

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

7:00 P.M.

November 20, 2018

**MEMBERS PRESENT:** Chairman David Rheaume, Vice-Chairman Jeremiah Johnson, Jim Lee, Peter McDonell, Christopher Mulligan, and Alternates Phyllis Eldridge and Chase Hagaman

**MEMBERS EXCUSED:** Arthur Parrott, John Formella

**ALSO PRESENT:** Peter Stith, Planning Department

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Chairman Rheaume announced that both alternate Board members, Mr. Hagaman and Ms. Eldridge, would be voting on all petitions due to the absence of two regular members.

**I. APPROVAL OF MINUTES**

A) October 16, 2018

*It was moved, seconded, and **passed** by unanimous vote to approve the October 16, 2018 minutes as presented.*

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**II. OLD BUSINESS**

A) Request for Extension – 163 Deer Street, Lot 4

*Vice-Chair Johnson moved to **grant** the request for extension, and Mr. Lee seconded.*

Vice-Chair Johnson stated that developing projects of that nature and size, especially in coordination with multiple other projects, took time and had to go through site plan and Historic District Commission (HDC) reviews. He said he did not find the request unreasonable and didn't have a problem with the request being five months early.

Mr. Lee concurred and had nothing to add.

*The motion **passed** by a vote of 6-1, with Chairman Rheaume voting in opposition.*

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B) Request for Extension – 165 Deer Street, Lot 3

*Vice-Chair Johnson moved to **grant** the request for extension, and Mr. Lee seconded.*

Vice-Chair Johnson noted that his previous comments applied and said that it was reasonable to grant the request. Mr. Lee concurred.

*The motion **passed** by a vote of 6-1, with Chairman Rheaume voting in opposition.*

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C) Request for Rehearing for property located at 127 & 137 High Street

Chairman Rheaume stated that the abutter was challenging the Board's granting of previous variances and asked the Board members whether they felt there was some error of procedure in their original consideration or if there was new information that could alter the outcome.

Vice-Chair Johnson said the Board had been extremely deliberative in deciding whether the request was approvable and that both sides were well represented and heard fairly. He thought a lot of the appellant's case was made on the value of surrounding properties and the disregard for the assessment of the paperwork provided to the Board. He said there was no specific error in the Board's process, approach, or motion made and that he did not agree with the abutter's appeal, specifically in relation to the diminution of value. Mr. Hagaman said there was no technical or procedural error or new information of facts presented. Mr. McDonell said the Board heard a lot of testimony indicating that the values of some of the neighboring properties would be diminished if what was proposed ended up being built, but that the diminution in value was not due to the granting of the variances. He said there was no case law on the value of surrounding properties. Chairman Rheaume agreed, saying the Board reasoned that the appellant's property value would be lower because the property had never been in close proximity to other buildings, and that the Board was not approving the fact that the building would be close to the neighboring properties. He said the Board had correctly judged it against what the applicant was requesting and that the appellant didn't have a reason to request a rehearing.

## **DECISION OF THE BOARD**

*Mr. Mulligan moved to **deny** the request for rehearing, and Mr. Hagaman seconded.*

Mr. Mulligan stated that he would incorporate the statements from the Board's discussion. He said the Board deliberated for a significant amount of time and handled it correctly and that he didn't see anything new in the submitted materials.

Mr. Hagaman concurred with Mr. Mulligan.

*The motion to deny the request for rehearing **passed** by unanimous vote, 7-0.*

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### **III. PUBLIC HEARINGS - NEW BUSINESS**

1) Case 11-1

Petitioners: Ryan and Karen Baker

Property: 137 Wibird Street

Assessor Plan: Map 134, Lot 48

Zoning District: General Residence A

Description: Construct semi-attached garage.

Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including variances from Section 10.521 to allow the following:

- a) a 0' left side yard where 10' is required; and
- b) 27%± building coverage where 25% is the maximum allowed.

#### **SPEAKING IN FAVOR OF THE PETITION**

The owner Ryan Baker was present to speak to the petition. He stated that the proposed garage would be partially attached to the main house because there were few options due to the new driveway's placement. He reviewed the criteria and said they would be met.

Vice-Chair Johnson said the Board had a difficult time with a zero-foot setback because of excavation concerns and issues of overhang and maintenance access on the neighbor's property. Mr. Baker said the garage was designed so that there would not be a long overhang on the sides and that there was enough wiggle room so that the garage would not encroach on the neighbor.

Mr. Mulligan asked what the single-story addition was. Mr. Baker said it was a kitchen in an alcove. In response to Mr. Hagaman's questions, Mr. Baker said he would remove three out of five trees that were near the property line and that he could not pull the garage forward or place it more front-facing without an additional variance. Mr. Lee noted that the Planning Staff recommended that an applicant get permission from a direct abutter to construct a garage.

Chairman Rheume said the previous owner appeared before the Board two years earlier with a request to divide the property and had said it would be fully conforming. Mr. Baker said he didn't have the property's full history and thought a garage wouldn't be a huge change for the neighborhood. He asked that he not be penalized for the previous owner's action.

#### **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.

## DISCUSSION OF THE BOARD

Mr. Mulligan said there were not a lot of places to site the garage because relief was previously granted to subdivide the lot, but he felt that the little addition on the house that drove the siting of the garage was part of a series of decisions that were made that left nowhere for the applicant to go. He said the property had a fairly large structure on the lot already and that there didn't seem to be a lot of room for a garage. He said that going from full compliance to 100 percent non-compliance was a lot to ask, even though the proposed garage was modest and zero lot lines were common in the neighborhood. Mr. Hagaman said he didn't see any hardship from not having a garage, noting that a lot of the homes in the neighborhood didn't have garages. Vice-Chair Johnson said he couldn't approve a zero setback unless the applicant had an easement for the neighbor's property line. He said he wasn't comfortable with the questionable numbers and didn't think there was a real hardship. Chairman Rheame noted that a garage wasn't essential to enjoy the home and that he'd want to see some easement from the neighboring lots. He thought the hardship was driven by the fact that the property was subdivided into two lots, which wasn't the applicant's fault, but felt the applicant knew the challenge of putting a garage on the property when they bought the home. Mr. McDonell said he could support the project because the hardship was due to the lot being created out of a larger lot and there was no other reasonable place to put the garage. Ms. Eldridge asked whether the petition could be approved if the abutter approved. Chairman Rheame said it could, with a stipulation that the abutter grant an easement as a legal method to ensure that there was something left for future construction and maintenance. Chairman Rheame suggested tabling the item to a future meeting.

## DECISION OF THE BOARD

*Vice-Chair Johnson moved to **table** the petition to the December meeting or a future meeting so that the applicant could return with another option that reflected the Board's discussion relating to their concerns with the zero-lot property line by increasing the setback by a foot or more, access to/from the adjacent property through an agreement with the neighboring property owner, or a relocation or redesign of the garage itself,*

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

### 2) Case 11-2

Petitioner: Potter-Schwartz Family Revocable Trust, Michael Schwartz and Sharon Potter  
 Property: 442/444 Middle Street  
 Assessor Plan: Map 135, Lot 44  
 Zoning District: Mixed Residential Office  
 Description: Vehicular circulation supporting commercial and residential units.  
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variances from Section 10.1114.32 to allow the following:

- a) vehicles to enter and leave a parking space by passing over any other parking space or requiring the moving of another vehicle; and
- b) vehicles to enter or leave the parking area by backing into or from a public street or way.

### **SPEAKING IN FAVOR OF THE PETITION**

The owner Mike Schwartz was present to speak to the petition and said he wanted to house a small consulting company in one side of the duplex. He said the parking would be used by the employees only and no customers, and that the only alternative would be to use the backyard.

In response to the Board's questions, Mr. Schwartz said one unit would be office space and the other would remain residential. He said parking would not be a problem because he would be the first one to arrive at the office and the other employees would park behind him or use street parking. He said there was adequate parking space as well as a garage.

### **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.

### **DISCUSSION OF THE BOARD**

The Board discussed whether it was safe to have several cars back out onto Middle Street. Mr. Mulligan said he worked on Middle Street that that they usually had two people at most using the driveway. He said the alternative for the applicant was to either abandon the idea of having a mixed residential use or to turn his backyard into a parking lot, which would be a waste of green space. It was pointed out that, if stacked parking were approved, another business that was more customer-oriented could move in. A stipulation was suggested that the variances be granted only for a business that didn't require customers at the site. Mr. Mulligan said he didn't think it was necessary to come up with conditions that would limit the nature of the office use because the site was zoned for mixed-residential and wouldn't work for a business with a more intense use. Vice-Chair Johnson said that backing out and stack parking would just require patience and that there would be sufficient time for a car to back out due to the traffic light at the corner.

### **DECISION OF THE BOARD**

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

Mr. Mulligan referred to the Board's discussion and said that granting the variances would not be contrary to the public spirit and would observe the spirit of the Ordinance. He said the essential character of the neighborhood would not be altered because it was a mixed residential and commercial district that permitted the applicant to convert an existing dwelling unit to office use.

Substantial justice would be done because the loss to the applicant if denied would not be balanced by any gain to the public. He noted that the applicant would have to create institutional parking in the backyard in order to comply with the parking requirements for the use. He said granting the variances would not diminish the value of surrounding properties because there would be no physical change to the property, the use was permitted in the zone, and stacked parking for office use could work. Literal enforcement of the Ordinance would result in an unnecessary hardship because the property was designed for residential purposes long before office use was permitted in the zone, and the existing parking wasn't configured to current zoning requirements, so there was no fair and substantial relationship between the purpose of those requirements and their application to the property. He said that the only way the applicant could comply would be to eliminate the greenspace in the backyard. He said it was a reasonable request and permitted use within the zone and met all the criteria.

Mr. McDonell concurred with Mr. Mulligan and had nothing to add.

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

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Vice-Chair Johnson recused himself from the petition.

### 3) Case 11-3

Petitioners: Arbor View and The Pines LLC c/o Forest Properties Management Inc.  
Property: 145 Lang Road  
Assessor Plan: Map 287, Lot 1  
Zoning District: Garden Apartment/Mobile Home Park  
Description: Add two apartment buildings for a total of 186 dwelling units on the property.  
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variances:  
a) from Section 10.521 to allow a lot area per dwelling unit of 8,321± s.f. where 10,000 s.f. is required; and  
b) from Section 10.522 to allow two new multifamily dwellings with a maximum building length exceeding 160 feet.

### **SPEAKING IN FAVOR OF THE PETITION**

Attorney Tim Phoenix was present on behalf of the applicant to speak to the petition, He reviewed the site plan and noted that there was significant density due to the wetland. He reviewed the criteria and said they would be met.

Mr. Hagaman said the proposed new buildings were shorter than the existing ones and asked whether 160-ft long buildings were considered that wouldn't require any variances. Attorney Phoenix said the number of units drove the building lengths. Chairman Rheume asked whether the price for the new units would equal the price for the current ones. Attorney Phoenix agreed.

### **SPEAKING IN OPPOSITION TO THE PETITION**

James Creteau of 214 Lang Road said the applicant wanted to maximize density within the complex by adding new units that would pose safety concerns relating to traffic and pedestrians. He said a previous variance granted in 1978 did not relate to the new variance required.

Richard Clark of 230 Lang Road said he was an abutter and thought the petition would threaten the safety of the residents because accidents were common at the intersection. He suggested that the southern entrance be blocked so that traffic would use Roberts Road that had a traffic light. He also suggested that a drainage study be done due to concerns about the wetland.

### **SPEAKING, TO, FOR, OR AGAINST THE PETITION**

Attorney Phoenix said they were requesting 32 units more than were allowed by right. He said they had not done a traffic study yet but felt that the additional traffic from the added units would be negligible compared to the existing traffic. He noted that stormwater, drainage, and traffic concerns would be vetted at the Planning Board meeting.

### **DISCUSSION OF THE BOARD**

Mr. McDonell said the additional units would not add much to the few existing traffic concerns on Lang Road and that stormwater and runoff concerns were not issues for the Board to decide. He said the lot area per dwelling unit calculation was technically right, but a large part of the lot was not developable, so he felt that the relief was more substantial than what was shown on paper. Otherwise, he felt that everything requested was reasonable. Chairman Rheume agreed that the project would drive density into the one corner that was developable but thought it didn't feel out of place with the character of the existing development.

### **DECISION OF THE BOARD**

*Mr. Hagaman moved to **grant** the variances as presented and advertised, and Ms. Eldridge seconded.*

Mr. Hagaman said that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance. He said the new buildings were in keeping with the others, even with the potential concerns over density since part of the property wasn't developable as a wetland. He said there was no evidence that the public's health, safety, and welfare would be affected, noting that the Board had discussed how the Planning Board would consider traffic and water runoff. He said granting the variances would do substantial justice because there would be no gain to the public that would outweigh any loss to the applicant. He said the values of surrounding properties would not be diminished because the hidden development was set off from other neighboring properties and not within sightlines of those properties. He said that literal enforcement of the Ordinance would result in unnecessary hardship because the special conditions were that there was a lot of wetland that was not developable, so there was no fair and substantial relationship between the general purposes of

the Ordinance and their specific application to the property. He said the proposed use was a reasonable one, especially since parking was taken care of for the additional units and similar buildings were already on the property that did not damage the surrounding wetlands or buffer.

Ms. Eldridge concurred with Mr. Hagaman, noting that the buildings were appropriate for the site and would be a good addition to the neighborhood.

Chairman Rheaume agreed that there was a traffic issue on the corner of Lang and Lafayette Roads but said it was outside the applicant's ability to solve it. He pointed out that residential uses had less staggered traffic uses than businesses and that there was a traffic light at Roberts Avenue. He noted that the issues would go before the Planning Board and the Technical Advisory Committee (TAC).

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

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Vice-Chair Johnson resumed his voting seat.

#### 4) Case 11-4

Petitioners: Petition of Wayne and Kristin Barrows  
Property: 55 Lafayette Road  
Assessor Plan: Map 151, Lot 10  
Zoning District: General Residence A  
Description: Subdivide one lot into Lot 1 (conforming) and Lot 2 (nonconforming).  
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance for Lot 2 including variances from Section 10.521 to allow the following:  
a) a lot area and lot area per dwelling unit of 6,251± s.f. where 7,500 s.f. is required for each; and  
b) 96'± continuous street frontage where 100' is required.

#### **SPEAKING IN FAVOR OF THE PETITION**

Attorney Tim Phoenix was present on behalf of the applicant. He reviewed the petition and emphasized that an additional affordable home lot in Portsmouth would be attractive to a young family. He reviewed the criteria and said they would be met.

Chairman Rheaume asked whether a reasonably-sized house could fit on the property without the required setbacks, and Attorney Phoenix agreed. In response to Mr. Hagaman's question, the applicant Mr. Barrows said that the new lot was developable despite the exposed rock and trees. He said he hired an expert and was told that there would be no issues in making the lot buildable.

#### **SPEAKING IN OPPOSITION TO THE PETITION**



Georgina Rodriguez-Lapage of 20 Hampshire Road said she lived behind the applicant's property and didn't think it would be affordable housing. She was concerned that it could house a multi-story building. She said the property was primarily ledge and sloped into her yard, so she was concerned about water runoff and damage to her home's foundation.

Sandy Rodriguez of 20 Hampshire Road said she was concerned about drainage issues, change in the neighborhood's character, and the potential for the house to overlook her home. She asked that there be a stipulation for drainage and potential damage to her home's foundation.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

Attorney Phoenix said the water and ledge concerns would be vetted by TAC and the Planning Board and strongly felt that the project would not harm the neighbors.

The owner Wayne Barrows said he understood the abutters' concerns but that the new home could be a starter home for a young couple in an economy where homes were very expensive in Portsmouth. He said he would be happy to mitigate the water issues.

No one else spoke, and Chairman Rheaume closed the public hearing.

### **DISCUSSION OF THE BOARD**

Mr. Stith said the proposed single-family home would not have to go through site review but that the Inspection Department would look into the drainage and erosion issues. Mr. McDonell said he had difficulty seeing why the site being developed would need a variance. He said he had no big concerns with subdividing the lot but questioned whether the Board would want to see the applicant return in a year or so for further variance approval; he was also concerned about the drainage issue and the potential for the home to impose on the back neighbors. Mr. Hagaman said it looked like the new home would be a long, narrow house in the middle of the property. Vice-Chair Johnson said the relief was minimal. He thought the ledge might cause problems but that a better scenario would be likely, and that the nature of the lots would drive the house to be small. Ms. Eldridge said it was a request for a modest change and that the hardship was the shape of the land. She said the frontage and square footage were in keeping with the neighborhood and that the drainage issue would happen with the design. Mr. Lee said it was a great location for a modest house and that someone would buy it because the real estate prices in Portsmouth were driven by location. Mr. Hagaman said the relief requested was reasonable. Chairman Rheaume agreed that a modest home on the property would be in keeping with surrounding properties.

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

Mr. McDonell said that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance by not changing the essential character of the neighborhood or posing a threat to the public's health, safety, and welfare. He said it was clear that the Board was not being asked to approve the end result, which would be an existing home

and a new home that would have to be a modest size. He said that one of the lots would be conforming in every way, and the other lot in a few ways. He said some of the neighbors had concerns about an imposing structure overlooking their home and drainage issues, but he thought the process for preventing that would be followed. He said granting the variances would do substantial justice and that the benefit to the applicant would outweigh any harm to the general public because the benefit to the applicant was to make more use of his property, and an additional benefit to the public would be having an additional modest-sized house in Portsmouth. He said the values of surrounding properties would not be diminished, assuming that the process was followed; that there would be no increase in drainage; and that, given the size of what was allowed by right to be built on that lot, there wouldn't be an imposing structure. He said he would be hesitant about granting any additional relief to the new lot if an applicant who owned it came back and asked for setback relief, and so on. As for the hardship, he said the special conditions of the property that distinguished it from others in the neighborhood were that its street frontage relief, lot-area-per-dwelling relief, and minimal lot size area relief were all driven by the lot's shape. He said he saw no fair and substantial relationship between the purpose of the Ordinance and its application to the proposal and thought the proposed use was reasonable.

Mr. Lee concurred with Mr. McDonell and had nothing to add.

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

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Chairman Rheaume recused himself from the petition, and Vice-Chair Johnson assumed his seat as Acting Chairman.

#### 5) Case 11-5

Petitioner: Paul Lane  
 Property: 428 Hanover Street  
 Assessor Plan: Map 138, Lot 7  
 Zoning District: General Residence C  
 Description: Construct a two-story rear addition.  
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variances:  
 a) from Section 10.521 to allow a left side yard of 5.2'± where 10' is required; b) from Section 10.521 to allow a rear yard of 9.4'± where 20' is required; and  
 b) 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 Tim Phoenix was present on behalf of the applicant and introduced the project engineer Alex Ross and the applicant Paul Lane. He reviewed the site plan. He said he had a letter of

approval from the condominium association and also submitted an email from the abutter at 440 Hanover Street who approved the project. He reviewed the criteria and said they would be met.

Mr. Hagaman asked what prompted the need to go so far into the 20-ft setback in the rear yard and going within 10 feet in some areas instead of a more modest addition in the back. Mr. Ross said they were just trying to get livable space.

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

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

### **DECISION OF THE BOARD**

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

Mr. Mulligan said that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance, and the essential character of the neighborhood would not be altered, nor the public's health, safety, and welfare threatened. He said substantial justice would be done because the loss to the applicant if strict conformance to the setback requirements was required would outweigh any gain to the public. He noted that what drove the side yard setback relief was the fact that the applicant had to fit the addition in with the existing bulkhead and that it wasn't reasonable to require him to remove it. He said if the applicant was forced to conform to the 20-ft setback, any addition would be extremely small and of negligible use to the applicant. He said granting the variances would not diminish the value of surrounding properties because what was proposed would improve values by way of new construction and a more livable dwelling when renovated, and some of the existing non-conformities would be addressed. He said the hardship was due to a small lot that was already non-conforming with the setbacks, the existing configuration of the house and its siting and the location of the bulkhead that drove the siting of the proposed addition, and the fact that some of the neighboring uses were large multi-family dwellings, which were special conditions of the property that distinguished it from others in the area such that there was no fair and substantial relationship between the purpose of the rear and side yard setback requirements and their application to the property. He said the use was a reasonable one and met the criteria.

Mr. Lee concurred with Mr. Mulligan and had nothing to add.

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

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Chairman Rheame resumed his seat; Acting Chairman Johnson resumed his seat as Vice-Chair.

*It was moved, seconded, and passed by unanimous vote to **extend** the meeting beyond 10:00.*

6) Case 11-6

Petitioner: Petition of Patrick Liam Hughes  
Property: 65 Fields Road  
Assessor Plan: Map 170, Lot4  
Zoning District: Single Residence B  
Description: Approve existing nonconformities of the lot in order to become eligible for an attached accessory dwelling unit.  
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including variances from Section 10.521 to allow the following:  
a) a lot area of 7405.2± s.f where 15,000 is the minimum required;  
b) a 16.9'± rear yard where 30' is required;  
c) a secondary front yard of 17'± where 30' is required; and  
d) building coverage of 23±% where 20% is the maximum allowed.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Derek Durbin was present on behalf of the applicant. He reviewed the property's history, noting that the existing addition was constructed as a second dwelling unit and used that way for several years before the applicant bought the property. He discussed which area of the residence would be used as an attached auxiliary dwelling unit (ADU) and said that everything would be contained as it presently was. He reviewed the criteria and said they would be met.

In response to questions from the Board, Mr. Hughes said a tractor was in front of the building because the main water pipe collapsed, and the stairs had to be put back in. He said the ADU would be 760 square feet and that there was greenspace between the property and the road.

**SPEAKING IN OPPOSITION TO THE PETITION**

Frank Dietrich of 45 Fields Road said the variances should be denied because the district was a single-residence one and an ADU was not legal.

**SPEAKING TO, FOR, OR AGAINST THE PETITION**

Edward Kaylor of 84 Sewall Road said the 3-car driveway would be the only one of that width in the neighborhood.

Attorney Durbin said the reason for widening the driveway was to accommodate the third car and that the Ordinance allowed the use.

No one else spoke, and Chairman Rheume closed the public hearing.

**DECISION OF THE BOARD**

Chairman Rheume said the petition still had to go before the Planning Board for a Conditional Use Permit (CUP), as mandated by NH State Law that was passed two years before, which stated that even in single-residence districts, homeowners had the right to add an ADU of the size that the applicant requested. He said the Ordinance was updated to reflect the Statute and that there would be further opportunity for public input as part of the CUP.

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

Mr. Lee said that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance. He said a homeowner was allowed to have an ADU on their property by right and that there would be no new construction, so the essential character of the neighborhood would not be altered, nor would the public's health, safety, and welfare be threatened. He said that granting the variances would not diminish the value of surrounding properties and that literal enforcement of the provisions of the Ordinance would result in unnecessary hardship because it would prevent the owner from using what was already there and deriving some income from it if he chose to. He said there was no fair and substantial relationship between the general public purposes of the Ordinance and its specific application to that provision. He said the use was a reasonable one.

Mr. Mulligan concurred, adding that the hardship was due to a small corner lot that was half the lot area required by the current zoning and drove much of the relief required. He said it was all dimensional relief based on existing conditions and that the corner lot would never comply with the setbacks and lot area requirements, noting that the ADU law required municipalities to provide opportunities for ADUs and the applicant's case was a special one. He saw no fair and substantial relationship between the purpose of the dimensional requirements and their application to the project. He said it was a residential use in a residential zone.

Chairman Rheume said he would support the motion and noted that a process was in motion that would result in applicants not having to go before the Board for that type of relief.

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

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7) Case 11-7

Petitioner: Joseph and Ellen Yarborough  
 Property: 746 Middle Road  
 Assessor Plan: Map 232, Lot 49  
 Zoning District: Single Residence B  
 Description: Subdivide a lot into two nonconforming lots with an existing single family home and a single family home to be constructed.  
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variance:

- a) from Section 10.521 to allow continuous street frontage of 50' for each lot where 100' is required for each.

Chairman Rheume noted that, in 2014, the Board denied the same type of request. He cited Fisher v. City of Dover, which stated that an applicant had one opportunity to appeal if denied by the Board if the applicant had a material change of circumstances.

The Board discussed it. Mr. Hagaman said that the circumstances that changed were the encouragement of ADUs, but the variances were to divide the lot to build a separate house on one parcel, so he felt that the application didn't really pertain to the change in law. Mr. Mulligan said the application was almost exactly like the previous one and that he didn't think the primary concern in 2014 was that a subdivided lot would increase density, but that it was more that the amount of frontage relief required wasn't justified. He said there was no appropriate hardship shown because the existing lot was conforming and that what was proposed were two non-conforming lots. Chairman Rheume agreed that not much had changed since the original application, noting that it was a huge stretch to think that the ADU law made the proposal different or more acceptable or appropriate than was proposed before.

Vice-Chair Johnson said he supported the project before and thought there were redeeming qualities in the new proposal. He said the acceptance of the ADU was a recognition of places in existing parcels to build up Portsmouth's housing infrastructure. He said the physical appearance itself was close to what it was before and that the extra detail helped very much. Chairman Rheume said he could buy into that argument more if the previous application had been for creating something very ADU-like and was denied by the Board and the applicant was returning because the ADU law said the project was acceptable. He said it wasn't the same project at all and that there were two very different concepts.

*Mr. McDonell moved to **invoke** Fisher v. City of Dover stating that it applied and to preclude the Board from hearing the current application. Mr. Hagaman seconded.*

Mr. McDonell said he would incorporate everyone's earlier comments. He noted that he wasn't present in 2014 but that the Board's discussion led him to believe that it was the same request. He said he understood the reasoning behind the request in light that the new ADU ordinance was a material change in the circumstances, but he agreed with the Board that it would make sense in the case where the earlier application was for an ADU, so there was no material change in circumstances whether the circumstances were on the ground or the law itself that affected the merits of the application such that it made it different enough in nature and degree.

Mr. Hagaman concurred with Mr. McDonell, adding that he didn't think a more detailed application was a materially different application or that the legal standard or the change in the municipality ordinance pertaining to the ADU was a material change impacting the application. He said it was a fundamentally different application than an ADU, subdividing a property and adding a much larger home as opposed to adding a smaller, subordinate ADU.

Chairman Rheume agreed that a small, subordinate structure in common ownership with the primary structure was very different from the proposal to create two separate lots with the potential of two separate owners for both of those lots.

### **DECISION OF THE BOARD**

*The motion to invoke Fisher v. City of Dover and decline to hear the petition **passed** by unanimous vote, 7-0.*

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Mr. Mulligan and Mr. Hagaman recused themselves from the petition.

8) Case 11-8

Petitioner: Portsmouth Housing Authority  
Property: Gosling Road (40 Wedgewood Road)  
Assessor Plan: Map 239, Lot 12  
Zoning District: Gateway Neighborhood Mixed Use Corridor (G-1)  
Description: Convert 670± s.f. in an existing recreation center to pre-school use.  
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:  
a) a special exception under Section 10.440, Use #7.12 to allow a group day care facility including private preschool and kindergarten where the use is only allowed by special exception.

### **SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernie Pelech was present on behalf of the applicant. He reviewed the application, noting that the preschool would convert 670 square feet of space in the existing recreation center. He reviewed the criteria and said they would be met. He said there were four dedicated parking places on site and that traffic wouldn't be affected because most of the students would walk.

In response to Chairman Rheume's questions, Attorney Pelech said there was a demand for a preschool in that community and that the number of employees would be two.

### **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**

*Vice-Chair Johnson moved that the special exception be **granted** for the petition as presented and advertised, and Mr. Lee seconded.*

Vice-Chair Johnson said the preschool would be a great, conducive use for the recreational center and was allowed. He said granting the special exceptions would pose no hazard to the public or adjacent properties on account of potential fire, explosion, release of toxic materials, and so on because common sense dictated that those would not be issues for that type of use. He said there would be no detriment to property values in the vicinity or change to the essential characteristics of any area, including residential neighborhoods or business districts on account of location or scale of buildings, parking areas, odor, smoke, and so on. He said the building already existed and had a similar use. He said granting the special exceptions would pose no creation of traffic safety hazards or traffic increase and so on because the attendees lived in the neighborhood and would be dropped off by foot or stroller. He said there might be the occasional drop-off by car but there was already a fair amount of residential traffic and he saw no increase. He said there would be no excessive demand on municipal services and so on because the use of the facility as a recreational center had higher peak flow times than a preschool. He noted that an increase in stormwater and so on was a non-issue because the building already existed.

Mr. Lee concurred and had nothing to add.

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

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#### **IV. OTHER BUSINESS**

Mr. Stith stated that elections would be held at the December meeting.

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#### **V. ADJOURMENT**

*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