

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

7:00 P.M.

DECEMBER 19, 2017

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

MEMBERS EXCUSED: Alternate John Formella

ALSO PRESENT: Peter Stith, Planning Department

I. ELECTION OF OFFICERS

Mr. Parrott moved to retain David Rheume as Chairman and to elect Mr. Jeremiah Johnson as Vice-Chairman. Mr. Moretti seconded the motion.

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

It was moved, seconded, and passed that Vice-Chair Johnson take control of the meeting if anything happened to Chairman Rheume.

Chairman Rheume stated that the City Council had voted to reappoint Mr. Jim Lee for a term to expire December 1, 2022 and had voted to appoint Mr. Peter McDonell as a Regular Member for the same term.

II. APPROVAL OF MINUTES

A) November 21, 2017

*It was moved, seconded, and unanimously passed to **approve** the November 21, 2018 minutes as amended.*

III. PUBLIC HEARINGS - NEW BUSINESS

1) Case #12-1

Petitioner: Michael De La Cruz
 Property: 75 (63) Congress Street
 Assessor Plan: Map 117, Lot 5
 Zoning District: Character District 5 (CD-5)
 Description: Construct 15 residential units.
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:

1. A Variance from Section 10.1112.30 to allow no off-street parking spaces to be provided where off-street parking spaces are required.

DECISION OF THE BOARD

The Board acknowledged that the petition had been withdrawn at the request of the applicant.

2) Case #12-2

Petitioner: Brenda J. Bouchard Revocable Trust of 1999
 Property: 33 Holmes Court
 Assessor Plan: Map 101, Lot 12
 Zoning District: General Residence B
 Description: Install rear condenser.
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:

1. A Variance from Section 10.573.10 to allow a 3' ± right side yard setback and a 1'4"± rear yard setback where 5' is required for both.

SPEAKING IN FAVOR OF THE PETITION

Kevin Davis was present on behalf of the applicant to speak to the petition. He showed the condenser’s location and said it was the least intrusive place.

In response to Mr. Lee’s questions, Mr. Davis said the condenser would be on a base and the noise level would be small at 70 decibels.

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 as presented and advertised, and Mr. Parrott seconded.*

Mr. Mulligan said that granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance because the essential characteristics of the neighborhood would not be altered, and what was proposed would not pose any threat to the public's health, safety, or welfare. Substantial justice would be done because there was a minimal amount of relief requested and he couldn't see any harm to the public by holding fast to the 5-ft setback rule for the accessory structures. Granting the variance would not diminish the value of surrounding properties because they wouldn't be affected at all. He said there was a number of special conditions, including that the lot was oddly shaped and the current built environment on the lot was very tight to the lot lines. He said it was the most appropriate place to put that kind of equipment, it was a reasonable use, and it met all the criteria.

Mr. Parrott said he concurred with Mr. Mulligan and had nothing to add.

The motion passed by unanimous vote, 7-0

Mr. Lee and Mr. Parrott recused themselves from the petition.

3) Case #12-3

Petitioners: James C. and Amy M. Baker
 Property: 75 Humphreys Court
 Assessor Plan: Map 101, Lot 37
 Zoning District: General Residence B
 Description: Replace and expand a rear addition (or construct a rear addition)
 Requests: Variances and/or Special Exceptions necessary to grant the required Relief from the Zoning Ordinance including:

1. A Variance from Section 10.521 to allow an 18' rear yard setback where 25' is required.
2. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance.

SPEAKING IN FAVOR OF THE PETITION

The project architect Jennifer Ramsey was present on behalf of the applicant to speak to the petition. She said they wanted to replace an addition on the back of the building with a new addition that would have the same depth but less width. She reviewed the petition, nothing that the abutters and neighbors favored the project. She also submitted to the Board a letter from the back abutters who were in favor.

Mr. Johnson asked whether there would be vertical expansion on the rear elevation of the main addition, and Ms. Ramsey said the eave line would remain the same. In response to Chairman's Rheaume's questions, Ms. Ramsey said the entire portion where the existing addition was being removed would be reconstructed and that there was no foundation.

Mr. Harold Whitehouse of 58 Humphreys Court said he knew the area well and had signed the petition. He said the addition would be beneficial for the large family.

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

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

DECISION OF THE BOARD

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

Mr. Johnson stated that the ratio asked for was a little more significant than what the Board usually approved, but the particulars of the property made it a reasonable request, and the current condition would be increased only by one foot. He said that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance because it was a tasteful and modest design, and much smaller than many other additions. He said the current addition was awkward, and the proposed one would clean up the design and add more usable square footage to the second floor. He said he liked that it wasn't a vertical expansion but just a reconfiguration of what was there and thought the dimensions were pretty common on a house of that nature. He said granting the variances would do substantial justice because no harm to the general public would be outweighed by any benefit to the applicant. He said the values of surrounding properties would not be diminished because the property as well as the surrounding ones could see an uptake in value due to a tasteful modernization of the house's general appearance. He noted that literal enforcement of the Ordinance would result in unnecessary hardship. He said the awkward footprint of the site and the main house as it presently sat did fit the property within the setbacks and that it made sense to work in the area of the current addition and to expand upon it. He also noted that it was the least offensive side of the rear abutter's yard, which also played into the spirit and public interest, and that the project had the neighborhood's support.

Mr. Moretti concurred with Mr. Johnson and said it was a very modest addition and an improvement to the setback. He said the current foundation wasn't substantial, and at some point, modifications might have to be done, so he thought the project was moving it all in the right direction.

*The motion **passed** by unanimous vote, 5-0.*

Mr. Lee and Mr. Parrott resumed their voting seats.

4) Case 12-4

Petitioners: Joseph D. Bezanson & Chelsea M. Ladd

Property: 87 Union Street

Assessor Plan: Map 145, Lot 66

- Zoning District: General Residence C
 Description: Construct 17' x 10' left rear deck.
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:
1. A Variance from Section 10.521 to allow an 8'± left side yard setback where 10' is required.
 2. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance.

SPEAKING IN FAVOR OF THE PETITION

The owner Mr. Joseph Bezanson was present to speak to the petition. He said he wanted to replace an existing deck that needed repairs and to gain some space as well as provide covered space for the unit below. Chairman Rheume noted that the applicant submitted written reasons why the petition met the criteria.

Mr. Johnson asked what would prevent Mr. Bezanson from doing the 8-ft setback. Mr. Bezanson said it wouldn't be worth making because it would be on the line of where the door would be.

Mr. Parrott noted that the hand-drawn sketch showed the new deck flush to the house, but the tax map note stated that the deck was set in 2 feet from the edge of the building. Mr. Bezanson said the deck would be two feet in. It was noted that the sketch was inaccurate.

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. Parrott moved to **grant** the variances as presented and advertised, and Mr. McDonell seconded.*

Mr. Parrott said it was a simple project in which the deck would be placed into an existing notch at the back of the corner of the building. He said granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance because there would be no change to the essential characteristics of the neighborhood. He said an open deck would not threaten the public's health, safety, and welfare. He noted that the applicant explained his reasons for doing the project. He said the project would improve the condition of the existing deck and would just be a general upgrade to the building. He said that granting the variances would do substantial justice because there was no offsetting situation that would argue that the public would be better off if the variances were denied. It would not diminish the values of surrounding properties because all upgrades like the proposed one could do nothing but help the affected property and surrounding properties. He said the hardship was that the building was fairly tight to the property line and the deck would be set in from the side of the building, so there would be no unnecessary hardship or problems for any of the abutting properties. He noted

that the size of the structure relative to the size of the property indicated that it was the best the applicant could do to build a reasonably-sized deck.

Mr. McDonell said he concurred with Mr. Parrott and had nothing to add.

The motion passed by unanimous vote, 7-0.

Mr. Mulligan recused himself from the petition.

5) Case 12-5

Petitioners: Lucky Thirteen Properties LLC, owner, Lexie’s Portsmouth, LLC, applicant.

Property: 361 Islington Street

Assessor Plan: Map 144, Lot 23

Zoning District: Character District 4- Limited 2 (CD4-L2)

Description: Convert existing building plus 90 s.f. addition to restaurant use.

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

1. A Variance from Section 10.5A41.10A to allow the following: a) a secondary front yard of 66’± where 12’ is the maximum permitted; b) a 30’± left side yard setback where 20’ is the maximum permitted; c) 14.9%± open space where 25% is the minimum required; and d) shopfront façade glazing of 47%± where 17% exists and 70% is the minimum required.
2. A Variance from Section 10.1113.20 to allow off-street parking to be located in a required front yard between the principal building and a street.
3. A Variance from Section 10.5A44.31 to allow off-street parking spaces to be located less than 20’ behind the façade of a principal building.
4. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance.

SPEAKING IN FAVOR OF THE PETITION

Attorney John Bosen on behalf of the applicant was present to speak to the petition. He introduced the owners K. C. Cargill and Alexis Wile, the project engineer Eric Weinrieb, and the project architect Brandon Holben. Attorney Bosen reviewed the history of the property. He emphasized that the restaurant was permitted by right in that particular zone and that there would be minimal changes to the dimensions. He reviewed the criteria and said they would be met.

Mr. Johnson noted that it was a re-use of a gas station and asked whether there were limitations to what the new use could be. Attorney Bosen replied that there were deed restrictions preventing a residential use of the property and that the restaurant was a permitted use. Mr. Johnson verified that there was zero open space. Mr. Weinrieb explained that a small green area in the back yard was part of the parcel. Mr. Johnson asked for a summary of the HDC’s feedback on the current design. Mr. Holben said that the first work session went well, with six Commissions in favor, and the seventh having a problem with the colors.

In response to Mr. Moretti's questions, Mr. Weinrieb said snow removal would be done during large storms and stored on site after small storms. He showed the proposed location for the grease dumpster but said it could be another spot after the final design.

Chairman Rheume said there was some confusion about the left side yard dimensions and asked whether it was 30 feet. Attorney Bosen said it was. In response to further questions from Chairman Rheume, Attorney Bosen said the setback from Islington Street was well within the requirement maximum, and the current wall would be straightened out and placed up against the property line to make the parking spaces at the back side of the property. He said they would add additional greenspace and that there was no intent to have a drive-through.

SPEAKING IN OPPOSITION TO THE PETITION

No one rose to speak.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Ms. Melissa Doerr of 304 Cabot Street said she lived two doors down and had read that the property's deed covenant stated that there would be no water wells for drinking or food processing. Chairman Rheume said the Planning Department could probably address it. She said she supported the location's renovation but was concerned about the traffic flow and parking due to the dangerous intersection of Cabot and Islington Streets, people running the red light, speeding, traffic congestion, and the primary ingress and egress on Cabot Street. She also questioned whether the proposed landscaping plan would really be incorporated, and she suggested a fence in the back of the building for aesthetic reasons.

Ms. Sally Elshout of 311 Cabot Street asked whether the criteria of a hardship outweighing any benefit to the public would be considered related to the Cabot Street intersection. Chairman Rheume replied that the Board took public input and had criteria that they judged the applicant by to decide if the applicant's arguments had merit or not. Ms. Elshout asked whether the maximum occupancy would remain at 50. Mr. Stith said that was what the applicant indicated. Ms. Elshout said she agreed with Ms. Doerr's concerns and was especially concerned about parking availability and the building design, which she felt was not in keeping with surrounding homes. It was noted that the applicant had to go through site plan review, the HDC, and the Planning Board, where issues such as parking, auto access, traffic, and so on would be addressed.

Mr. Dan Hale of 356-358 Islington Street said he wasn't sure that the proposed use was the proper one for the site due to the traffic flow and surrounding residential units, and was also concerned about lighting, operating hours, smoke, and noise. He said the design should blend in better with the neighborhood and look more like Portsmouth.

Ms. Ginny Smith of 217 Cabot Street said she was concerned about the parking issue, which was already a problem on her street. She said the design didn't match the surrounding architecture and felt that the influx of traffic and street parking would be detrimental to the neighborhood.

Mr. Weinrieb said they asked the City to incorporate the future Islington Street Corridor project into their landscape design and that the proposed four trees were part of that project. He said there was an easement to allow a new traffic signal and that a lot of issues would be handled by the Corridor project. He said the restaurant's lighting would be low level and neighborhood friendly and that they would improve ingress and egress.

Attorney Bosen said the restaurant was a permitted use and would be less intense than other permitted uses in that area, and that it met the parking requirements. He said all other concerns would be vetted before the Planning Board. Mr. Holben said the landscape plan would be part of the record. He said the HDC thought that the design was in keeping with, and improved, the existing style. He pointed out that there were neighbors who lived behind the lot who were interested in making their property a restaurant.

Ms. Doerr said her concern was that the Board was kicking the can down the road to the HDC and the Planning board. She said the project could make Cabot Street a main thoroughfare for a commercial business and thought it was incumbent on the Board to consider that impact, especially the entrance and exit plan.

Mr. Stan Smith of 304 Cabot Street said he was receiving texts from the neighbors, who were asking that the Board consider the ingress and egress on Cabot Street and the safety issue.

Mr. Hale said the owners indicated at the HDC work session that they might have runners delivering food to cars instead of a drive-through, which would cause a lot of cars to pull in.

Ms. Elshout reiterated that the intersection would be more unsafe than it currently was and that the trees might not be planted right away.

Attorney Bosen stated that the neighborhood was not a quiet one because it was one of the main corridors in and out of Downtown and was already busy and commercial. He said a restaurant use was permitted and asked the Board to be mindful of property rights.

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

DECISION OF THE BOARD

The Board discussed the petition. Mr. Johnson said the Board was being asked to consider a lot of variances, most of which had to do with the existing location of the building and nature of the site. He said there were a few categories, such as the secondary front yard and the 30-ft side setback. He said the existing open space and shopfront glazing didn't meet the current zoning. He said they would all be improved by the proposal. He said the parking location was predetermined by re-using the existing building and that he understood the issues of ingress and egress off Cabot Street, but the Board wasn't there to consider those issues. He said for the current building to be re-used and to comply with the variances sought would cause further variances to be sought, like if the applicant met all the maximum setbacks, the parking spaces wouldn't fit. He said the project fit into the City's Master Plan, was allowed by CD4-L2 zoning, would activate the street front, and was a better use of that site. Mr. Lee agreed, noting that

Lexie's was already in the neighborhood, and the site would allow a more orderly manner to get in and out than the existing one.

Mr. McDonell said he was sympathetic to the abutters' concerns but he agreed with Mr. Johnson that the variance requests were before the Board due to how the applicant was trying to re-use the building, and he wasn't sure how granting the variances for those requests would have an effect on whether or not people could enter or exit on Cabot Street. Mr. Moretti said he felt for the neighbors and knew Cabot Street was a small street. He said one of his concerns was the traffic flow going onto the property and causing an intense amount of vehicle lights shining into the neighborhood behind the property. He said he hoped the Planning Board addressed some type of fencing. He said he wished there were something in the Ordinance that spoke to the abutters' concerns, but there wasn't. He said the building design was not in the Board's purview.

Mr. Johnson said TAC would take a chunk out of the proposal and would want to know the details about snow removal, fencing, lighting, grease traps, auto and pedestrian access, and so on. Mr. Parrott said he was sympathetic to the abutters' concerns with ingress and egress on Cabot Street and felt that they were entirely justified, but thought that the variances before the Board could not be tied to the traffic pattern in and out of the site. He said it was important that the abutters have their comments on the record for the benefit of the Planning Board, the Traffic and Safety Commission, TAC, and so on. He said perhaps there could be a different traffic flow pattern or signs, but he thought the basic concepts of what was requested from the Board were sound and that the other concerns about heavy traffic going in and out on a small street were very legitimate and needed to be addressed by the proper boards.

Chairman Rheume said the Board was chartered to do very specific things relative to the zoning ordinance and that the first set of variances all related to the character district, which was set up to give the Board better control over zoning and ensuring that new projects and construction would have a look and feel in keeping with the neighborhood. He said it didn't talk to the traffic concerns or the use, just the overall appearance. He noted that a lot of relief was seemingly being asked for but that the existing structure was being repurposed and the applicant was trying to keep it within the look and feel of the neighborhood. He said there would be some things that would difficult to accomplish while reusing the existing structure but that it could be something for the Board to accept. He said that allowing off-street parking was a design element that the Board sought in new structures and he explained why. Chairman Rheume said he understood the concerns of the neighbors relating to traffic and the entry and exit issue but didn't feel that it was within the Board's purview.

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

Mr. Johnson stated that he would refer to his previous comments. He said they had a proven entity within the neighborhood that was relocating, so they had an advantage, and that the existing Lexie's had residential components around it but he hadn't heard any negative feelings expressed. He said the applicant was before the Board in an earnest effort to do the project in the right way and that a lot of issues would be addressed at TAC and the Planning Board that were in their purview due to the potential intensity of use and the change of use. He again addressed the criteria, stating that granting the variances would not be contrary to the public interest and would

observe the spirit of the Ordinance. He said the Board could not argue that the project was not within the character of the neighborhood because Lexie's was already in the neighborhood and it was an allowed use, a use encouraged in the City's Master Plan and part of the activation of the Corridor project. He said it would activate the street front and improve a longtime eyesore. He said substantial justice would be done by granting the variances and thought that the tipping point went to the applicant because they were making an effort to re-use the property as it physically was. He thought it was intense in use but that there were many design aspects in place to mitigate that. He noted that Lexie's was currently on a tight site and was accustomed to the complications that went with a restaurant use in a moderately urban setting. He said that granting the variances would not diminish the value of surrounding properties and that any effort to improve the property would probably bolster surrounding values. He said it was a tasteful restaurant destination that would hopefully benefit the owner and surrounding properties. He said the hardship was tricky because the former use predated the current zoning, but now the building was being repurposed under more modern zoning. He said the hardship was that the existing site of the building and conforming to some of the variances would cause the need for other variances, like parking access widths, and so on.

Mr. Lee said he concurred with Mr. Johnson and was very excited to see the eyesore of the building come back to life as a nice restaurant.

The motion passed by unanimous vote, 6-0.

Mr. Mulligan resumed his voting seat and Mr. McDonnell recused himself from the petition.

6) Case 12-6

Petitioners: National Propane LP c/o Amerigas Eagle Propane, owner and Granite State Gas Transmission Inc dba Unitil, applicant

Property: 1166 Greenland Road

Assessor Plan: Map 280, Lot 2

Zoning District: Industrial District

Description: Install fence and utility structure.

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

1. A Special Exception under Section 10.440 Use #15.12 to allow a utility related structure providing a community-wide or regional service where the use is only allowed by special exception.
2. A Variance from Section 10.521 to allow an 8'± primary front yard setback where 70' is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Rob McSorley of Sebago Technics was present on behalf of the applicant. He introduced Bob Shumrick of Unitil. Mr. McSorley said the building was a maintenance inspection facility and that Unitil was required to do periodic inspections He explained the process, noting the reasons why they couldn't locate the facility in other places. He said the building would be

located near the existing main line near the right-of-way and that it would be partly in Greenland and Portsmouth. He said the Conservation Commission approved their petition with some conditions of approval. He said they also went to a TAC workshop and agreed to install privacy slats as screening. He said TAC asked whether a vehicle leaving the right-of-way would be an issue. He said the DOT requirement was 27 feet clear zone and that they were back another 8 feet and would add a guardrail for more protection. He reviewed the criteria and said they would be met.

In response to Mr. Lee's questions, Mr. McSorley said they would have a gas line inspection every seven years but that the inspector tended to visit every week to ensure that the facility was secure. Mr. Parrott asked why the facility was out in the open. Mr. McSorley said that type of facility was typically above ground and that they would put privacy slats within the chain-link fence to buffer it. In response to Chairman Rheume's questions, Mr. McSorley said the piping was underground until it got into the fenced-in facility area, that the piping assembly was three feet tall, and that it would go far west and headed toward the road because of other areas being part of the LP National Gas facility or in the wetland. He explained the topography and said the back access road would support only that facility. He said there would be no security lighting.

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 special exception and the variance as presented and advertised, and Mr. Mulligan seconded.*

Mr. Mulligan addressed the special exception criteria, noting that the particular use requested was permitted in that zone. He said that granting the special exception would pose no hazard to the public on account of potential fire, explosion, release of toxic materials, etc. because it was a well-designed facility and none of that was likely. He said it would pose no detriment to property values in the vicinity or change the essential characteristics of the area on account of the location, scale of buildings or other structures, parking, accessways, odor, smoke, pollutants, and so on. He said he didn't think that any of those were applicable because it would be a small portion of property shared with the existing gas operation. Granting the special exception would not create a traffic safety hazard or increase the level of traffic or congestion in the vicinity. He noted that the facility would only be sporadically visited by representatives of utilities. He said there would be no excessive demand on municipal services including water, sewer, waste disposal, police and fire protection, and so on because he believed that no one would be impacted by what was proposed, which was to assist in proper maintenance and provision of municipal services. He said granting the special exception would pose no significant increase of storm water onto adjacent properties or streets because it was a minimal facility and he didn't believe there would be any storm water runoff. He noted that the applicant would have to go before TAC and the Conservation Committee to address those concerns.

Mr. Mulligan then addressed the variance criteria. He said that granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance because the essential characteristics of the neighborhood would not be threatened, nor would the public's health, safety, or welfare. Substantial justice would be done because the loss to the applicant would outweigh any benefit to the public by keeping the line on the front yard setback. He said if the applicant were required to comply, it would push the facility much further away from the existing gas main. Granting the variance would not impact the values of surrounding properties. He noted that the special conditions that distinguished the property from others was that it was adjacent to the transmission line that the facility would affect and it was an existing lot used by a gas facility. He said there would be no fair and substantial relationship between the purpose of the front yard setback ordinance and its application to the property. He said the proposal was reasonable and met all the criteria.

Mr. Moretti concurred with Mr. Mulligan. He said another special condition was that the property bordered two towns and was one of the most unique conditions the Board had seen in a while. Chairman Rheaume noted that there were existing structures on the otherwise suitable property that drove the need to push the item toward the road, which was another hardship. He said it sounded like the applicant was doing good things to ensure that it remained safe above and beyond what was required.

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

Mr. McDonell resumed his voting seat.

7) Case 12-7

Petitioners: 409 Franklin Pierce Highway LLC

Property: 917 Greenland Road

Assessor Plan: Map 259, Lot 7

Zoning District: Single Residence B

Description: Demolish existing structure and build new single-family dwelling.

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

1. Variances from Section 10.521 to allow the following: a) a lot area and a lot area per dwelling unit of 11,760± s.f. where 15,000 s.f. is required; and b) an 18'± primary front yard setback where 30' is required.

SPEAKING IN FAVOR

Attorney Derek Durbin was present on behalf of the applicant to speak to the petition. He introduced David Calkins and the project engineer Mr. Eric Weinrieb. Attorney Durbin reviewed the property's history and said the applicant wanted to demolish the existing structure, which was an eyesore, and replace it with a single-family structure that would be slightly smaller in footprint. He reviewed the criteria and said they would be met.

Mr. Mulligan asked about the landscaping plan. Mr. Calkins said the entire lot was pavement and that they planned to remove all the asphalt and install a new driveway. He said they would plant natural trees and install a fence on the Sherburne Avenue side.

**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 COMMISSION

*Mr. McDonell moved to **grant** the variances as presented and advertised, and Mr. Parrott seconded.*

Mr. McDonell said he thought that a residential use was appropriate because it was surrounded by residential uses except for the school. He said that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance, noting that the proposed use was like the other residential uses and wouldn't alter the essential characteristics of the neighborhood or threaten the public's health, safety, or welfare. He said substantial justice would be done because there would be no harm to the general public that would outweigh the benefit to the applicant by taking a structure that was not being used for anything and making it a residential one. He said that granting the variances would not diminish the value of surrounding properties and that it would turn the property into something like the surrounding uses. As far as the hardship test, Mr. McDonell said that the special conditions of the property were that it was a corner lot, oddly shaped, and had a small footprint. He said the applicant wanted to site a small structure as best they could in a limited building envelope and that it would make the existing violations a little less severe.

Mr. Parrott concurred with Mr. McDonell, adding that the replacement of an obsolete, abandoned building with a new house was very appropriate and that the relief requested was reasonable, given the odd shape of the lot. He said it was a win-win for everyone.

Chairman Rheume noted that a significant hardship was the corner lot and a fairly substantial front yard setback, which was faced with two sides that had a 30-ft setback requirement. He said if it were a more normal lot, there would be more flexibility in placing the house. He said the applicant chose the best alternative in keeping the house away from the more traveled road and having the proposed driveway go toward the less traveled road.

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

Mr. Moretti recused himself from the petition.

8) Case 12-8

Petitioners: Kathryn Michele Arbour
Property: 86 Emery Street

Assessor Plan: Map 220, Lot 87-1
Zoning District: Single Residence B
Description: Second free-standing dwelling on a lot.
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:
1. A Variance from Section 10.513 to allow a second free-standing dwelling on a lot.

SPEAKING IN FAVOR OF THE PETITION

The contractor Mr. Jeff Alderson of 99 Bracket Road, Rye, NH stated that the property was evaluated to see what the best location would be for the second dwelling. He said the lot was irregularly shaped and didn't have much usability due to a lot of ledge. He said the proposed unit was modest and would be a second home for the family, not a rental property. He reviewed the petition, noting that the current driveway was cleared land to bring machinery to the barn and that they planned to have designated parking on the driveway and also do some landscaping. He said a buffer would be maintained to hide the sight of school buses in the front.

Mr. Jeff Matheson of 86 Emery Street said he was the owner and was born in the house. He said he converted the barn and was trying to adapt it to the limited mobility of his parents-in-law. He reviewed the criteria and said they would be met.

In response to Chairman Rheaume's questions, Mr. Mattheson said the second dwelling was just under 700 feet and the structure was 20 feet away from the main house. He said he was before the Board instead of the Planning Board for the attached accessory dwelling unit (ADU) because it was in front of the principal dwelling unit and he couldn't apply to do that until he and his wife occupied the main dwelling. He said he hoped to have his in-laws in the home at the same time that he and his wife occupied the main home. He said both structures would be completed and occupied at the same time by August 2018.

The owner Ms. Kathryn Arbour briefly explained why she wanted to move her parents close by.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. John Flintosh of 261 Myrtle Avenue said his property would be close to the renovated barn and that he would see the top of another dwelling when the project was completed. He said he was also worried about runoff from the driveway and didn't know if the sewer line going to the barn would be able to handle an additional dwelling. He also asked what would happen if the family moved. Mr. Mulligan asked whether he would be opposed if the additional dwelling were sited further behind the barn. Mr. Flintosh said he would have less opposition to the project.

Ms. Juliana Flintosh of 261 Myrtle Avenue said the applicant was building another dwelling on a lot that was not supposed to have two dwellings on it. She was concerned that someone could do the same thing on the other two available lots, and she feared the dwelling could become a rental unit if the family moved and would have a detrimental impact on her home.

Ms. Diane Kozikowski of 287 Myrtle Avenue said she was the rear abutter and that the property used to be part of a bigger property that had gone before the Board before. She said she was concerned that the two additional lots could have two more houses on each lot. She said the proposed house didn't fit the neighborhood and would negatively affect surrounding properties.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Matheson said both structures would have matching natural cedar siding and the barn would be a salt box style. He said it was common to have a barn structure behind a dwelling and would improve curb appeal. He noted that ledge under the barn necessitated the addition's location.

Mr. Alderson said the applicant was within the setbacks and could build a 2-story garage if they wanted to. Chairman Rheume asked whether anything on the lot prevented the second unit being placed behind the barn. Mr. Alderson said there were unknowns, such as how far the sewer going to it was and whether going through the ledge would be more destructive.

Mr. Matheson said the back portion flattened out and the proposed dwelling was the same elevation as the street and driveway, which made for less grade change.

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

DECISION OF THE BOARD

Chairman Rheume said they had a new ordinance that related to the issue and a recent State law that stated that owners could add an ADU in a single-family residence district. He said there were certain requirements that the City could create a zoning ordinance around, including that the ADU not exceed 750 s.f. of living area and that it be separated from the single-family dwelling by 20 feet. He said the exterior design had to be compatible with other structures on the lot as well as provide open space and landscaping. He said the ADU would maintain a compatible relationship to adjacent properties in terms of location and design and would not significantly reduce the privacy of adjacent properties.

Mr. Stith said that no ADU would be located in front of any required front yard or closer to the street than the principal building.

The Board discussed the petition. Mr. Johnson said the Board could stipulate an after-effect ADU tie-in, with the end result being that the ADU have binding requirements to alleviate concerns about future rental use. Chairman Rheume agreed but said an ADU couldn't be made into a condo and it was required that one of the two units be occupied by the owner. Mr. Parrott said the most striking thing about the site was its size and its shape, which really suited the 'odd' category. He also thought that the nature of the property's topography with its ledge limited the feasibility of developing it. He said another striking factor was the eclectic nature of the neighborhood, with its high-tension wires, commercial uses, and houses spread out in odd arrangements with respect to each other and the street. He said it was an unusual site and the Board had the authority by State law to consider more than one unit on a single residential lot. He said that a good argument could be made for placing the structure on the lot where proposed,

due to the rugged topography. He said it was an effort to make reasonable use of a difficult site. He commended the applicant for rebuilding rather than tearing down the barn and said it would preserve a little bit of Portsmouth.

Mr. McDonell said he was confused about the timing of an ADU Conditional Use Permit (CUP) request and asked whether the principal dwelling had to be occupied before the issuance of the CUP and be conditional on there being a primary residence. Mr. Stith read the section of the ordinance stating that either the principal dwelling unit or the ADU shall be occupied by the owner of the dwelling. It was further discussed. Mr. McDonell said a reasonable argument could be made that there was some issue with the location and the privacy because they affected the neighboring property. Chairman Rheume said that the idea that one couldn't go before the Planning Board until the property was physically occupied seemed overwrought and felt that the applicant needed a resolution so they could build the ADU.

Mr. Johnson suggested tabling the application. He said the Board was being asked to find a compromise and that the Planning Board had the power and ability to make a decision by asking the applicant to prove to them that they were occupying the building. It was further discussed. Mr. Stith noted that ADUs could not be located in front of a principal dwelling. Chairman Rheume said he felt that the applicant would end up in land use 'ping-pong' and that there could be another month's delay. He said the Planning Board could weigh in, having helped create it and having similar petitions, thus having more experience.

Mr. Mulligan said that the Board could consider a variance conditioned on the applicant's meeting the requirements of who was allowed to have an ADU, but it still didn't address the design element issues that the Planning Board was supposed to address. He said that he wasn't comfortable making those findings, based on what the Board had. He asked whether tabling the petition would give the applicant the opportunity to agree or take their chances on the Board's decision. Chairman Rheume said that if they tabled it and had the applicant work with the Planning Board by resolving it through their ADU process, it could come back before them if it required a variance. He said the other option was for the Board to make a decision that night but couldn't guarantee that it would be favorable. It was further discussed.

*Mr. McDonell moved to **table** the petition and ask the applicant to apply to the Planning Board for a Conditional Use Permit.*

Mr. McDonell said he thought that it was more appropriate for the applicant's request to go through the Planning Board because they were tasked with looking at those criteria and determining the whether the neighbors' privacy concerns had been addressed.

Mr. Mulligan seconded the motion.

Mr. McDonell said he would incorporate his earlier comments. Mr. Mulligan said he concurred with Mr. McDonell. He said the timing issue was unfortunate, but it wasn't a justification for the Board to usurp the CUP process and ignore the specific criteria that the Planning Board had to find to grant the CPU for the ADU. He said he personally thought it should be granted, but there

were legitimate concerns and findings to be made, and the Board members were not the ones to make those findings.

Mr. Johnson said it was a reasonable request because it was a Single Residence B Zone and the Board would say 99 out of 100 times that there couldn't be two residences on a single lot.

Mr. Parrott said it was referred to the Board by the Planning Department, and he thought they had enough information to vote it up or down. He said it could later be determined that the Board acted improperly. He said he didn't think he would support the motion to table it.

Chairman Rheaume said it was a tough situation because there was urgency on the part of the applicant, but he thought the Board had to arrive at the right resolution and table the petition to see whether it could be resolved through the Planning Board. He said he felt badly that the applicant was put in that position but the Board had an obligation to ensure that it came out right. He said the abutters would be impacted.

*The motion **passed** by a vote of 4-2, with Mr. Parrott and Mr. Lee voting in opposition.*

IV. ADJOURNMENT

*It was moved, seconded, and **passed** by unanimous vote to adjourn the meeting at 11:00 p.m.*

Respectfully submitted,

Joann Breault
BOA Recording Secretary