riley.

Mr. Baker, Jr. asked Deputy Fire Chief Heaney if the fire alarm system installed in the building was not in contemplation of a residential unit on the first floor. The Deputy Fire Chief confirmed this and that the current first alarm system would have to be reconfigured if the relief was granted but it would not be a major deal to do so. He also wanted confirmation from the Deputy Fire Chief that at the applicant was told that he could not move a residential tenant into that unit which the Deputy Fire Chief confirmed. Mr. Baker, Jr. also pointed out that although 5 units may have been put on an application, it does not specify where the units are. He then asked Mr.

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Timmins if it was his client's opinion that it is impossible to rent out the rear unit for a commercial use or if it was more convenient to rent it out as residential.

Mr. Baker, Sr. asked Attorney Riley if past history of that unit could be taken into consideration even though it was illegally being used as an apartment and Attorney Riley stated it could.

Mr. Tansey asked if there was currently a residential tenant occupying the unit. Attorney Timmins asked Mr. Ruble and Mr. Ruble stated that he believed there was and then asked when they tried to find a commercial or office tenant because as soon as one residential tenant moved out another resident moved in and the apartment was never vacant. Attorney Timmins contacted Mr. Shanahan and verified there was a residential tenant there currently. Mr. Baker, Sr. stated the residential tenant was there illegally without a sprinkler system.

Mr. Ruble then asked Deputy Fire Chief Heaney if he remembers how much time there was between the residential tenant moving out and the new one moving in and he answered the Fire Department was there for the illegal storage of 2 motorcycles and gas fumes in the building and he believes that there was a new tenant lined up to move in there which the owner knew was not allowed after speaking with both the Fire Chief and the Building Inspector. There was discussion about making the entire building residential.

Mr. Baker, Sr. makes a motion to close the public portion of the hearing.

The Chairman then opens the hearing to the public for comment. No one spoke in favor. No one spoke in opposition.

Mr. Baker, Sr. makes a motion to close the Public Hearing.  
Seconded by Mr. Baker, Jr.

A roll call vote was taken: Mr. Tansey – yes; Mr. Haynes – yes; Robert Baker, Jr. – yes; Mr. Robert Baker, Sr. – yes; and Mr. Stephen Galley – yes.

Mr. Rosa then told the applicant the Board would deliberate tonight and welcomed him to be present during deliberations and informed him they will receive a decision in the mail with a date stamp and informed him of his obligations to request a certificate of no appeal. If no one has appealed to the Town Clerk, the certification and an attested copy of the original decision will need to be recorded at the Registry of Deeds to be valid, and the applicants must provide proof of recording to the Building Department.

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### **DELIBERATION.**

The Board was in agreement that just because a residential unit may have been there at some time, it does not justify allowing a new one after the use was discontinued. The Board additionally discussed that the granting of the proposed variance would grant a bad precedent for other owners and that the town is trying to revitalize the center area to bring in business. The Board discussed that it was also not persuaded that the owner had made an effort to market the unit for the permitted commercial use. The Board also found that it had been previously decided by building owners that a fifth residential unit was not desirable. The denial of the variance would not result in the deprivation of a reasonable use of the property.

### **DECISION:**

The Chairman entertains a motion either for or against the granting of the variance.

Robert Baker, Sr. makes a motion to deny the use variance.

Seconded by Robert Baker, Jr.

The Board takes a vote in favor of denying the use variance with members, Gregory Tansey, Robert Baker, Jr., Robert Baker, Sr. and Stephen Galley in favor of denying the use variance and Mr. Timothy Haynes in favor of granting the use variance.

The vote is 4 in favor of denying the use variance and 1 in favor of granting the use variance. The use variance has been denied and does not pass.

### **FINDINGS:**

The Board found that the applicant did not provide sufficient evidence establishing all of the elements needed for a use variance. Also, there is a history of municipal enforcement against these types of configurations.

**REASON FOR DECISION:** The Board finds that the granting of relief as requested would set poor precedent. The Board was informed that the Town has aggressively enforced the provisions of this B1 district and has even filed lawsuits in the past and gone to court and had a trial on the merits to win the case similar to this. As such, with the evidence presented at this hearing, the Board had adequate information upon which to make specific findings as to the impact of the proposed uses as required by the Variance standards as found in the Zoning Bylaw subsection 415-89.1.B and found that the proposed use did not meet such standards. The Board

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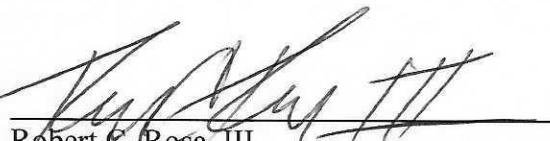
found that there were no conditions and circumstances that were unique to the applicant's lot, structure or building and do not apply to the neighboring lands, structures or buildings in the same district; that strict application of the provisions of the Bylaw would not deprive applicant from making a reasonable use of the lot, structure or building in a manner equivalent to the use permitted to be made by other owners of their neighborhood lands, structures or buildings in the same district without the requested relief; that the unique conditions and circumstances are the result of actions of the applicant taken subsequent to the adoption of this Zoning Bylaw; and that the relief, if granted, would cause substantial detriment to the public good and impair the purposes and intent of this bylaw which was to favor in this area a commercial use.

**NOTE:**

- ❖ This decision may be appealed to the District Court, Housing Court, Land Court or Superior Court pursuant to Chapter 40A, Section 17. Said appeal must be filed within twenty (20) days after this decision is filed with the Town Clerk.
- ❖ Chapter 40A, Section 11, states that in part, that no variance or Special Permit shall take effect until the Town Clerk certifies that twenty (20) days have elapsed, and no appeal has been filed.
- ❖ This Board certifies that copies of this decision have been filed with the Planning Board as well as with the Town Clerk.

**FOR THE ZONING BOARD OF APPEALS**

By:

  
Robert C. Rosa, III  
Chairman