

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

7:00 P.M.

OCTOBER 15, 2019

**MEMBERS PRESENT:** Chairman David Rheaume, Vice-Chairman Jeremiah Johnson, John Formella, Jim Lee, Peter McDonell, Chris Mulligan, Arthur Parrott, Alternate Phyllis Eldridge, Alternate Chase Hagaman

**MEMBERS EXCUSED:** None

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

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**I. APPROVAL OF MINUTES**

**A) September 17, 2019**

*It was moved, seconded and **passed** by unanimous vote to approve the September 17, 2019 minutes as amended.*

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**B) September 24, 2019**

*It was moved, seconded and **passed** by unanimous vote to approve the September 24, 2019 minutes as amended.*

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**II. OLD BUSINESS**

Vice-Chairman Johnson and Mr. Mulligan recused themselves from the following request, and Alternates Chase Hagaman and Phyllis Eldridge took voting seats.

**A) Request for Extension regarding property located at 84 Pleasant Street.**

Chairman Rheaume read the request into the record.

**DECISION OF THE BOARD**

Minutes Approved 11-19-19

*Mr. Parrott moved to **grant** the request for extension, and Mr. Lee seconded.*

Mr. Parrott said the project was a complicated one and the request was timely. Chairman Rheume said he would support the motion, noting that the request was reasonable because the applicant had a good reason, due to the property abutting another that was still being developed.

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

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Mr. Parrott recused himself, and Alternate Ms. Eldridge took a voting seat.

**B) Request for Rehearing regarding property located at 20 Taft Road**

Chairman Rheume read the request into the record. He stated that the abutting neighbor requested the rehearing and provided additional information.

**DISCUSSION OF THE BOARD**

Mr. Mulligan said the additional information provided the Board members with a number of subdivision plans, which he felt didn't move the needle a lot. He said he was struck by the lack of any real explanation for what the abutting applicant's objection to the project was and why the abutter hadn't gone to the first hearing and articulated those concerns. He said the additional information wasn't enough to reopen the case. Mr. Lee said he thought the request was minor to start with. He said the project was in the middle of a residential neighborhood and that he didn't see a compelling reason, based on the new information provided, to find enough cause to have a rehearing. Mr. Formella agreed, saying he didn't think there was anything new that he hadn't known about before. Ms. Eldridge noted that Mr. Formella's original motion addressed all the criteria and that she didn't think an error was made.

Chairman Rheume concluded that no error and no real new information were found. He said the Board had been aware of the paper street and the fact that any property behind the wetlands buffer, regardless of who the owner was or its current nature, was essentially also going to be in the wetlands, and that the likelihood of developing the lot would be minimal. He said the Board felt that the encroachment provided some level of comfort for them, which factored into their consideration, and that it wasn't new information.

**DECISION OF THE BOARD**

*Mr. Mulligan moved to **deny** the Request for Rehearing, and Mr. Lee seconded.*

Mr. Mulligan said he would incorporate his prior comments into the record and reiterate what the other Board members said, mainly that the five criteria were adequately addressed at the hearing and that it was accurately determined that the project met the criteria. Mr. Lee concurred and had nothing to add.

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

Chairman Rheume asked that Case 8-11 be taken out of order so that it could be postponed.

*It was moved, seconded, and **passed** by unanimous vote to take Case 8-11 out of order.*

(Refer to Page 5).

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C) **Case 7-2.** Petition of Kenneth K. and Deborah A. Jennings for property located at **27 Thaxter Road** to Appeal a Decision of the Portsmouth City Council to restore two involuntary merger lots. Said property is shown on Assessor Plan 66, Lot 39 and lies within the Single Residence B District. (This petition was postponed from the September 17, 2019 meeting.)

Chairman Rheume, Christopher Mulligan, and Arthur Parrott recused themselves from the appeal. Vice-Chair Johnson took a seat as Acting Chair.

Planning Department Representative Peter Stith reviewed the background of the appeal and noted that City Assistant Attorney Jane Ferrini was present to answer any questions.

## **DISCUSSION OF THE BOARD**

Mr. Formella stated that Attorney Robert Sullivan's memo had answered his questions, one of which was whether it was appropriate for the Board to consider the new information. He said he saw no reason not to go along with Attorney Sullivan's opinion that the Board could either consider the new information and take action or remand the case to the City Council. Acting-Chair Johnson agreed, noting that Attorney Sullivan's memo allowed a lot of flexibility for the Board to decide. Ms. Eldridge said the City Council made the original decision and that they should be the ones to reconsider it. Mr. Stith said if the case was remanded to the City Council and they upheld their decision, it could be appealed again or resolved. Acting-Chair Johnson said if it were repealed, it would be because there was a lot of information missing. He agreed that the City Council was the appropriate body to make that type of decision about information that wasn't presented the first time. He also pointed out that the Board thought it would be appropriate to send it back to the City Council the first time. Mr. McDonell agreed. He said no one was arguing that the City Council had made an incorrect decision, based on the information they had at the time, and he thought it made sense to let them rehear the case, seeing that they were the body who heard it first. Mr. Formella said the City Council also had the option to refer it to the Planning Board, who had more resources and experience. He said it didn't feel right for the BOA to decide because they weren't really reviewing the City Council's decision but rather were deciding a whole new case. Acting-Chair Johnson said it took a lot of digging to pull up the information presented the previous time, so it seemed fair to let the City Council do it. Mr. Hagaman agreed and said it made the most sense to remand it to the City Council, given that a lot of new information was brought forward in the appeal that may not have been considered by the City Council or the Planning Board the first time.

**DECISION OF THE BOARD**

*Ms. Eldridge moved to **remand** the matter to the City Council for further consideration, consistent with whatever new findings had arisen. Mr. Hagaman seconded.*

Ms. Eldridge referred to the reasons in her motion. She said the Board was in agreement that the original body who made the decision should have the chance to reconsider it. Mr. Hagaman concurred and referred to his prior comments, noting that additional information was at hand and that the City Council should have the opportunity to consider that information.

Mr. Formella asked whether the Board, by voting in favor of the motion, was granting the appeal and remanding it to the City Council, and if the lots were not merged or were status quo. Attorney Jane Ferrini rose to speak. She said the remand was an unusual position for the Board to take because the Statute was unusual. She thought the City Attorney recommended that, because there were no real guidelines, the Board remand the appeal to the City Council, which would constitute the decision. She noted that, for the Statute that governed the appeal process, the ‘municipality shall have the burden of proof to show that any previous owner voluntarily merged the lot’. She said that was another unique aspect of it and a reason why she didn’t have a clear answer, but she noted that the new information related to that fact.

Acting-Chair Johnson asked whether remanding it to the City Council would void the previous approval by the City Council and set the bar back to zero to be reheard. Attorney Ferrini said another ordinance addressed that issue but she thought that was the presumption. As far as a *de novo* situation relating to the new evidence, she said she had a case that had institutional language relative to the specifics for that issue that she would send to the Planning Board. Mr. Hagaman asked whether the Board had a legal binding remand so that the City Council would be required to reconsider the case, or whether the City Council could say they wouldn’t rehear the issue because they had already made their decision. Attorney Ferrini said the Statute required the City to meet that burden of proof, so it would be a hard argument for the City to make.

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

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Christopher Mulligan recused himself from the following petition, and Alternate Mr. Hagaman took a voting seat.

D) **Case 8-11.** Petition of Dagny Taggart, LLC for property located at **0 (53) Daniel Street** for a five-story building with mixed commercial uses wherein variances from Section 10.5A41 & Figure 10.5A41.10C are required to allow the following: a) a building footprint up to 17,500 s.f. where 15,000 s.f. is the maximum allowed; and b) a 3’ rear yard where 5’ is required. Said property is shown on Assessor Plan 107, Lot 27 and lies within Character District 4 and the Downtown Overlay District. (This petition was postponed from the August 27, 2019 meeting.)

Chairman Rheume reminded the Board that they tabled the item on August 27 and asked for a motion to take the item off the table.

*It was moved, seconded, and **passed** by unanimous vote to take the item off the table.*

## **DECISION OF THE BOARD**

*Vice-Chair Johnson moved to **postpone** the application.*

He said it was prudent to allow the applicant due diligence because he was going before multiple land use boards. He noted that the Board's decisions were black-and-white and generally final, so he preferred to have a well-worked out project before the Board and felt that postponing the petition was the only proper way to get an educated and well thought-out decision on their part.

*Mr. Formella seconded the motion.* He said he concurred with Vice-Chair Johnson, noting that it was only fair to allow the applicant more time to gather the information the Board requested.

Chairman Rheume said he would support the motion, noting that he knew the applicant was working towards a solution where he might not even need anything from the Board, yet would be in full compliance with the Ordinance.

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

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Mr. McDonell and Ms. Eldridge were recused from the petition.

E) **Case 8-12.** Petition of Foundry Place LLC for property located at **0 Hanover Street (aka 181 Hill Street)** for construction of a six story 60' hotel with interior parking wherein the following variances are required: a) from Section 10.5A43.31 and Section 10.5A46.10 to allow a six-story 60-foot tall building where a five-story, 60-foot tall building is permitted; b) from Section 10.1114.21 to allow 54 valet-only parking spaces using a two-car lift system where 10 spaces do not meet the parking depth requirements; and c) from Section 10.1114.32(a) to permit a valet-only lift system which requires passing over another parking space or moving another vehicle where both requirements are prohibited. Said property is shown on Assessor Plan 138, Lot 62 and lies within Character District 5. (The public hearing was reopened at the September 17, 2019 meeting and scheduled for the October meeting.)

Chairman Rheume stated that Mr. McDonell and Ms. Eldridge would not be voting members for the following petition because they weren't present for the original hearing in August. He noted that the Board had closed the public hearing and begun deliberations but then decided they couldn't come to a decision due to the late hour and the complexity of the petition, so they tabled it to the following meeting. In the meantime, he said the Board received additional public information, so they voted in the September meeting to re-open the public hearing.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Tim Phoenix was present on behalf of the applicant and introduced the applicant Kim Rogers. He said the main variance they were requesting was the sixth story, which was due to the parking that wasn't feasible to go underground. He reviewed the petition and addressed some of the previous comments from the Board and the public as follows:

- He said the area was not a transition area because CD5 was a standalone zoning district and the applicant had the right to do what they were doing in terms of use and the building's height and size;
- The applicant's building would block a lot of the light from the Foundry Place Garage that the neighbors complained about;
- Any problem with cars would be non-existent because the property was enclosed and the building would block the entry for the cars;
- Hill Street was 6-7 feet higher than Foundry Place, so the neighbors would see five stories;
- Relating to building a hotel versus residential units, he said the guests' vehicles would be parked on the property or in the Foundry Place Garage, whereas residents would go in and out of the building constantly and more cars would be involved;
- Relating to whether or not parking with a lift system was a good idea, he said it was a safety issue and that every car would be valet-parked. He said they wouldn't have the issue with parking and lifts that the parking size in the Ordinance was designed to protect, and he noted that the Board had approved parking lifts in other applications;
- Air, light, noise, and traffic were all Technical Advisory Committee (TAC) issues;
- The reason for placing the garage on the second floor was due to high tide and groundwater issues, a high water table, and a ledge that would involve blasting.

Attorney Phoenix read part of Mr. Rogers' letter to the Board as follows: 'The proposed hotel for Lot 6 meets current use and architectural zoning requirements. We seek limited relief for the number of stories, with the reduction of overall height and the valet-only life parking. The neighboring zoning of CD4L1 provides a buffer to the residentially zoned areas, and the proposed hotel would conform to the dimensions of the Foundry Place Garage and act as a screen or buffer. Because of the precedent ZBA approvals and because of bedrock and high water tables, limited City stormwater capacity, unstable fill, and so on, justice will be served by approving Foundry Place's three requested variances, which will allow the applicant to mitigate extraordinary hardships that are outside his control. It will also serve the public interest by minimizing long-term construction impacts to the City and the neighborhood regardless of use'.

Vice-Chair Johnson noted that the ledge, water table, and so on were valid reasons and asked what the approach was back in 2017 as far as the hardship involved in those site characteristics. Mr. Rogers said the City's sewer system had not been installed when the project went before the Planning Board in 2017, so they didn't know the extent to which the project could affect that sewer. He said the City's storm system came to a head right before they project received approval. He said they had already gone through the process of designing everything, including the basement garage, and were constantly dealing with how to handle contaminants and so on.

Mr. Hagaman asked whether the 14 parking spots on Hill Street were required by easement for the adjacent residents. Attorney Phoenix said there was an easement for parking spaces on the site and that they were told by the City when they asked whether the 14 spaces should be counted that the Ordinance didn't address it. He said if the 14 spaces weren't there, the vehicles parking in those spaces would be parked on the street. Chairman Rheume said the conundrum the City Staff found themselves in was whether the City was the parking police and had to check who was parking in an applicant's parking spots. He noted that the applicant could choose to lease out those parking spaces and not use them for the intended purpose of the Ordinance or that the parking spots could be used by other people at night. Mr. Hagaman said his concern was whether there was a legal right for the residents to use those spots all the time. Attorney Phoenix said they were full-time parking spots for those residents from a pre-existing situation and that the project still met the parking requirements.

Mr. Mulligan asked if there would be mechanicals or utilities on the roof. Mr. Rogers said they were presently dealing with schematic design-level documents that would be fully flushed out for the Planning Board and TAC. Mr. Mulligan asked whether there could be dozens of independent air conditioning units facing Hill Street. Mr. Rogers said it wasn't likely, given that the hotel would have vertical air conditioning units, one for each room.

Chairman Rheume said the Board had looked at the Lot 3 parcel and granted some variances associated with it, but he noted that the plan for that property was five stories, with the first floor being all parking and the remaining floors being the hotel. He asked what the difference was between that property and the current property that made it so the applicant couldn't do something similar. Mr. Rogers said they were required to put a certain amount of programming on the first floor that was integral to the hotel's function and that when they looked at how they could fit everything in, it didn't work. He noted that Lot 6 was much smaller. Chairman Rheume said there was about 3,000 square feet for a restaurant in the original application but that the revised plan's restaurant was over 10,000 square feet, which was quite a bit larger. Mr. Rogers said the 3,000 square feet hadn't included the lobby and that the property was adjacent to Lot 2, which was the future public plaza. He said the lobby itself was also considerably bigger.

In response to further questions from Chairman Rheume, Mr. Rogers said the following:

- Relating to what drove the need for a restaurant and retail on the first floor, he said they couldn't have parking on the first floor unless it had liner space in front of it, and they would need a wide aisle to get cars in and out. He said Lot 3 was a flat site, whereas Lot 6 was not, so they were dealing with a dual-level site that made it tricky for cars getting in and out, and they couldn't place parking on Lot 6 and still have a lobby, restaurant, fitness center, etc.;
- From a hardship standpoint, he said digging down was difficult, so they were raising the hotel by one story, even though they had solved similar issues on other lots, because Lot 3 was bigger than Lot 6, and the extra story was still needed because parking would take up the first floor and everything would have to go up to the next floor;
- In response to whether the six stories were driven by the number of rooms to make it work or by some unique hardship, he said it was a hardship for the property in that they could not go down to put the parking in; he said the lot was a different size and a different bird altogether.

Mr. Hagaman asked who required the applicant to provide certain amenities. Mr. Rogers said Cambria required a certain amount or size of lobby, fitness area, restaurant, kitchen, laundry room, etc., but that it was a fundamental business model and not unique to Cambria. Attorney Phoenix said that anything that went on the site would be driven by issues of ledge and so on, but from a view point, the six floors would not change anything.

Vice-Chair Johnson asked if the hotel would be five stories if the application were denied. Attorney Phoenix said he wasn't aware of any plan to go down a story.

Mr. Parrott asked whether the elevator design was locked in and how far the elevators would go above the roofline. Mr. Rogers said nothing was locked in and was subject to the Planning Board and TAC, but that the elevators were placed where they made sense. Mr. Parrott said the drawings showed nothing about a certain level. Mr. Rogers said it was 60 feet plus a 2-ft parapet. Mr. Parrott said the building could be another 10 feet for an elevator shaft. Mr. Rogers said they had stair towers that went up a story above and that he couldn't say what it would exactly look like. Mr. Parrott concluded that the Board was looking at something that didn't accurately reflect what the height would be but was being asked to approve 60 feet.

Mr. Mulligan said the purpose of character districts was to encourage development compatible with the established character of its surroundings. He asked how a chain hotel designed by an architect in Indiana met the intent and purpose of character districts. Attorney Phoenix said that was an issue for the City Council and the Planning Board because they created a zone where a building of that size and use was permitted. He said they tried to incorporate it by having the CD4L1 as a buffer zone between the residences. He said the applicant was doing what the Ordinance allowed him to do, and the City had determined that it was a reasonable way of proceeding with compatibility for the neighbors. Mr. Mulligan noted that Attorney Phoenix had said that the CD4L1 was a transitional zone, and he asked if that was from the Ordinance. Attorney Phoenix said the zone next to it was the GRC, which he thought might have been the MRO zone previously.

Chairman Rheaume asked what took place at the meeting with the abutters and other parties and whether any changes were made to the applicant's proposal as a result of that meeting. Mr. Rogers said the information provided to the Board that day was in response to the neighborhood meeting. He said hotels were quieter than residential uses. He said a lot of issues were discussed but the primary concern remained the mass and scale of the building.

Chairman Rheaume opened the public hearing.

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

No one rose to speak.

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



Tyler Goodwin of 349 Hanover Street said that Lot 6 was between his building and the parking garage and did not fit in with the neighborhood's character, especially with six stories. He said the applicant was trying to appease the hotel chain's requirements instead of the neighborhood's.

Robin Husslage of 27 Rock Street asked how the hotel would be a quiet addition to the neighborhood, with 120 individual rooms, air conditioning, and fans for the cars on the second floor, and how it could be a community-friendly building. She said the sixth story represented 30 or more hotel rooms with more people, cars, supply deliveries, and so on.

Nicole LaPierre of Rock Street said the hotel received lots of incentives from the City and that an additional story would increase the intensity of the building. She said hotels were not good neighbors because parking requirements doubled in a neighborhood where parking was already an issue. She said the air conditioning units would be disrespectful to the abutters and would affect the neighborhood for generations.

Kayla (last name indecipherable) of 31 Sudbury Street said she echoed all the comments about the sixth story and asked that a variance for a sixth story not be granted.

Ryan Costa of 126 Hill Street said he agreed with all the previous public speakers.

Jane Reynolds of 579 Sagamore Avenue said she had thought that the deal the City Council made involved community housing, and she asked what happened to it. She suggested that there be impact fees for the sewer and so on.

Marcy Caughran of 407 Hanover Street said she saw no hardship.

James Beal of 286 Cabot Street said the residents were being squeezed in from all sides due to parking, and that the sizes of modern vehicles would not be conducive to stacking. He asked where the employees would park and where the hotel guests who chose to park offsite would park. He said there was no transition from a stepped-up residential building and a 6-story block.

Ned Raynolds of 110 Aldrich Road said the City needed more housing and not hotels. He noted that there was already an approved apartment building and that the Board was asked to approve three variances for a hotel, which was the last thing the City needed.

Lucia (last name indecipherable) of Simms Avenue said the neighborhood was supposed to get much-needed housing. She said the back side of the hotel with all its unloading, dumpsters, etc. would face people's homes for generations and would be very noisy. She asked the Board to deny the variances in favor of maintaining the neighborhood's character.

Bruce Sommer said he was the owner of 317, 327 and 337 Hanover Street and had sold the property to the applicant. He said there was no natural or public transition from the applicant's property to his properties and that placing parking on the second floor would create noise. He said the 14 parking spaces was an easement and dedicated to his residents only but that they had

an agreement for up to 21 parking spaces, and that he hadn't seen what access those residents would have to the parking spaces. He said there wasn't enough information on the mechanicals, elevator shafts, etc. that would increase the height; that he counted six stories seen from the Hill Street property; and there could be environmental impacts from waterflow. He said the variances requested were contrary to all the criteria, noting that the applicant had the chance to identify the hardship before he bought the property from him.

Mr. Mulligan asked what structures were on the site previously. Mr. Sommer said there was one business, our residential units, and two dwellings on one lot. Mr. Parrott asked what the foundations were on those structures. Mr. Sommer said they were cinder blocks and that two of them had dug foundations and were successful.

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

Attorney Phoenix said he misspoke when he said the building looked like five stories from the back. He also said the applicant was entitled to follow the zoning.

Elizabeth Bratter of 159 McDonough Street said the variances should not be granted; the extra story was not transitional and would create more people and more noise; and the applicant applied for the maximum of everything and then complained that they had issues with bedrock, stormwater, etc. She referred to a boring report and said the applicant had to meet those requirements. She said none of the criteria would be met.

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

### **DISCUSSION OF THE BOARD**

Mr. Hagaman said the Board was not debating whether a hotel was permitted. He said the applicant made a point of saying it wasn't technically a transition zone, but when crossing Hill Street, it became CD4L1 where a hotel was not permitted, and the number of stories allowed dropped considerably, with no incentive overlay. He noted that the previous approved project was a mixed-use development and was used as a point of comparison by the applicant, but the building was a 62-ft structure that included an offset penthouse, so the perspective from Hill Street was four stories with a barely visible top floor versus 5-1/2 stories of sheer wall that would certainly have an impact on abutters. Vice-Chair Johnson said he was very conflicted because he did think there was a hardship due to subsurface conditions of the ground, but he kept going back to the difference between why the number of stories and the building height were regulated because the number of stories was a method to regulate some of the density of a building in an area where density wasn't necessarily regulated. He said that, in a residential zone, a certain amount of units was allowed per lot, whereas it wasn't the same downtown. He said that, assuming that the applicant could upgrade and put parking under the ground, the Board could look at a building that was 60 feet with five stories, including four stories of units and one story of entry, lobby, restaurant, etc. He said that, within that same 60-ft envelope, there would be the same density, but the applicant claimed that they were using up an additional story that could be

used for hotel units because of the property's condition that necessitated altering the programming of their building and using alternate programming on one floor that would typically be residential units. He said the hotel was an allowed use and it wasn't the Board's job to hold the line on that but was rather the City Council's job because they decided that a hotel use was appropriate in that location. He said the previous form-based zoning addressed more of what immediately surrounded the property. He said he was conflicted because he felt there were some hardship arguments to be made that were relative to the actual variances requested. He agreed with a lot of the commentary against the project but didn't think it was necessarily pertinent to the zoning ordinance that the Board had to consider. He said the Board was asked to break up a project and not look at the entire merits of a project as a whole but rather look at the things the project was proposing to be altered from what the zoning ordinance allowed.

Mr. Hagaman asked Mr. Stith what the City's determination was about whether a lift was an appropriate size for the space. He noted that some of the proposed lifts appeared to be outside of what were determined to be undersized spaces and that some spaces seemed to be shorter than regulated ones. Mr. Stith said the City had no requirements for lifts but that certain lifts would have to accommodate certain-sized cars. Chairman Rheume said there wasn't much in the ordinance relating to lifts because previously the City felt it was more of an urban issue. Mr. Lee said the use would alter the essential character of the neighborhood as well as Portsmouth's character in general; the benefit to the applicant would outweigh the harm to the public; and the value of surrounding properties would be diminished. He said that looking at the back of a hotel would not be a conducive atmosphere for people wanting to live in that neighborhood, and a six-story building would do a lot more harm than a 5-story because it would result in more people, services, noise, and so on.

Mr. Formella said he was also conflicted because the relief requested wasn't the most major relief but led to a project that had a lot of opposition from the neighborhood and that might alter the essential character of the neighborhood. He referred to the Lucy property case where the Superior Court overturned the Board's granting of the variance, and he read an excerpt from the Court's ruling as follows: 'The Lucys and the City have not cited, and the Court is unaware of, any case law that suggests that a zoning board can grant a variance despite a finding in diminution of values so long as some other permanent structure could possibly cause the same harm, even though the property owner has no intention of constructing that alternative permanent structure.' He said that issue convinced him that the Board had to think about the project as a whole if they thought there was a chance that, without the variances, the project as a whole wouldn't be built. He said he didn't think he would support a motion to approve because he didn't think the project met the hardship criteria as well as the diminution of property values, public interest, and the spirit of the ordinance criteria.

Mr. Parrott agreed. He referred to the applicant's argument that the Board shouldn't look at the hotel as a hotel because it was allowed in the zone but were asked to look at it in the abstract, and he said he couldn't separate the two because the applicant couldn't have it both ways. He said the applicant was asking for relief that would make the hotel more intense and have a negative

impact on the neighborhood. He said he could not separate the hotel from the requested variances to make it an even bigger hotel with higher capacity than would otherwise be required.

Mr. Mulligan said the use and the 60 feet were permitted in the zone, but the applicant's claim that five stories versus six stories was due to having no ability to excavate property for an underground basement for parking, otherwise they could get their five stories of programming and rooms within 60 feet and wouldn't need the relief. He said what he struggled with was the fact that there was a new character-based zoning regime that was supposed to produce developments that blended in with the established character of their surroundings, and the applicant's hotel looked like one that belonged on Route 17 in northern New Jersey. He said he was very disappointed that the hotel met all the functional criteria of the character-based zoning because it had almost no character at all, but he didn't know if that was enough to deny the relief because the applicant was asking for an additional story to get the program elements in that the chain required, and not design relief. He asked whether that was the City's problem or a problem with the business model.

Chairman Rheaume said there were two pieces: one, the series of parking requests including the lift system, which the applicant previously requested for their other proposed hotel on Lot 3 and was granted. He said the Board had more detail in the previous application as to how it would work and that some of those arguments could again apply because the valet-managed lift made economic sense, but he asked what the implications would be if people didn't use it because it was too cumbersome. He said he was disappointed that 14 parking spaces weren't really for the project and that he preferred to see additional parking in the garage for those spaces. He said the Board's previous approval for the same type of allowance was for just under 20 parking spaces in the garage, and the applicant now had just about 20 spaces in the garage, so it was about equal. He concluded that he was okay with that piece. He said Part 2, the additional story, was where he had a hard time in terms of the application meeting all the criteria. He said the applicant's argument was that they had special conditions that distinguished their project from others, including a high water table that prevented them from digging down, but he noted that the garage across the street and the Lot 3 project had the same issue. He said there was some compromise that could be made that the project didn't need the additional story. He said it was also lacking the spirit of the ordinance criterion, and that looking at those two criteria together, the intensity did add some negative consequences to surrounding properties, as well as the air conditioning units for every room that would project additional noise. He said the Board thought the character-zoning district would make all buildings look like their surroundings, but the incentives to apply for a fifth floor factored in, and the applicant was stretching the line and asking for a sixth floor. He said the extra story was problematic in terms of the spirit of the ordinance and thought the application failed the public interest and the hardship criteria as well. He said he would approve the parking variances but not the additional story.

## **DECISION OF THE BOARD**

*Mr. Hagaman moved to **grant** Variance C to permit valet parking and lifts and to **deny** Variances A and B. Mr. Lee seconded.*

Mr. Hagaman stated the following:

As I mentioned earlier, in my mind this is a difficult decision and a complicated application. There's been a lot of talk that it's a set of minor variances, but I disagree. I would reinforce those key considerations we've been discussing. We're not debating whether a hotel is permitted on this lot or in this district. It's a permitted use, but the requested variances impact the intensity of that use. If you cross Hill Street into CD4L1, a hotel's not permitted. You drop from a standard maximum of 2-4 stories with an incentive bonus story in CD5 to 3-4 stories, with no bonus in CD4L1, and to me that speaks volumes in terms of the intent and spirit of the ordinance. The incentive overlay cuts right along Hill Street. The purpose of character-based zoning is to encourage development that's compatible with the established character of its surroundings and consistent with City goals and its preservation and enhancement of the area. I also made mention of a previously-approved mixed-use development, which has been used as a point of comparison for this application, because it was 62 feet tall and 5 stories, but the project there was actually 4 stories with a fifth story offset penthouse, so I don't know if it's a great comparison for justifying the height for this project, given that the penthouse was barely visible from the Hill Street perspective for abutters. We're talking about a proposed 60 feet, 5-1/2 stories of sheer structure for those abutters looking up. The surrounding properties are 2-3 stories, some residential and some commercial, and the parking garage used as a comparison is more of an outlier because of those low-lying structures. We talked about how the ground floor of the proposed application has a kitchen, restaurant, gym, lobby with no parking – the parking is moved to the second level effectively, and what's driving that is the hotel chain. I do have questions about the 14 parking spots on Hill Street and whether they should be considered in the applicant's total count, but we're not really considering that issue in this application. Regardless of the total parking requirements, nearly 20 percent of the 54 spaces within the hotel structure are undersized, and I question whether it could more because of the design of the lift systems. One of the reasons I moved to grant Variance C is because the purpose of the ordinance for prohibiting passing over or moving other vehicles is related to safety, but a valet takes care of that concern.

I'll address the five criteria backwards because we talked a lot about hardship. The application only has to fail one criterion, and I believe it fails on multiple, especially as it pertains to the first two variances requests. Under the fifth criterion, literal enforcement of the provisions of the ordinance would not result in an unnecessary hardship: the application fails this criterion. A hotel is a reasonable use in this zoning district, but the variances requested impact the intensity of that use. It's a large lot in a relatively high density zone, which may have groundwater and bedrock issues, located near a large municipal garage, but surrounding properties have similar issues and were able to cope with them. Where the application really falls short is that there does not seem to be a fair and substantial relationship between the provisions of the ordinance and its special application of those provisions to the property. With regard to adding six stories, it would enable the construction of a building out of character with its surroundings in size and mass. The valet seems to rectify public safety and traffic concerns caused by lift parking but does not address the undersized spaces. Given the uses on the first floor, and absent any attempt to provide more properly-sized parking, the hardship argument concerning underground spaces is not convincing. The fourth criterion is the value of surrounding properties could be diminished, so it fails that criterion. It remains to be seen whether surrounding property values would be

diminished because it's currently a vacant lot and just about any structure would likely improve that property, but the applicant bears the burden of showing that the project will not decrease property values, and the applicant hasn't done so. A six-story hotel across the street from 2-3 story residences could negatively impact the value of surrounding properties. Also, from the frequency of services, traffic, etc., you could make an argument that parking for those residents would also impact property values. The third criterion, as to whether substantial justice would be done and whether the loss to the applicant would be outweighed by the general public – I believe it fails that as well. We're not debating whether a hotel could be built, but an argument could be made that there's public gain to insuring a properly sized, safe parking arrangement and guarding the character of the neighborhood by enforcing a maximum number of stories imagined by the zoning ordinance, even with a bonus incentive. We're going beyond the limit with this proposal. The first and second criteria might be the most significant failure of all because granting the variances would be contrary to the public interest and the spirit of the ordinance would not be observed. We're taking the very specific requirement of the character-based zoning into account and the fact that it's meant to encourage development that's compatible with the character of its surroundings. I think granting these variances would enable the construction of a building that would alter the character of the neighborhood and would not observe the spirit of the ordinance. It's also a legitimate concern when there is a significant number of air conditioning units that could impact the general welfare of the public. The previous proposed project on this property that was used as a comparison, although potentially taller, had the fifth story that was a penthouse set off from the Hill Street properties that are two and three stories, so I struggle with the implication of putting a maxed-out property behind its own zoning limitations on the very edge of an incentive overlay in a district that abuts a district that you couldn't get anywhere near that height, and whether that is actually the spirit of the ordinance and how it was originally designed. The character of the neighborhood is not the large municipal garage, it's really what's surrounding this property, which is much smaller buildings. I think it's more of an outlier in an area of lower-lying structures.

The third variance, relating to the lift system – I don't believe it would be contrary to public interest or to the spirit of the ordinance or would alter the essential character of the neighborhood. It would be an integral parking system within a building that would not threaten the public's health, safety, or welfare because the valet aspect would enable trained professionals to maneuver the cars and help reduce the number of vehicles trying to cram in this small space with a lift system. Substantial justice would be done because there would be no gain to the public that would outweigh any loss to the applicant by being able to put as much parking on the property as allowed. We've had past parking issues in Portsmouth, and enabling putting more parking spots on a property in a safe manner would be substantial justice. The value of surrounding properties would not be diminished – there's no evidence that a lift system on a property would do so. As far as literal enforcement of the provisions of the ordinance resulting in an unnecessary hardship: we did lay out that there could be special conditions of the property with regard to digging down into the lot deep enough for parking, but we said there's plenty of room on the ground floor for a lift system, so there doesn't appear to be a fair and substantial relationship between the general public purposes of the ordinance and its provision and application to the property. Providing more parking via a safe lift system is a reasonable use.

Mr. Lee concurred and said he would incorporate his previous remarks, noting that having a six-story would definitely alter the essential character of the neighborhood.

Vice-Chair Johnson said he would not support the motion because he thought the Board was denying Variances A and B based on the use. He said he thought the project was a horrible use for the location but that it wasn't the Board's job to repair an error in the ordinance for that zone. He said he didn't believe the additional story had additional bearing on the neighborhood that wouldn't be there if it was one story less. He said approving one variance and making a case for the hardship and the other criteria for it undermined the reasons for denying the other two variances. He said they went hand-in-hand because some of the hardships were derived from some of the same issues put forward to approve it. He said he didn't support the project but felt that it was his job to interpret the ordinance the way it was laid out, and if there was any error made, it was allowing that use to be there in the first place. He said he thought it could be rectified but that it wasn't for the Board to do.

Mr. Hagaman clarified his comments by stating that the hardship relative to the six stories was different from the hardship relating to needing a lift system, in that the sixth story seemed to be driven by being able to fit everything in the building as required by the hotel brand versus coping with the difficulties of the property itself. He said providing additional parking on it to cope with those difficulties and not require digging further into the ground was the same coping mechanism that had been used by surrounding properties. Chairman Rheume said he would support the motion and could have been persuaded to accept Variance B, but he thought there were some arguments in that instance that didn't work as well.

*The motion passed by a vote of 6-1, with Vice-Chair Johnson voting against the motion.*

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### **III. OTHER BUSINESS**

#### **A) Parking Principles**

Mr. Stith reviewed the comments from Board members related to the parking principles and said that he would forward the comments to the City Council with the noted revisions.

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#### **B) Board of Adjustment Rules and Regulations**

Mr. Stith stated that Chairman Rheume recommended the following changes:

- Adding a Number 15 stating that the applicant or designated representative for the applicant must appear before the Board at the time of the public hearing or application (page 4).
- Section 9, Miscellaneous: Add to the second number that an application may only be withdrawn by an applicant or his representative up until the time that the Board begins the

public hearing on a specific application (page 6). He noted that it was to prevent situations of applicants requested to withdraw after the public hearing

Mr. Mulligan said there were occasionally applicants who sensed the temperature of the Board and would modify their request ad-hoc. Chairman Rheame said the Board could postpone and give the applicant more time to rework their information, or they could close the matter.

The Board discussed at which point the public hearing was officially opened and whether the Board should determine if they would allow the applicant to have additional time for their project and postpone it. Mr. Stith said the Chair would read the case into the record and the applicant could request to withdraw at that time or before the case was read into the record.

Mr. Stith said No. 3 was a case where, if an applicant was granted a postponement more than once, the applicant would have to re-advertise at his or her expense. He said that almost never happened. Chairman Rheame said the number of Board member recusals could play into that, and he thought it needed more discussion by City Staff.

Mr. Stith said page 7, Section 8.1A, a presentation by the applicant or the applicant's representative explaining the application and reasons why the Board's approval should be granted, was just giving more information on what should be presented to the Board. Chairman Rheame said the presentations varied in quality and thought no additional wording was needed.

Mr. Stith said there was a new Number 4, page 8: 'When the public hearing is closed and the application is postponed for more information, the Board may vote to re-open the public hearing and may consider additional information from the public. If the public hearing is closed and the application is postponed for further discussion by the Board, no additional public comment will be considered by the Board'. Mr. Stith noted that the old Number 4 would be Number 5.

Mr. Stith said he would get further feedback on the rules the Board had questions on.

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#### **IV. ADJOURNMENT**

*It was moved, seconded, and passed unanimously to **adjourn** the meeting at 10:15 p.m.*

Respectfully submitted,

Joann Breault  
BOA Recording Secretary