

**MINUTES OF THE
BOARD OF ADJUSTMENT RECONVENED MEETING
EILEEN DONDERO FOLEY COUNCIL CHAMBERS
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE
PORTSMOUTH, NEW HAMPSHIRE**

7:00 P.M.

JULY 25, 2017

MEMBERS PRESENT: Chairman David Rheume, Jeremiah Johnson, Patrick Moretti, Chris Mulligan, Arthur Parrott, Jim Lee, Alternate Peter McDonell

MEMBERS EXCUSED: Vice-Chairman Charles LeMay, Alternate John Formella

ALSO PRESENT: Peter Stith, Planning Department

Chairman Rheume noted that there would be two recusals and that Alternate Mr. McDonell would vote on all the cases.

Chairman Rheume asked that Petition 7-10 be taken out of order because it was a request to postpone.

Mr. Mulligan and Mr. Johnson recused themselves from the vote.

*It was moved, seconded and **passed** unanimously take Petition 7-10 out of order.*

Chairman Rheume read the petition into the record.

*Mr. Parrott moved to **postpone** the petition until the August 15, 2017 meeting. Mr. Lee seconded.*

Mr. Parrott said it was the first time that the Board had seen the proposal and that it normally granted those as a matter of form, so he saw no reason not to do so with the request. Mr. Lee concurred and said he had nothing to add.

*The vote **passed** by unanimous vote.*

III. PUBLIC HEARINGS – NEW BUSINESS (continued from July 18, 2017)

Mr. Mulligan recused himself from the vote. Mr. Johnson resumed his voting seat.

7) Case **7-7**.

Petitioners: Roman Catholic Bishop of Manchester St. James Church, owner, Stonegate NH Construction LLC, applicant

Property: 2075 Lafayette Road

Assessor Plan: Map 268, Lot 97

Zoning District: Single Residence B

- Description: Construct two (2) 24-unit multi-family dwelling.
- Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:
- 1A. A Special Exception under Section 10.335 to allow a lawful nonconforming use to be changed to another nonconforming use
If the Special Exception for the proposed use is not granted, then the following is requested:
 - 1B. A Variance from Section 10.440, Use # 1.53 to permit construction of two multi-family dwellings (24 units each).
 2. A Variance from Section 10.521 to allow a lot area per dwelling unit of 3,769± s.f. where 15,000 s.f. is required.
 3. A Variance from Section 10.522 to allow the building length of a multi-family dwelling to be 205'± long where 160' is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

Attorney F. X. Bruton was present to speak to the petition on behalf of the applicant. He asked for an additional ten minutes to do his presentation.

It was moved, seconded, and unanimously approved to grant the applicant an additional ten minutes.

Attorney Bruton introduced Eric Katz of Stonegate NH Construction, Cory Belden of Altus Engineering, the consultant Bill Wagner, Brian White of White Appraisal, and the traffic assessor Jeff Dirk.

Attorney Bruton stated that the project was a redevelopment of the property and their intent was to seek a special exception to allow the construction of a multi-family dwelling. He said the project would consist of two buildings with 24 units each. He showed a rendering of the building and the site plan layout. He said the parcel was in the SRB zone and unique because it was large for the zone and abutted four other zones that had commercial aspects to them. He emphasized that the lot was in a residential zone and that they were proposing a residential use. He noted that the project would create a residential buffer between traditional residential uses and commercial activities.

Attorney Bruton said the property was 4.15 acres and that most of the surrounding properties were 12-15K square feet. He said the lot had 40K square feet of paved driveway and 135 existing parking spaces. He said the applicant wanted to discontinue the use of the access road, with the only caveat being that the Fire Department or the Public Works needed emergency gated access. He said his client had no plans to use it for the project itself, and that would dramatically affect the surrounding neighborhood in terms of removing overflow parking that occurred in that location and also would remove the traffic flow that went into Hoover Drive. He said the abutters had a favorable reaction to all that. He said they ended up with an increase of 18,000 square feet of open space and that by removing a lot of the parking, they would have 20 outside parking spaces and 34 underground spaces. He said that, as a result, the parking calculation would be dramatically decreased as well as the impervious surface. He said it would also allow drainage that wasn't presently along Pheasant Lane and would be a benefit.

Attorney Bruton discussed the landscape plan noting that landscaping would be created around the entire perimeter of the project, along with a 6-ft privacy fence and a berm. He said they had a tremendous amount of abutter support. He discussed the traffic analysis they did in detail, noting that the Sunday traffic would be reduced by 380 cars.

Mr. Katz stated that the project was a condominium ownership targeted toward empty nesters and active adults. He said each condo would have one-floor living. He said they met with the Planning Director and the Pheasant Lane neighborhood and received great feedback, noting that people were in favor of the transition and that it would provide a nice protection for them from the nearby commercial uses. Mr. Katz emphasized that there would be buffer enhancements, discontinuation of the access road, decrease of impervious, runoff treatment, parking in the rear, and two buildings that were positioned properly. He noted that Mr. Wagner received 120 neighborhood signatures in support.

Mr. Belden discussed the site plan, the potential widening of Lafayette Road, the landscape plan, the buffer, and the access road. He noted that there would be a reduction in asphalt, storm water management, a reduction in peak flows, and impervious surface treatment.

Attorney Bruton reviewed the criteria in detail, noting that there would be less adverse use than existing and no adverse impact to surrounding properties. He said there would be one access point instead of two and a significant reduction in traffic, at least on Sundays, with negligible change on the weekdays.

Attorney Bruton also reviewed the criteria for the variance request in detail and said they would be met. He said it would be conforming than the existing use because it would be a residential use. He emphasized that 120 neighbors were in support. He said the hardship was that there was no correlation between the general intent of the Ordinance to promote the health, safety and welfare of the public and the restriction imposed, which did not allow the applicant to do multi-family structures. He said multi-families were permitted in much smaller lot sizes, so the massing would also helped the abutters with a visual and noise barrier from the Lafayette Road activity. He further addressed the use, the length of the buildings, and the lot size.

Mr. Wagner stated that he and Nancy Clayburgh had spent a lot of time meeting with the neighbors. He said he had lived in Elwyn Park for a long time, was a 7-term Councilor for the neighborhood, and knew the neighborhood issues. He said that no one that he or Ms. Clayburgh talked to was opposed to the project, and the main reason people favored it was because it was less intrusive and more compatible than any other potential project.

Mr. Moretti asked whether a stoplight would be put at the connection to the road across the street. Attorney Bruton said it was currently controlled by the Department of Transportation (DOT) and would be part of the site plan process. He said the two buildings were strictly condominiums.

Mr. Johnson asked what the driver was for the unit count. Attorney Bruton said it was a balance between a critical mass for the project to be successful. Mr. Katz said the building could have been expanded to add more units, but they felt that 48 units was the appropriate number based on the needs of the church and the needs of the development.

Mr. McDonell said the trip generation summary referred to adult education programs in the weekday evenings of 100 participants, and he asked if it was every weekday. Mr. Dirk said the calculation was an average of multiple nights during the week. Mr. McDonell asked how the senior adult housing differed from something that wouldn't be senior housing. Mr. Dirk said the daily traffic volume would be slightly higher, but on peak hours the difference would be higher traffic for a non-senior focused community, whereas senior driving tended to be lower. He said that instead of 15 trips during peak hours, it might be 20-25 trips. Mr. McDonell asked whether Mr. Dirk picked senior housing because it was the goal. Mr. Dirk said it also represented that someone in the unit might work, so the number of units for the peak traffic hours would be generally half of the number of units that generated traffic during the peak hours.

Chairman Rheume said the positioning of the buildings was discussed as a positive in terms of protection from Lafayette Road, and he asked Attorney Bruton to explain the concept more. Attorney Bruton said that Portsmouth preferred the buildings to be up front, so they came up with the design to bring the buildings as far up to the front as they could but to also position them that way with patios, which would go unnoticed to the abutters in the back.

Chairman Rheume asked what the distinction was between the two types of parking. Attorney Bruton said the aboveground parking was for visitors and overflow. Chairman Rheume asked if it was only one vehicle per resident. Mr. Katz said there were 34 spaces under each building, and each unit in each building would have one parking space. He said they could buy a second space. He said it was dictated by zoning and the maximum of spaces that they could place on the outside. He said it was usually about 40% of a one-person household, so the numbers worked out. He said that they would not sell aboveground parking spaces.

Kelly Shaw of Banfield Road stated that she was in favor of the buildings but wanted a signalized traffic light. She said the traffic studies did not give a true picture of the traffic situation, especially the traffic from Water Country. She asked that DOT be notified if the project was approved because the traffic was a nightmare and they needed a light.

Nancy Clayburgh of 405 F.W. Harper Drive said she lived in the Woodlands neighborhood and that she and her neighbors were in favor of the residential development.

Paul Harrington said he was the Director Secretary for the Real Estate Diocese of Manchester. He said he received a lot of phone inquiries about the property from malls, car dealerships, and restaurants. He said he hoped the project would get approved.

David Paquette of 8 Pheasant Lane said he was the secretary of the Owner's Association and that the members were all in favor of the project and thought the project would be much better than retail or commercial use.

Ken Riley of Hoover Drive said the traffic study was done when the church was active, and even without that traffic flow, getting out of Hoover Drive onto Lafayette Road was dangerous. He said there should be a traffic light. He said the development was a good fit but asked that the traffic concerns be addressed.

SPEAKING IN OPPOSITION TO THE PETITION AND/OR SPEAKING TO, FOR, OR AGAINST THE PETITION

Rick Becksted of 1395 Islington Street said he was familiar with the neighborhood and thought the traffic concerns were with Water Country. He thought it was important that the public see the traffic study, which he said was not part of the website. He asked that the approval be postponed until the traffic study was made more public. He also noted that there were almost 4000 registered voters in that community and some were probably on vacation or didn't hear about the project, which he felt was another reason to postpone the approval.

Bill Wagner said there was enough public knowledge of the meeting, and he referred to the meeting and canvassing the neighborhood.

Ms. Clayburgh said that the Woodlands neighborhood was part of the website 'Next Door', which the neighbors could use to communicate with one another. She said she sent the announcement and documentation to over 400 homes in the Woodlands neighborhood.

Butch Ricci said he thought the project was a good use of the property and for the area.

Mr. Becksted said he thought the project was the best outcome but could be an intense use. He thought there could be another way to deal with the traffic other than creating another entrance on Lafayette Road and didn't believe that all the residents were aware or willing.

Attorney Bruton said he had done land use for quite a while and never had 120 abutters support a project. He said everything was available in the Planning Department for people to look at.

No one else rose to speak, and Chairman Rheaume closed the public hearing.

DECISION OF THE BOARD

Mr. Stith said the Planning Department typically put the entire submittal on the website and said he would check to make sure the petition was advertised.

Mr. McDonell said he noticed the severe contrast between the applicant's presentation and his previous one for the Bypass. He said he didn't think there was anything wrong with the other application but thought it seemed like they may have learned from the commentary and tailored their application process accordingly by canvassing the neighborhood and doing what they could. She said the variance related to the length of the two multi-family building, but given the way the buildings were set up, he wasn't sure if it was more than 160 feet from the road.

Mr. Moretti said he thought the project fit the neighborhood. He said that, at first look, it seemed like the number of units was intense, but the applicant explained how he came up with that number. He said the applicant had no control over a traffic light and understood that having an opening directly across from another street might trigger something. He said there would be traffic problems even if another commercial building went in there, so he felt that the project was the lesser of two evils.

Mr. Parrott said the proposal was the furthest thing from the obvious SRB zone but thought the type of housing was logical to go on that lot. He said it would form a logical buffer between the commercial areas and the more residential area. He said it was logical from that perspective, even though it was a huge amount of relief asked for. Mr. Parrott said the traffic issue was difficult to balance if, in the sense that the church traffic was intensive for a short period of time on weekends and then spread out through the rest of the week. He said the church was gone, but he knew the location had been a point of traffic congestion that didn't last all day, and an officer directed traffic during peak periods. He said the new proposal would spread the traffic out throughout the day and evening, so it was a short intense congestion versus a small amount of conditional congestion spread through the day. He said he was sure that the residents would learn the traffic pattern. He said he would favor of the project on those two points.

Mr. Johnson said the application packet was always available in hard copy, and that the applicant legally was only bound to post a hearing notice and didn't have to reach every household. He said that, at first, he didn't think it was a good fit, but the more he reviewed it, the more it grew on him. He said he was bolstered by the neighbors' support. He said the traffic would be spread out enough and not be very intense. Mr. Lee said it seemed like a good use of the property, certainly better than a mall or fast food restaurant. He also noted that he lived across the street from a large condominium complex and never had trouble getting in or out of the driveway because people came and went at different times of the day.

Chairman Rheaume stated that many Board members had captured his thoughts. He said he was skeptical at first because it was an SRB unit and the applicant was asking for 48 units, which he thought was intense, but in view of the property's past use and its unique location sandwiched on the edge of an SRB

zone, he thought the neighborhood would be protected. He noted that the neighbors had to be very protective of their neighborhood because of being on Lafayette Road and the constant pressure to change some of the residential use into commercial. He thought it was a good thing that the project was residential use. He thought the angles of the building were helped by having the entrance and exit road directly across from West Road, which would be a traffic benefit by allowing vehicles to enter and exit. He thought a traffic light could eventually be put in at the intersection. He agreed that the placement of the buildings at an angle also lessened the lengthening effect, making them less imposing to Lafayette Road. He said he didn't think that the project would really impact traffic. He said it was a large parcel and not realistic for one single large house in that location. He said that subdividing it would necessitate having vehicles backing out on Lafayette or Pheasant Lane Roads, which would be more negative. He said he thought it was the right thing for the neighborhood and a good project. He agreed with Mr. Johnson that the process wasn't a perfect one as far as putting out information on a project, but the citizens had to pay attention and watch out for their neighborhood

Chairman Rheaume discussed the special exception, stating that the applicant in concept was asking for moving from the church use to one of a multi-unit dwelling residential project, which they felt was less of a nonconforming and intensive use than the previous use. He asked the Board if they believed that argument or thought that the variance argument would be more appropriate.

Mr. Johnson said he could probably buy into the special exception but it seemed so general in the application. He said it needed to be less intense use, noting that it was a more intense in height and occupancy. He said there were different ways to look at it.

Chairman Rheaume read Section 10.335 of the Ordinance, stating that a lawful nonconforming use may be changed to another nonconforming use provided that the property use was equal or more appropriate to the district than the existing use, and the impact on the adjacent properties was less adverse than the impact on the existing use. He said there were two options and that the Board just needed to pick the more appropriate course of action.

*Mr. McDonell moved to **deny** the request for special exception, and Mr. Johnson seconded.*

Mr. McDonell said it was difficult to get over the first hurdle, Section 10.335. He said it was reasonable to argue that the proposed use was equally or more appropriate to the district than the existing use, especially in that location, but the bigger issue was the impact on adjacent properties being less adverse than the impact on the existing use. He said he wasn't sure that he saw that, especially given the alternate and the Board's ability to grant a variance factored in for him. He agreed with Mr. Johnson that assessing the impact on adjacent properties was less adverse, so there were several issues, especially given the fact that the church no longer existed. He said he would have trouble making an argument that the impact would be less adverse. He asked Chairman Rheaume if he was right in thinking that the Board didn't have to go to the actual standards for a special exception if the request didn't pass the initial hurdle. Chairman Rheaume agreed, noting that one of the Ordinance's standards was that the project had to meet the criteria of being less adverse, and it was not meeting that standard. He said it failed that first criteria, so subsequently, the Board couldn't move forward to granting the special exception.

Mr. Johnson said he concurred with Mr. O'Donell and had nothing further to add.

Mr. Parrott said he had the same concerns. He said if one read the actual words 'existing use', it was clear. He said it was an empty building, so clearly the proposed use would be much more adverse to the neighborhood than the existing use.

*The motion **passed** by unanimous vote, 6-0.*

*Mr. Johnson moved to **grant** the variances for the application as presented and advertised, and Mr. Moretti seconded.*

Mr. Johnson said the Board had a good conversation and that he would echo all those comments. He said the project seemed to make sense, but what irked him was why the building had to be so long. He agreed, however, that it was a unique parcel site that took away the ominous link to the building. He said that, in general, people walking or driving by the buildings would perceive that the lengths of the buildings were much less, and he thought it was a valid argument that the site was much bigger than anything else around it and would be appropriate for a bigger building. As for density, he thought it was close to not passing the test, but the lot size, location, and type of residential use made it a third of the way there, and the neighborhood could handle it. He said it was the SRB zone, so 47 units were technically too many to fit, but as many of the abutters said, any restaurant, store, or gas station could build on it and could be granted a variance. He said the project was a much more appropriate use because it built off the neighborhood behind it and created a nice buffer.

Mr. Johnson said that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance because it was residential in use and was in closer conjunction to most of the surrounding uses behind and next to it. He said the essential character of the neighborhood would not be threatened, nor would the public's health, safety, and welfare. He said the traffic was kind of a wash because the intensity of traffic in the past had been an issue but was brief, and the traffic would probably be the same quantity but a lot less noticeable. He said that multi-residence use trip generation was much less than perceived. Granting the variance would do substantial justice. He said a lot of the abutters supported the project, and it created a nice buffer for the residents behind it and would be a pleasant atmosphere for a large multi-family dwelling. He said he didn't see any specific negatives to the public. He said granting the variances would not diminish the value of surrounding properties because what were presently there were a church and a ton of asphalt, so it would help invigorate a lot of the surrounding properties. He said he certainly didn't see a decrease and thought the applicant provided extensive information to back that up. As far as the hardship, he said the size of the lot on different zones on a major thoroughfare with a lot of traffic, commercial uses, commuters, and the extension of that neighborhood as a well-protected area would keep it residential. He said the project created its own transition, a buffer zone between more single-family residents and a commercial/industrial retail alley with lots of traffic, but it tastefully did so with a residential use.

Mr. Moretti concurred with Mr. Johnson. He said that reducing the impervious by almost 40% would be a great advantage to the property and the neighborhood. He said grass was more pleasant to look at than asphalt, and the building design was driven by the parking underneath. He noted that adding the drainage would benefit the neighborhood. He agreed about the hardship, saying that one would think it was a commercial property already, especially driving by it on Lafayette Road entering the Gateway Zone. He thought the project would be an advantage to the other developments in the area.

*The motion **passed** by unanimous vote, 6-0.*

Mr. Mulligan resumed his voting seat.

8) Case 7-8.

Petitioners: Tyler B. & Meredith Jackson
Property: 678 Maplewood Avenue
Assessor Plan: Map 220, Lot 89

- Zoning District: Single Residence B
- Description: Expansion of the use of a second dwelling unit into the first floor of the garage and after-the-fact approval for a deck.
- Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:
1. Variances from Section 10.521 to allow a 21'2" ± rear yard setback where 30' is required and to allow 32.29%± building coverage where 20% is the maximum allowed.
 2. A Variance from Section 10.331 to allow the extension or enlargement of a non-conforming use.
 3. A Variance from Section 10.333 to allow a nonconforming use to be extended throughout other parts of the building.

SPEAKING IN FAVOR OF THE PETITION

Attorney Derek Durbin was present on behalf of the applicant. He stated that they sought two sets of variances, one for a reconstructed deck and the other relating to an existing second dwelling unit. He noted that the deck was built without a building permit. He asked the Board to address the two sets of variances related to the deck and second dwelling unit together.

Mr. Johnson verified that the applicant was unaware that no building permit was pulled. Attorney Durbin agreed. Mr. Mulligan asked when the second dwelling set-up was installed in the garage. Chairman Rheame noted that the staff report said 1979.

Chairman Rheame asked what the motivation was for doubling the square footage, noting that it was almost becoming a full-size house. Attorney Durbin said it was to expand the living space in that structure and add functionality to it. Chairman Rheame said the diagram showed parking for six vehicles but the applicant's requirement between the two homes would be four spaces. Attorney Durbin agreed and said they just wanted to show that, with the existing driveway, there was ample parking space. He said they were a bit offset but could be made more horizontal. In response to further questions from Chairman Rheame, Attorney Durbin said the garage was uninhabitable in its present state and there would be no construction other than the deck that would require relief from the Board in the future.

Attorney Durbin reviewed the criteria and said they would be met. He noted that there was a letter from an abutter who was concerned about cars being parked on Maplewood Avenue but said it was because the owner requested that the tenants temporarily park on the street during the day so that the contractors could access the driveway.

SPEAKING IN OPPOSITION TO THE PETITION AND/OR SPEAKING TO, FOR, OR AGAINST THE PETITION

No one rose to speak, and Chairman Rheame closed the public hearing.

DECISION OF THE BOARD

Chairman Rheame noted that the application was almost like two separate ones and suggested that the Board deal with the two changes separately, beginning with Variance #1 for the deck.

*Mr. Parrott moved to **grant** Variance #1 request related to the deck, and Mr. Mulligan seconded.*

Mr. Parrott stated that the request was simple and straightforward and was to replace something that was in poor condition, so it would be a plus for the property and the neighborhood. He said that granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance because no detriment to the public was possible, seeing that it was in the back yard and just a simple replacement and upgrade to the property. He said that substantial justice would be done because there was no public interest and the tip went to the owner, who wanted to replace and upgrade, which was a desirable thing to do in the interest of the neighborhood. Granting the variance would not diminish the value of surrounding properties because it was a simple upgrade to the existing property and would have nothing but a beneficial effect on surrounding homes. Regarding the hardship, Mr. Parrott said the deck was deteriorating, the applicant neglected to get a variance before but was requesting one now, and it would be inspected and brought up to code. Mr. Parrott said the application met the five criteria.

Mr. Mulligan concurred with Mr. Parrott, adding that the Board probably didn't want to encourage variances for people who didn't get permits like they were supposed to. However, he said it wasn't a deck that went up in the middle of the night, so he felt that it met the criteria and would be a good improvement to the property.

*The motion **passed** by unanimous vote, 7-0.*

The Board then voted on Variances #2 and #3.

Mr. Lee said it was a benign use because the property had been used as a two-family one for some time and the proposed extension of it wouldn't affect it too much, seeing that it was just finishing some of the downstairs space and make additional living space in the apartment. He said it wouldn't be any larger. He noted that the property had been before the Board several times and that it was a unique one bounded by Route 95, commercial buildings, and Maplewood Avenue and he didn't see any impact to the surrounding neighborhood.

*Mr. Lee moved to **grant** the variances for the application as presented and advertised, and Mr. Johnson seconded.*

Mr. Lee said it was a unique piece of property, bounded by Route 95, commercial buildings, and Maplewood Avenue, and had existed for some time. He said it met the criteria for the variance because it would not be contrary to the public interest or the spirit of the Ordinance, would do substantial justice, would not diminish the value of surrounding properties and would not create an unreasonable hardship because of the previously-outlined reasons.

Mr. Johnson concurred with Mr. Lee, adding that the Ordinance didn't specify how big a dwelling could be. He said the lot could have two dwellings, with one having nine bedrooms. He said he didn't think there should even be a variance for that sort of thing because the owner was within his rights to get rid of the garage and find better value in expanding the second unit.

Chairman Rheaume said he would not support the motion because, even though the parcel was a special one off to one side and surrounded by business areas, it was still in the SRB zone. He said the Board worked hard to preserve that concept. He noted that the property was granted an exception for a specific use in 1979, and he felt that the expansion to double it in size to a home that was bigger than his previous home was asking for substantial relief in the SB zone and essentially creating two single-family homes right next to each other of a substantial size. He said the ADU was in place for a cottage-sized unit and the proposal was above and beyond that.

*The motion **passed** by a vote of 5-2, with Mr. Parrott and Chairman Rheaume voting against the motion.*

Mr. Moretti recused himself from the vote.

9) Case 7-9.

Petitioner: Karona LLC
Property: 36 Artwill Avenue
Assessor Plan: Map 229, Lot 4
Zoning District: Single Residence B District
Description: Detached accessory dwelling unit in an existing garage.
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:
1. A Variance from Section 10.521 for street frontage where 100' is required and 0'± exists.

SPEAKING IN FAVOR OF THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant. He said the principal Butch Ricci was also present. Attorney Phoenix explained the background of the lot and showed photos of the house and the garage and an aerial context of the neighborhood. He noted that they had a Conditional Use Permit (CUP) from the Planning Board that was on hold until they got more plans. He explained that it was impossible to have frontage on the street because of a 1958 ruling that the Planning Board to not let it have frontage, so it was a nonconforming condition. He said the new building required relief because the overall lot had no frontage on a public street. He reviewed the criteria and said they would were met.

Mr. Mulligan said he had a hard time with whether the structure would qualify as a detached ADU, due to the square footage and it not being separated by the primary dwelling by at least 20 feet. Attorney Phoenix said even if the ADU were denied, the garage could still be put to good use. He said the distance and size could be waived by the Planning Board.

Mr. Mulligan said the project had a checkered history because the prior owner well exceeded the scope of the building permit that he was granted. He said the owner previously went before the Board before the ADU Ordinance to seek relief and was shut down, so he wanted to be careful about granting relief based on a preexisting condition that was sort of illegal. He said that the nonconforming condition of the garage was more than its position on a private road with no frontage. Attorney Phoenix said the garage was given the building permit and then inspected. He said the owner got into issues about the quality of the framing and so on. He said a variance was needed at the time for that type of use but wasn't needed any longer. He said Mr. Ricci bought the property subjective to a Cease and Desist order. He asked that that applicant not be penalized for the sins of a former owner.

Mr. Parrott asked whether the location and dimensions were defined, relative to the street. Attorney Phoenix said it was defined by the factual location of the pavement but the tax map was not. Mr. Parrott said the front setback was shown as 27.5 feet and was too little. He said he met with the Planning staff and filed a request for a setback variance but discovered that it wasn't a City street and there was no setback, so he pulled the variance and submitted the new request. Mr. Parrott said he found it odd logic.

Chairman Rheume said that one of the things mentioned was access to emergency vehicles, and he pointed out that there was some disagreement between the neighboring properties before. He asked what the current status of agreement among the neighboring parties that now owned the access street was and whether there were plans to improve it.

Mr. Ricci said Jean Wilson owned the property as well as most of Artwill Avenue and that she would have to bring it up to City standards but couldn't afford it. Consequently, he said that Artwill Avenue would remain a private road, and the rest of the street residents would make it accessible. He said the City wanted to extend a water line, so the residents would have City water and a maintained line instead of a private line. He said he was working with the neighbors in accessing that road, and there were some signs of progress.

**SPEAKING IN OPPOSITION TO THE PETITION AND/OR
SPEAKING TO, FOR, OR AGAINST THE PETITION**

No one rose to speak, and Chairman Rheume closed the public hearing.

DECISION OF THE BOARD

Chairman Rheume noted that the law had changed because it related to ADUs. He said the Planning Department said that, because of the change in use, they wanted to ensure that the lot was fully compliant. He said the argument was whether or not it was a street and that the Planning Department decided that the street did not exist.

*Mr. Mulligan moved to **grant** the variance for the application as presented and advertised, and Mr. Parrott seconded.*

Mr. Mulligan stated that the specific relief was not that big a deal, but the checkered history could be. He said the Board was asked whether or not the applicant could make improvements to his property, and he would need the same relief if he just wanted to put an addition on the dormer. He said it would always be a private street, but big enough so that a lot of improvements could be made to the main dwelling and would require the same relief. He said he wasn't thrilled with the idea that the ADU was about as big as the primary dwelling, but the applicant was entitled to get the CUP from the Planning Board, so he thought it met all the criteria. Focusing on the specific frontage requirements, he said that granting the variance would not violate the spirit of the Ordinance and the public interest. He said the character of the neighborhood would still be residential. Granting the variance would result in substantial justice because the applicant couldn't get frontage any other way, so anything he could do to improve the property would require the same variance and therefore the loss to the applicant was not outweighed by any gain to the public. He said the value of surrounding properties would not be diminished because, specific to the frontage requirement, granting relief would not have any effect. He said the hardship involved special conditions because the property that the City deemed as having no frontage because it was on a private right-of-way distinguished it from others within the general area, so there was no fair and substantial relationship between the purpose of the frontage requirement and its application to the property. He said there was plenty of access on Artwill Avenue, but it just wasn't what the City considered a road. Mr. Mulligan said the use was a reasonable one, a residential use in a residential area, and met the criteria.

Mr. Parrott concurred with Mr. Mulligan, noting that it was a technical change, and thought it was proper for the Board to approve it.

Chairman Rheume said he would support the motion. He said he had thought of waiting until there was a better legal definition for Artwill Avenue due to previous problems and relationships, but it sounded like there was enough progress moving forward.

*The motion **passed** by unanimous vote, 6-0.*

Mr. Moretti resumed his voting seat

10) Case 7-10.

Petitioners: Petition of Flintatta LLC, owner and the Unitarian Universalist Church of Portsmouth, applicant

Property: 73 Court Street

Assessor Plan: Map 116, Lot 19

Zoning District: Character District 4-L1

Description: Change of use.

Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:

1. A Special Exception under Section 10.440 Use #3.11 to allow a religious place of assembly in a district where the use is only allowed by special exception.
2. Variances from 10.5A41.10A to allow the following: a) a 1'± right yard where 5' is required; b) a 1'± left yard where 5' is required; c) a 3'± rear yard where 5' is required; d) 71.8%± building coverage where 60% is the maximum allowed; and e) 21.3% open space where 25% is the minimum required;
3. A Variance from Section 10.1112.30 to allow zero (0) off-street parking spaces to be provided where 8 spaces are required for the office use and 67 spaces are required for the assembly use.

Request to Postpone

DECISION OF THE BOARD

*Mr. Parrott moved **postpone** the petition until the August 15, 2017 meeting. Mr. Lee seconded.*

*The motion **passed** by unanimous vote.*

Mr. Moretti resumed his voting seat. Mr. Johnson recused himself from the vote.

11) Case 7-11.

Petitioner: Robert J. Fabbriatore Irrevoc. Trust of 2012

Property: 177 State Street

Assessor Plan Map 107, Lot 44

Zoning District: Character District 4

Description Construct a 360 s.f. two-story addition

Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:

1. A Variance from Section 10.5A41.10C to allow 5.6%± open space where 10% is the minimum required.
2. A Variance from Section 10.1112.30 to allow 1 off-street parking space to be provided where 9 are required.
3. A Variance from Section 10.1114.32(b) to allow vehicles to enter the property by backing into or from a public street.

SPEAKING IN FAVOR OF THE PETITION

Attorney James Noucas was present on behalf of the applicant to speak to the petition. He introduced Mary Brake of McHenry Architects and Alex Ross of Ross Engineers.

Attorney Noucas reviewed the property's background, noting that it was in the CD4 district and adjoined to the 175 State Street property. He said it abutted the boundary of the Downtown Overlay District but was outside of it. He said the building was two properties joined together, the first of which was built in 1828, with an ell built in 1865. He reviewed the petition, noting that the property did not have access to Sheafe Street like many of its neighbors and had no on-site parking. He discussed the open space on the property in detail. He also said they had a vehicular circulation problem because they either had to back in or back out of the garage, and there was no way to arrange parking on the lot for even one space. He said, however, that someone exiting the garage would have a good sight line because it was a one-way street with no parking on their side of the street. He reviewed the criteria and said they were met.

Mr. Mulligan asked how many parking spaces would be created in the garage as a result of the improvements. Attorney Noucas said they could only fit one but would search the area for other alternatives. Mr. Mulligan asked whether there was only one existing residential unit, and Attorney Noucas agreed.

Mr. Lee asked whether there was any access to the street to make a curb cut. Mr. Ross said there was a brick sidewalk in that location with a lowered curb, so they could put a curb cut there in the future. Mr. Moretti asked whether the applicant planned to put the fire escapes back in place. Attorney Noucas said they would do so and would probably improve them.

Mr. Moretti noted that the applicant was building on the back part of the building and building a wall out. He asked whether they would keep it inside the building. Attorney Noucas said it wouldn't fit because the wall was at an angle and that they planned to remove it due to structural issues. Mr. Ross added that the new wall would match the rest of the brick face.

Chairman Rheume asked whether the first floor would be retail or office. Mr. Ross said it would be retail. In response to further questions from Chairman Rheume, Mr. Ross said the garage would be attached either to the second floor or the top unit, that a car leaving the garage would have to go through the garage doors, and that they had not consulted with Public Works or Traffic and Safety about backing in and out.

Chairman Rheume said it was unfortunate that the building was one of the very few that had some open space to it and the applicant was proposing to take it away. He asked whether the narrow strip could be converted to usable space and asked what was driving the removal of what little open space there was. Attorney Noucas said it was the square footage of the property and consistency with other buildings in the area.

SPEAKING IN OPPOSITION TO THE PETITION AND/OR SPEAKING TO, FOR, OR AGAINST THE PETITION

No one rose to speak, and Chairman Rheume closed the public hearing.

DECISION OF THE BOARD

*Mr. Mulligan moved to **grant** the variances for the application as presented and advertised, and Mr. Moretti seconded.*

Mr. Mulligan said he thought the applicant was correct in the argument that complying with the parking requirements for the property as it now stood and with any improvements would be impossible. He said the building swallowed almost the entire lot and that there was no way the applicant could comply with the parking. He said the open space requirement was a bit different because there was some existing open space, but it was unlovely. He said he didn't think he had ever seen anyone use or enjoy it, so no one would miss it. He said that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance because the essential character of the neighborhood would not change. He said it was a healthy, vibrant mix of office, retail and residential, so it met the criteria. He said that substantial justice would be done because the loss to the applicant if denied would be much higher than any gain to the public if the Board insisted on strict compliance. He said that granting the variances would not diminish the value of surrounding properties. He thought it would enhance surrounding properties because it would drive the renovation of a unique downtown and historic property. As for literal enforcement of the Ordinance resulting in unnecessary hardship, Mr. Mulligan said the special conditions of the property were that it was an extremely old one with historic character that needed to be preserved. He said the applicant would have to get approvals from the other land use boards, including the HDC, so the public interest would be protected. He said there would be no fair and substantial relationship between the open space requirement or the various parking requirements and their application to the property and that the property couldn't realistically comply with those requirements. He said the use was a reasonable one and met the criteria.

Mr. Moretti concurred with Mr. Mulligan, adding that the public's interest would be protected during the HDC process. He said it was a very historic building and added a lot of character to Portsmouth, and protecting it was vital to the public. He said the addition was tasteful and, although he was concerned about removing the 1800 wall, he said progress moved forward and hoped that the HDC could get the wall to appear that it had been there for that period of time.

Chairman Rheaume said he would support the motion, but with some reservations. He said the loss of what little open space there was around the property was concerning, but it was just a little grass plot and probably wouldn't be missed. He said that, because the building had been around for so long, not meeting the parking requirement made sense. He said it was tricky to back in and out of that street with pedestrians and hoped that the Planning Board could address it satisfactorily and that the Parking and Traffic Committee could look into it, but he was satisfied that project met the requirements. He said the argument that the structure was outside the Downtown Overlay District was close, but that they should get the same relief without requiring any parking. He said he was seeing more applications like it and thought the Board had to be careful not to rewrite the boundaries of the District. He said the Downtown Overlay District was what it was, and that it was important not to grow it. He said it was created for a reason, and if it was outdated, then the Planning Board and the City Council should extend it. He said he had some concerns, but for that specific case for that specific property, he thought it made sense.

The motion passed by unanimous vote, 6-0.

IV. ADJOURNMENT

It was moved, seconded, and passed by unanimous vote to adjourn the meeting at 10:20 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary