

**MINUTES OF THE  
BOARD OF ADJUSTMENT MEETING  
PORTSMOUTH, NEW HAMPSHIRE**

**Remote Meeting Via Zoom Conference Call**

**7:00 P.M.**

**MAY 26, 2020**

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

**MEMBERS EXCUSED:** John Formella

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

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Chairman Rheaume requested that Petition #2, 268 Dennett Street, be taken out of order to be postponed.

*It was moved, seconded, and passed by unanimous vote (7-0) to take Petition #2 out of order.*

(See Petition #2).

**I. PUBLIC HEARINGS – NEW BUSINESS**

1) Petition of **Barry & Martha White, Owners**, for property located at **83 Rockingham Avenue** wherein relief was needed from the Zoning Ordinance to demolish existing structures and construct new single-family dwelling which requires the following: A Variance from Section 10.521 to allow a lot area and lot area per dwelling unit of 14,258 where 15,000 is required for each. Said property is shown on Assessor Map 236 Lot 20 and lies within the Single Residence B (SRB) District.

Alternate Ms. Eldridge took a voting seat.

**SPEAKING TO THE PETITION**

Attorney Derek Durbin representing the applicant reviewed the petition. He stated that the property had a single-family home with a detached garage and that the owner wanted to demolish the existing house and build a new one. He reviewed the criteria, noting that a special condition of the property was that it was originally a conforming lot but the southwest corner was conveyed to the State in the 1960s, so the home was relocated to its existing location and the property became nonconforming.

Mr. Mulligan asked when the existing home was built. Attorney Durbin said it was built in the 1950s, so it pre-dated the conveyance to the State. Chairman Rheume said it seemed odd that the State felt they had to clip off the corner of the lot. Attorney Durbin said utilities ran through the area but that he didn't know the reason why the corner was cut off.

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

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

### **DECISION OF THE BOARD**

*Mr. McDonell moved to **grant** the variance for the application as presented, and Vice-Chair Johnson seconded.*

Mr. McDonell said the request was straightforward and that he didn't think the corner issue mattered because the house's reconstruction was in an existing nonconforming lot. He said granting the variance would not be contrary to the public interest or to the spirit of the ordinance. He didn't see anything that would alter the essential characteristics of the neighborhood or cause injury to the public's health, safety, or welfare. He said the existing single-family home on an existing and almost completely conforming lot would remain that way. He said substantial justice would be done because the benefit to the applicant would outweigh any benefit to the public, noting that it was a clear benefit to the applicant or they would not tear down the house and rebuild. He said granting the variance would not diminish the values of surrounding properties and that placing a new house would likely increase them by increasing the value of the new structure. He said the special condition of the lot that distinguished it from others was the fact that it was an existing nonconforming lot due to the State taking it, and there was no fair and substantial relationship between the general purposes of the ordinance and the application of its provisions to the property. He said it was a single-family home and would remain that way, and he thought the variance should be granted.

Vice-Chair Johnson concurred, adding that the house was based on the time it was built, and its size, scale, and appearance had helped define the character of the neighborhood. He said the only physical change experienced by the public would be a more modern house in the same scale.

Chairman Rheume said he would support the motion, noting that the only reason the petition was before the Board was because the State chose for some reason to clip a corner of the lot. He said anyone looking at the lot would not know that it was undersized.

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

2) Petition of **Michael Petrin, Owner**, for property located at **268 Dennett Street** wherein relief is needed from the Zoning Ordinance to demolish the right side portion of house and reconstruct new addition which requires the following: 1) A Variance from Section 10.521 to allow a 0' right side yard where 10' is required. 2) A Variance from Section 10.321 to allow a nonconforming structure or building to be extended, reconstructed or enlarged without

conforming to the requirements of the Ordinance. Said property is shown on Assessor Map 143 Lot 13-1 and lies within the General Residence A (GRA) District.

Chairman Rheume recused himself from the vote, and Vice-Chair Johnson assumed his seat as Acting Chair. Alternates Ms. Eldridge and Mr. Hagaman took voting seats.

Acting Chair Johnson read the petition into the record. He asked the applicant's representative Attorney Derek Durbin why the applicant wanted the petition postponed. Attorney Durbin said he received a letter late that day from the attorney representing the abutter to the right of the property that questioned the scope of a maintenance easement. He said his client opted to postpone the petition so that he could discuss the issue with the abutter.

*Mr. Hagaman moved to **postpone** the petition to the June 16, 2020 meeting, and Ms. Eldridge seconded.*

Mr. Hagaman said the Board typically looked kindly on an initial motion to postpone, and in that instance it was especially important, given that the applicant was trying to work with an abutting neighbor. Ms. Eldridge concurred and had nothing to add.

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

**3)** Petition of **Stacey & Philip Gibson, Owners**, for property located at **48 Hillside Drive** wherein relief was needed from the Zoning Ordinance for the keeping of chickens including a Special Exception from Section 10.440 Use #17.20 to allow the keeping of farm animals where the use is permitted by special exception. Said property is shown on Assessor Map 231 Lot 32 and lies within the Single Residence B (SRB) District.

Alternate Mr. Hagaman took a voting seat.

### **SPEAKING TO THE PETITION**

The owners Stacey and Philip Gibson were present to speak to the petition. Ms. Gibson said they wanted to rent two hens for the summer and early fall only, and that there would be no roosters. She said the coop was small and wasn't a permanent structure and was located in the backyard 25 feet from the other property lines. She reviewed the special exception criteria and said they would be met. She noted that the chickens were delivered two weeks earlier.

Chairman Rheume opened the public hearing.

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

Karen Solomonides said she was an abutter and in favor because there would be no roosters.

Mr. Stith said the Board received letters from three other abutters who were in favor.

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

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

**DECISION OF THE BOARD**

*Vice-Chair Johnson moved to **grant** the special exception as presented, with the following stipulation:*

- *That the hens number no more than six, and that there be no roosters.*

*Mr. Hagaman seconded.*

Vice-Chair Johnson stated that the Board tended to approve that type of application as long as the applicant met a few criteria. He said he saw no issue with the petition, noting that the feedback from previous applicants requesting chickens had met the Board's standards and that the requests were reasonable and met the criteria. He said chicken coops were permitted by special exception and would pose no hazard to the public or adjacent properties on account of fire, toxic materials, and so on. He pointed out that there could be an argument about toxic materials if the chickens were a larger quantity, but there was no issue with two chickens. He said granting the special exception would pose no detriment to property values in the vicinity or change in the essential characteristics of the area on account of noise, odor, dust, and so on. He said the standard quantity of six chickens with no roosters was something that didn't tend to affect neighborhoods negatively in terms of odor and sound disturbance and that the request for two chickens was small and would only be for two seasons. He said granting the special exception would not create a traffic or safety hazard, pose no excessive demand on municipal services, or cause significant stormwater increase. He said the petition should be approved.

Mr. Hagaman concurred and had nothing to add.

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

**4)** Petition of **Borthwick Forest, LLC, Owner**, for property located at **0 Islington Street** wherein relief was needed from the Zoning Ordinance for installation of a monument sign which requires the following: A Variance from Section 10.1253.10 to allow a 3.6' setback for a monument sign where 20' is required. Said property is shown on Assessor Map 241 Lot 25 and lies within the Office Research (OR) District.

Mr. Hagaman returned to alternate status, and Ms. Eldridge took a voting seat.

**SPEAKING TO THE PETITION**

Attorney Justin Pasay representing the applicant was present, as well as the project engineer Patrick Crimmins. Attorney Pasay said the applicant needed signage to identify the new medical building. He said the property had a new private road called Eileen Dondero Foley Avenue,

which sloped up so that the new building or sign couldn't be seen from Borthwick Avenue. He said a berm would also obstruct the building and sign from view. He noted that the multi-use path caused twenty feet of the driveway to be constructed in the right-of-way, so the sign had to be located where it could be seen. He reviewed the criteria and said they would be met.

Chairman Rheume said the exhibit had several lines that looked odd, and it was discussed. Attorney Pasay said the thickest line was the front lot line and looked like it was 15 feet away from the paved portion of the new road, and the front lot line showed the relief sought.

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

No one was present to speak to the petition, and Chairman Rheume closed the public hearing.

### **DECISION OF THE BOARD**

*Mr. Mulligan moved to **grant** the variance as presented and advertised, and Mr. Lee seconded.*

Mr. Mulligan said it was an interesting project in that it was a blank slate that the applicant was drawing upon, but he thought the applicant made a good argument as to why the strict application of the 20-ft sign setback was not warranted. He said granting the variance would not be contrary to the public interest or to the spirit of the ordinance, noting that trying to characterize the essential characteristics of the neighborhood was difficult because it was brand new and a neighborhood unto itself, so he didn't see how any relief would alter its essential character. He said the sign's placement was well thought out and would enhance the public's health, safety, or welfare because it would be easier to identify the facility's location. He said granting the variance would do substantial justice because the loss to the applicant if the Board were to require strict compliance with the ordinance would not be outweighed by any gain to the public. He noted that there was an artificial setback due to the multi-use path, and if the Board were to add a full 20 feet onto that, it would likely be less conducive to identifying the property from the vehicular-travelled way and would result in a loss to the applicant and no positive gain to the public. He said granting the variance would not diminish the value of surrounding properties because the development was off by itself on a large lot, and there were similar types of signage for similar uses in the immediate vicinity that had not negatively impacted the values of those surrounding properties. Relating to hardship, he said the special conditions of the property was its large size and the fact that it was isolated from other developments. He said that the way the approach and driveway sat in relation to some of the other topography, especially the berm that would impact the site lines, made it more feasible to bring the signage closer to the traveled way. He said they were all special conditions that distinguished the property from others and that there was no fair and substantial relationship between the purpose of the setback ordinance and its application to the property. He said one had to have signage for that type of commercial use, so it was a reasonable use and met all the criteria.

Mr. Lee concurred and had nothing to add.

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

5) Petition of **James E. Gould, Owner**, for property located at **246 Thornton Street** wherein relief was needed from the Zoning Ordinance to un-merge two lots and construct a single-family dwelling on the vacant lot which requires the following: For lot 23: Variances from Section 10.521 to allow: a) 61' feet of continuous street frontage where 100' is required; b) a 4' left side yard where 10 feet is required; c) lot area of 7,183 sq. ft. where 7,500 is required; and d) lot area per dwelling unit of 3,591 where 7,500 is required. For lot 25: Variances from Section 10.521 to allow: a) 60.61' of continuous street frontage where 100' is required; b) a 6' left side yard where 10 feet is required; c) 26% building coverage where 25% is the maximum allowed; d) lot area and lot area per dwelling unit of 7,161 where 7,500 is required for each.. Said property is shown on Assessor Map 161 Lot 7 and lies within the General Residence A (GRA) District.

Ms. Eldridge returned to alternate status, and Mr. Hagaman took a voting seat.

### **SPEAKING TO THE PETITION**

Attorney Derek Durbin representing the applicant was present, as well as the project architect Jennifer Ramsey and project engineer John Chagnon. Attorney Durbin reviewed the petition, noting that the property had two involuntarily-merged lots, of which Lot 23 had a house and Lot 25 was vacant. He said the applicant wanted to build a single-family home on Lot 25. He pointed out that the left yard setback relief was for a bulkhead and that they tried to bring the two-car garage into compliance but couldn't due to the constraints of the lot. He noted that the abutter to the right submitted a letter in support of the project.

Mr. Mulligan asked where Attorney Durbin was in the process of restoring the lots to their pre-merged status. Attorney Durbin said they were seeking the zoning relief before going to the City Council. Mr. Mulligan said there was therefore a possibility that the Board could grant the relief but that the City Council would not restore the lots. Attorney Durbin agreed but said there was no indication that they would not restore the lots, noting that it was a merger by right and that he was confident that it would be approved. Mr. Mulligan said he struggled with it procedurally because the Board was dealing with two separate lots and he wondered how they would grant relief based on the size of the lots, seeing that they didn't yet exist as far as the City was concerned. Attorney Durbin said it was the same situation as a subdivision.

Mr. Hagaman said one of the requests could be eliminated if the bulkhead was in a different location. He asked if alternative locations had been considered. Attorney Durbin said the back of the building itself was considered but the bulkhead would access an unfinished portion of the basement. He said they had been on the cusp of whether or not to ask for the relief for the bulkhead and that they still were not sure, but it would probably depend on the grading of the property. He said it was easier to apply for the relief than not to.

Vice-Chair Johnson said the Board normally didn't see that much of a developed plan for the house when they got subdivision requests for a vacant lot. He asked whether the presented design would be the one that would be built. Attorney Durbin said they had worked on that design for

quite a while and thought it was better to show it to the Board so that the Board could get a true sense of how the property would be developed.

Chairman Rheume said the requested one percent relief was just one percent of lot coverage, and he asked if the applicant could find a way to get rid of it because the bulkhead might not be required. He said he was concerned that it was one percent this time, but next time it could be two percent or five percent. He wanted to ensure that the applicant had done their due diligence. Attorney Durbin said the benefit to the applicant was to provide the enclosed space for two vehicles that would also address any off-street parking concerns.

Chairman Rheume opened the public hearing.

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

Nelly Parkington of 592 Dennett Street said she lived around the corner and wasn't concerned about on-street parking because she didn't think it would alter the neighborhood's characteristics. She said she was pleased that something would finally be done with the vacant lot and thought it would increase her property's values.

(Note: Ms. Parkington originally mistakenly spoke during the Opposition section).

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

Glen Meadows of 245 Thornton Street said he lived across the street and was opposed for two reasons, the street parking and site drainage. He said the property had been rented out to four adults previously and that there were two cars on the street at any given time, so he felt that the availability of on-street parking would be lessened with the new curb cut and double-wide driveway and would change the neighborhood's character. He said the previous owner also had issues with site drainage, noting that the area was flooded during severe rainstorms. He said he wanted the City to conduct a site review showing that the design of the stormwater infiltration system behind the home would not exceed its capacity.

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

Project Engineer John Chagnon said the prepared plans included a conceptual drainage plan that would work well. He explained that there were currently a few basins that infiltrated water below the surface and that sometimes the coverage might get clogged, which would keep water ponded for longer periods. He said the lot drained well enough so that it was not a wetland and that they would introduce an area where the roof runoff could be moved and infiltrated into the soil. He said the proposed grades were such that the water would move from the front right curved wall, and the second wall would be higher up so the ground would slope to the top of the first wall, which would allow water to flow from the house and toward the back. He said they would not create any holes, although the drawing seemed to indicate that they would.

Mr. Meadows said it looked like there were spot grades on the new curb curve.

Mr. Chagnon said the grades came from the home and dropped one foot and one and a half inches from the top of the new 2-ft high wall. He said there was 1'3" in grade change from the new grade to the top of the existing wall on the street side, and that the 34.5' measurement was the existing back side of it which would be filled, so the front wall would sort of disappear.

Mr. Meadows said he still wanted the Board's feedback on the possibility of a site review for the drainage around the area of the stormwater infiltration system because he was concerned about runoff onto the abutting property on Dennett Street.

No one else was present to speak, so Chairman Rheaume closed the public hearing.

## **DECISION OF THE BOARD**

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

Mr. Parrott said he was glad that all the parties recognized the issue of stormwater drainage and runoff, noting that it was important because it was a small, tight lot that didn't have a lot of extra space, so there had to be an engineered solution that would not adversely affect adjacent lots. He said he believed that Mr. Chagnon's firm had addressed the issue and come up with a reasonable approach. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance because a single-family house was located on a previously-existing and perhaps to-be-created new lot and the house had been designed to fit the lot. He said it would not alter the essential characteristics of the well-established residential neighborhood and nothing would impact the public's health, safety, or welfare. He said it would do substantial justice because the balancing test was whether there would be a benefit to the public if the project was denied, which he didn't see, and he thought there would be a harm to the applicant if the potential for a new house were to be denied. He said granting the variances would not diminish the values of surrounding properties, noting that there was no testimony other than the one about the drainage issue that an additional house built to modern standards would negatively affect other homes and would probably have a positive effect. Relating to the hardship, he said the proposed use was a reasonable one and that it was hard to make a judgment as to whether there was any relationship between the purpose of the ordinance and its specific application to the property because the property was a blank slate for what was a vacant lot and he didn't think the Board could argue that, so he thought the criterion was met. He noted that the Board had some information about the engineering that was already done on the site for stormwater and that the issue would be part of the development process, so he was satisfied that all the criteria were met.

Mr. McDonell concurred. He said the location of the existing structure was driving the side yard setbacks, which was another special condition. He said it was a large lot, and he noted that one Board member made the point that one could probably get away with a little less relief than what was requested, particularly the building coverage that was just one percent over what was allowed, but he thought the applicant's representative articulated the reasons for the proposal and that it was reasonable. He said the only thing left was the street frontage and lot area, which were driven by the unmerging, and he didn't think that was the Board's call to make. He said it was a blank slate in a way but a lot of what was driving the relief request was the location.



Mr. Mulligan said he would support the motion, even though he was hesitant about approving a variance based on a plan to restore involuntarily-merged lots that had not yet occurred, but if the applicant was willing to roll the dice with the City Council, he didn't believe that the requested relief was anything extraordinary, should those lots get restored to that status. He said if the lots didn't get restored and they retained their pre-merger status, he wouldn't look at a proposed subdivision the same way, but given that the applicant knew it was the first step in the process and that the City Council had to decide, he didn't think it was a lot of relief requested.

Chairman Rheume said he would support the motion. He said the Board was generally the first land board that applicants started with because it was more straightforward and the applicant either got the approval or didn't. As far as the unmerged lot, he said the Board always preferred that new construction be fully compliant with the zoning ordinance, but he understood the bulkhead issue. He said he thought the bulkhead could be moved and understood that the lot was small, the dwelling wasn't extremely large, and that having a two-car garage was not excessive, but he didn't think it was worth making the applicant rework everything for a one percent relief. He said there was validity to the abutter's concerns about drainage but thought the applicant had done a fair amount of engineering and would ensure that changes would be made if any errors caused a problem with an abutting property, so he didn't think the extra step of having it submitted to the City for site review would help.

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

**6)** Petition of **Salema Realty Trust, Owner**, for property located at **199 Constitution Avenue** wherein relief was needed from the Zoning Ordinance for construction of a multifamily dwelling containing 40 - 70 dwelling units in a zone where residential uses are not permitted which requires the following: A Variance from Section 10.440 Use #1.53 to allow more than 8 dwelling units where the use is not permitted in the district. Said property is shown on Assessor Map 285 Lot 16 and lies within the Industrial (I) District.

Mr. Hagaman returned to alternate status, and Ms. Eldridge took a voting seat.

#### **SPEAKING TO THE PETITION**

Attorney Justin Pasay was present on behalf of the applicant to review the petition. Project architect John Chagnon was also present.

Attorney Pasay said the goal was to fill a significant need for housing stock in Portsmouth that was consistent with the Master Plan, would help lower-income individuals, provide access to public transportation, and would provide a reasonable return for the applicant. He referenced the Staff Memo that put a cap on the number of units, and he said the basis of the 40-70 unit building was a placeholder and that his client would be happy with a conditional approval to build four stories with a maximum of 60 units. He noted that the applicant originally got approval for an industrial building that didn't require any variance relief, but he had decided that it would be expensive to build and that he wouldn't get much of a return on it financially, so he switched to a residential building. Attorney Pasay reviewed the criteria in detail and said they would be met.

Mr. Hagaman asked if there were any public transportation stops near the building and if the applicant had considered workforce housing for the project. Attorney Pasay said he wasn't aware of any public transportation stops but said the owner also owned two industrial buildings that housed commercial entities and also owned other businesses around Portsmouth, some of which were within walking distance of public transportation, job opportunities, and so on. He said they had discussed workforce housing and that their goal was to provide housing that was consistent with the affordable type of workforce housing statutes but not anything that would comply with challenging procedural items. He said his client wasn't building workforce housing as a means to earn a living but would provide reasonable housing for people, including his own employees.

Mr. Hagaman said Attorney Pasay referenced a few other developments that were more tied in with businesses surrounding them, and he asked what measures the client was taking to tie in the proposed project and make it feel more residential as opposed to a misfit island among all the industrial uses. Attorney Pasay said his client had to go through the planning and review processes, but for now it was a concept that would activate the commercial corridors along Lafayette Road, like the Master Plan intended to do, and also accommodate the surrounding needs. He said the building would be attractive and viable and noted that the Planning Board would vet some of the specifics about the site itself.

Mr. McDonell said the applicant had stated that the property couldn't reasonably be used in strict conformance with the ordinance regarding hardship, and he asked why the applicant's financial argument was used as reasoning for not being able to do so. Attorney Pasay asked if the question meant the law in general. Mr. McDonell said he meant the law in general and whether the applicant had seen that financial argument applied in another case. Attorney Pasay said when the shift in the law happened back in 2010, a new standard was added, and his client endured the expense of trying to use the property consistent with the ordinance, but the expense of drainwater and stormwater remediation was so much that he couldn't make it work. He said he didn't have a specific case to cite but knew that there were several similar cases that made for a hardship.

Mr. McDonell said he thought it was something inherent in the property rather than the financial aspect of it. He also remarked that Attorney Pasay referenced the south development in his presentation, and he asked if there were similar residential facilities in the area, noting that he hadn't seen any. Attorney Pasay said there weren't any to the north of the project, but to the south were Patriot Park Apartments and residential areas. He said Walmart was in the G1 zone. He said when one considered the area at large and the proximity of the property to Lafayette Road, there were residential uses in the general area. He said the concept was to incorporate the mixed-use nature of what the Master Plan talked about in the G1 District. Mr. Chagnon said the Southgate Plaza was in close proximity and that it also had the Veridian apartment building behind the first row of retail buildings that blended in well and was very successful.

Mr. Parrott said he didn't understand the difference between the applicant not being able to create an industrial building in an industrial zone and then building a structure that was the same size but for residential use in the zone. Second, he wondered if the applicant considered convincing the City Council that the parcel was zoned incorrectly. He asked why the parcel would support a large apartment building but not an industrial building of the same size. Attorney Pasay said the industrial building wasn't built because it didn't justify the expense of a

million dollars for drainage construction on the property. He said it could be justified with an apartment building, even with modest rents coming in. As far as going before the City Council to petition for rezoning, he said it was a unique case because it was a property that had two industrial buildings, and if they were to rezone it or redevelop it, there might be a lot of required relief down the road. He said it made more sense to pursue the variance relief. Mr. Parrott said the applicant could go for a re-subdivision and a rezoning of the newly-created lot.

Ms. Eldridge agreed with Mr. Parrott. She said Lafayette Road was full of successful commercial properties. She said there might be tradeoffs if it were workforce housing, but she wasn't convinced that there was a hardship. Attorney Pasay said those buildings were permitted at different times when costs were different, and lots of money was spent by his client on engineering and approvals, only to conclude that once the bids came in, especially for drainage, it wasn't viable. Ms. Eldridge asked whether the drainage costs for a commercial building would be much greater than a 70-unit apartment building. Attorney Pasay that it came down to the return on investment, and the standards for stormwater had become much more stringent.

Chairman Rheume asked if there were any restrictions in the easement part of the plan for gaining access to the development via Walmart, noting that there were different needs for traffic flow than a residential apartment building, and whether those easements would prevent the applicant from developing the property. Attorney Pasay said they had discussed it with Walmart and were comfortable that the easements would be sufficient to provide the access they needed. He noted that it would be vetted at the Planning Board stage. Chairman Rheume agreed but said there were a lot of potential uses in the industrial zone for something different than a not-permitted use for residents. Attorney Pasay said the legal argument was that the standard for hardship was based on whether the special circumstances of the property made it so that the zoning ordinance wasn't just or reasonable. He said they had outlined why that was the case. He said he wasn't sure what other types of activity could be permanent in the area and wasn't sure if his client had analyzed different concepts. He said the standard was not whether something else could be put there but whether the specific conditions of the property made the application of the zoning ordinance reasonable. He said they concluded that it did constitute a hardship.

Chairman Rheume said Attorney Pasay implied that complying with workforce housing was onerous but not impossible and that his client was not an experienced developer, but he said a 60-unit development was in the big league of developers. He asked if the applicant had considered workforce housing. Attorney Pasay said they had discussed it but decided not to. He said it didn't mean that it would not be considered in the future, but the current proposal would provide rental housing in a manner consistent with the Master Plan in providing housing to an array of people who might not otherwise have access to it.

Chairman Rheume opened the public hearing.

#### **SPEAKING IN FAVOR OF THE PETITION OR IN OPPOSITION TO THE PETITION**

No one spoke in favor or opposition.

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

Attorney Pasay phoned his client Mr. Salema to see if his perspective had changed after listening to the Board's discussion. He said Mr. Salema stated that the expense of building the industrial building would have been two million dollars and there was no way in the current market to make the math work between all the costs, including the cost of the infrastructure, and the revenue generated.

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

**DISCUSSION OF THE BOARD**

Ms. Eldridge said she could not support the petition because it went against everything she understood about what the definition of hardship was. She said it wasn't like the property had too many wetlands or was too narrow, it was simply that the applicant had tried to build an industrial building and it wouldn't work, so he wanted to build a residential building. She said she didn't see not being able to make money as a hardship. Mr. Mulligan said he didn't know if he could make a convincing argument for hardship as well. He said the Veridian complex was close by and worked well, and he could see why a similar use could thrive in that location because it had access to a lot of the same things, but he struggled with what the unnecessary hardship was. He said he didn't think it was a bad project, but he was on the fence as to what the downside of approving the project would be. He said he didn't think the Board would see a glut of 60-unit apartment buildings going up in the Industrial District, but he agreed that the financial and return-on-investment arguments were not persuasive. He said the project did fill a housing need and could improve as it went through the site approval process, but the hardship was difficult to articulate.

Chairman Rheume said he could not support granting the variances because, in addition to the hardship criteria, mostly everything the Board had heard was financial, based on one option the applicant had tried and wasn't successful in doing. He said there were a number of potential uses in the industrial zone that could have been looked at, and the threshold was higher than just looking at 'one and done'. He said the petition also failed on the public interest and spirit of the ordinance and the general characteristics of the neighborhood. He said he didn't see anything that indicated that the project was something that would fit, where the ordinance said it would not fit. He noted that there were no other residential areas really close, except for the Veridian complex that was on a parcel zoned for the Gateway District. He said the Veridian had offered numerous advantages that made sense to the Planning Board, in that it was in a walkable community that offered a cinema, coffee shops, restaurants, shopping and so on. He said one could live there and not have to drive anywhere, while the applicant's development was walkable only to Walmart and was more of a complex where people would have to drive to everything. He said the applicant's building would abut a gateway district that happened to extend far back into the industrial zone because the Walmart store occupied a lot of the area, but it was really much deeper and farther away from the central hub. He said that previous applications had something close by that made the Board think it was the wrong kind of zoning, but he wasn't seeing that in this instance. He said there was an opportunity for the applicant to

get relief, but what the Board was asked to do was a legislative function of rezoning that portion of the property. He said there were possibilities of doing something in breaking off that portion of the larger property, like going through the Planning Board and the City Council and making the argument to potentially rezone it, but he said it was too much of a stretch for the Board. He said the project was just too far away, not promoting anything pedestrian, and completely surrounded by industrial buildings, so he could not support it.

### **DECISION OF THE BOARD**

*Mr. Parrott moved to **deny** the application, and Mr. Lee seconded.*

Mr. Parrott stated that all five criteria had to be satisfied. He said the project was contrary to the public interest and conflicted with the explicit and implicit purposes of the ordinance. He said the purpose of industrial zoning, which made it some of the most valuable property in the City, was to provide opportunities to create jobs by making structures, stores, or manufacturing facilities and that the project would not do that. He said it would also alter the essential characteristics of the neighborhood because it would not be surrounded by residential properties but by commercial properties on a commercial street in part of the industrial zone set up by the City to encourage businesses, not housing. He said that, regarding the hardship and the special conditions of the property that distinguished it from others in the area, there was nothing special about the property because it was similar to nearby properties and was part of a larger property that had industrial properties on it. He said it wasn't something that satisfied the basic underlying condition of having special conditions that distinguished it from others in the area, so that criterion was not satisfied. He said all those reasons were sufficient to support the argument that the project did not meet the zoning ordinance requirements for granting a variance.

Mr. Lee concurred and had nothing to add.

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

### **III. OTHER BUSINESS**

There was no other business.

### **IV. ADJOURNMENT**

The meeting was adjourned at 10:07 p.m.

Respectfully submitted,

Joann Breault  
BOA Recording Secretary