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

7:00 P.M. **July 20, 2021**

MEMBERS PRESENT: Chairman David Rheaume Vice-Chairman Peter McDonell, Jim Lee, Arthur Parrott**,** David MacDonald, Beth Margeson, Alternates Chase Hagaman and Phyllis Eldridge

MEMBERS EXCUSED: Christopher Mulligan

ALSO PRESENT: Juliet Walker, Planning Director

Chairman Rheaume introduced new member Beth Margeson.

I. APPROVAL OF MINUTES

A) Approval of the minutes of the meetings of June 15, and June 22, 2021.

The June 15 minutes were **approved as presented** by unanimous vote and the June 22 minutes were **approved as amended** by unanimous vote.

Alternate Ms. Eldridge took a voting seat.

Chairman Rheaume stated that Petition G, 22 Islington Street, had a request to postpone. It was moved, seconded, and passed to take it out of order. He read the petition into the record. He said the Board received a letter from the applicant's attorney stating that the applicant wanted more time to work with the abutter and requested that the petition be postponed to the next meeting.

*Mr. Lee moved to **grant** the request to postpone to the July 28 meeting, and Ms. Eldridge seconded.*

Mr. Lee said the Board typically approved first requests to postpone. Ms. Eldridge concurred.

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

II. OLD BUSINESS

Chairman Rheaume recused himself, and Vice Chair McDonell was Acting Chair. Alternates Mr. Hagaman and Ms. Eldridge took voting seats.

A) Appeal of **Duncan MacCallum** (**Attorney for the Appellants**) of the April 15, 2021 decision of the Planning Board for property located at **105 Bartlett Street** which granted the following: a) a wetlands conditional use permit under Section 10.1017 of the Zoning Ordinance; b) a parking conditional use permit under Section 10.1112 of the Ordinance; c) site plan review approval; and d) approval of lot line revision. Said properties are shown on Assessor Map 157 Lot 1 and Lot 2 and Assessor Map 164 Lot 1 and 4-2 and lie within the Character District 4-W (CD4-W) and Character District 4-L1 (CD4-L1) Districts.

Acting-Chair McDonell explained that the Board was asked to treat the appeal like an administrative officer's decision and consider whether the Planning Board's decision was correct or in error. After some discussion, the Board decided that 20 minutes was adequate time for the appellant's and intervenor's testimonies, with an additional five minutes if needed.

*Mr. Lee moved to limit the testimony to 20 minutes with an option for an additional five minutes if needed, seconded by Mr. Parrott. The motion **passed** by unanimous vote, 7-0.*

SPEAKING TO THE PETITION

Attorney Duncan MacCallum was present on behalf of the applicant. Civil engineer James Hewitt was also present. Attorney MacCallum said he represented 30 opponents of the project who were mostly direct or near abutters. He said the appeal of the Planning Board's decision to grant a wetlands permit and give full approval to the developer's plan was contrary to the zoning ordinance. He said the appeal involved the construction, interpretation, or application of the zoning ordinance provisions. He said the appeal of the decision was *de novo* and the burden of proof remained on the developers. He said he was surprised that the Planning Board approved the project because the developer's proposal was set against the backdrop of a small residential neighborhood of one-story and two-story dwellings and a few old industrial buildings and clashed with the character of the neighborhood, and there was massive public opposition to the project, including Historic District Commission Vice-President Jon Wyckoff. He said the developer, in seeking site plan approval, flouted two prior decisions issued by the BOA: in January 2020, they asked for three variances and two were unanimously denied because the Board said the project blocked the Dover Street view corridor and the proposed building was too tall. He said the developer then went to the Planning Board to get what the BOA said they weren't entitled to. He said the developer's plan called for a wall in the middle of the Dover Street view corridor that was contrary to the zoning ordinance as well. Second, he said the developers engaged in architectural sleight-of-hand by bring in fill and building under the building's foundation to raise the ground an extra seven or eight feet and calling the top of it the new ground level, resulting in a building 66 feet in height.

Mr. Hewitt said he compared the height of the Foundry Garage with the project's height. He said the top of the garage was 73 feet above sea level and the project would be 66 feet above sea level. However, the existing grade was about 10 feet above sea level and the project would dig down 3-4 feet for the wall below grade and bring in fill to hide the first story then build the other four stories, which would bring the height to 70.5 feet and get them an extra story. He said the

wall would actually be a set of steps with a patio and a 7-ft high obstruction over the existing grade blocking the view corridor.

Attorney MacCallum said the most controversial part of the developer's application was the wetlands buffer zone. He read some of the wetlands protection ordinance and said the baseline rule as that one could not build anything in the wetlands buffer zone without a Conditional Use Permit (CUP). He said the developer did not meet the criteria for a CUP, particular Sections 2 and 5, and in order for a CUP to be granted, there must be no alternative location outside the wetland buffer that is feasible or reasonable for the proposed use, and the alternative with the least adverse impact to areas or environments must be used. He said in this case, there was no question that the portion outside the buffer was feasible or reasonable for the use or that there was ample room outside the buffer to build the apartment building. He said it was also plain that the plan was not the alternative with the least adverse impact on the buffer, noting that the developer admitted before the Conservation Commission and the Planning Board that it was possible and feasible to build outside the buffer. He said the developer's reason was economics, or profit, and that they could make as much money if they complied with the zoning ordinance. Attorney MacCallum showed the Board a diagram indicating that it was possible to build apartment buildings that didn't encroach on the wetlands buffer and noted that the modified buildings were smaller but outside the buffer. He asked the Board to reverse the Planning Board's decision and disapprove the project.

Mr. Hagaman said Attorney MacCallum said the plan was workable relative to fitting within the requirements of the ordinance. He asked whether it was the units in the buildings or other criteria that was relied on as feasible. Attorney MacCallum said it didn't really make any difference because the diagram showed that three buildings were big enough to serve as apartment buildings and that Mr. Hewitt cut off a modest percentage of the three buildings. He said the developers could still make a profit. Mr. Hagaman said the intervenors in their brief felt that only Counts 2 and 7 in Attorney MacCallum's brief that were properly before the Board, and he asked if he agreed. Attorney MacCallum said some of the things included were due to whether he would have to go to Superior Court and he didn't want it waived on appeal just because he hadn't mentioned it. He said an example was the spot zoning. He said the Board had appellate jurisdiction over the things he mentioned in his address, and some of those things he asserted were out of an abundance of caution.

Ms. Margeson concurred that the BOA agreed that the CUP was outside its purview. Attorney MacCallum disagreed. Ms. Margeson asked Mr. Hewitt how he calculated the grade under the buildings. Mr. Hewitt said he based the height from the original grade, which was 10 or 11 feet, so the building would be 66 feet tall. He said the applicant brought in fill and was starting his measurement from the finished grade after raising it. Mr. Lee asked if it was a typical construction method to build an elevated platform. Mr. Hewitt said he had never seen a building built the way the applicant proposed. Ms. Eldridge said the applicant might be bringing in fill for a stronger foundation and asked what they would gain. Mr. Hewitt said they were getting an extra story because the underground garage wasn't really underground. Mr. Parrott asked what the height of the first floor and not the garage would be, using the railroad tracks as a fixed point for elevation starting as zero. Mr. Hewitt said the top of the finished floor would be 4-5 feet above the track. Mr. Parrott noted that wasn't the response he got the previous time.

Acting-Chair McDonnell said the intervenor pointed out that their definition was along a street, public way, or greenway relating to the maximum allowable building length, so they had different calculations. He asked the appellant to explain why his calculation was correct. Attorney MacCallum said the developer was playing games because the buildings were longer than 200 feet. He said Mr. Hewitt started with a plan that the developer's engineers did and cut off a few or the original buildings so they would appear to be within the buffer zone. He said if Building B was imagined to be extended before Mr. Hewitt cut it down, the edge was well in excess of 200 feet. He said the developers were saying that they had to go by the length that was parallel to Islington Street, and those lengths were less than 200 feet. Attorney MacCallum said the building was way over 200 feet, looking from Bartlett Street, and it depended on where one looked at it from. Acting-Chair McDonell said the point the developers were trying to make was, when you look at it from any of those things, it was less than 200 feet. Attorney MacCallum said that was the developers' contention. He said the long edge of Building B was 250 feet, which was what one would see for Bartlett Street.

Acting-Chair McDonell asked if the appellant said there was a wall or raised terrace obscuring the Dover Street view corridor because it was above ground level or it was obstructing what one see if it wasn't there. Attorney MacCallum said the developer was planning to raise the ground level, which would raise the base of the terrace. He said the ordinance stated that all new buildings located within 400 feet of the North Mill Pond will maintain the existing views, except for existing obstructions and that the public view corridor shall be maintained. He said the developer was not entitled to create new obstructions to the Dover Street view corridor using the terrace. Acting-Chair McDonell said it had to be a new building or structure for it to be within that provision, and he asked if the terrace was a new structure. Attorney MacCallum said the view was supposed to remain clear. He said one of the citizens complained that the developers were planning to plant a row of trees that would block the Dover Street view corridor. Acting-Chair McDonell said there were several existing trees that blocked the view, but the provision said that all new buildings and structures shall be located to maintain existing public views. Attorney MacCallum said that didn't mean that the developer was entitled to create more view obstruction. Acting-Chair McDonell said the developers were saying that because a structure was lower than four feet, it didn't count as a structure, as defined in the ordinance. Attorney MacCallum disagreed and said there was a difference of opinion as to whether the terrace would obstruct the view. He said a structure meant a structure and that it didn't have to be a building.

Mr. Hagaman said the existing structures and buildings along the pond were within the 150-ft wetland buffer, and he asked how the proposal was worse than that existing environment. Attorney MacCallum said one was not supposed to build within the buffer and that they couldn't do anything about the structures that were already there. He said the developer's representations as to what they would do or not do was like a moving target, noting that they talked about removing impervious and replacing it in fashion, but they weren't supposed to build in the wetlands buffer at all. He noted that the Conservation Commission had said there was no trade-off. Mr. Hagaman asked, in terms of the elevations of Dover and McDonough Streets and the railroad, if the terrace would reach an elevation that would impede the view of Dover and McDonough Streets as opposed to being in the corridor. Mr. Hewitt said anything built in the corridor would obstruct the view, and both views would be obstructed by the new terrace. Acting-Chair McDonell asked if he meant that the terrace elevation would be above the elevation

of the lowest point of Dover and McDonough Streets. Mr. Hewitt said he didn't know Dover Street's elevation but knew the railroad tracks were 13 feet and the terrace would be 17-1/2 feet.

Ms. Margeson said the ordinance stated that a structure is any production or piece of work artificially built up or joined together, but she remarked that there were two ways of calculating building length in the ordinance, the regular zoning ordinance and the character-based zoning, and that was the maximum building block length. Because the way the definition was worked in the character-based zoning, she thought it would seem to be the appropriate calculation for the building. Attorney MacCallum explained that the building length would be the end of an imaginary line. Ms. Margeson said Building B was 190 feet long according to the developer's plans and asked if Attorney MacCallum was saying it was longer than that. Attorney MacCallum said it was 250 feet long. Mr. Hewitt said Building B had two dimensions, with the long length being 185 feet and the ell being 65 feet, resulting in a total of 250 feet. He said the full 250 feet of building would be seen from Bartlett Street.

Attorney Michael Ramsdell was present on behalf of the intervenors and said he represented Iron Horse Properties. He said the applicant listened to all the land boards and City Staff and had a plan that satisfied all the ordinances involved. He said the appeal had no merit to it and was only to curtail progress on the project. He said there was no jurisdiction for the BOA for an appeal for a land use decision, and he cited a clause from the ordinance. He said a zoning board was not a board of equity. He said the Planning Board found that the criteria were met, but the appellant eliminated the part of the criteria that limits consideration to the proposed use, so it wasn't an issue of whether a different plan or use might be feasible outside the buffer but was whether there was an alternative condition for whether there is a propose use. He said there was no feasible or reasonable alternative location outside the buffer for the proposed use and that there was no adverse impact. He said the plan would restore impervious surfaces and improve the environment by restoring native plants and habitat and provide potential access to North Mill Pond, and the environmental footprint of the shared parking was shrunk through the CUP. He said the procedural defect before the Conservation Commission was not due to a lack of findings.

Attorney Ramsdell reviewed the counts as follows:

Count 1 alleges that the building block length of Buildings B and C are too long. He said it was incorrect because the building block was measured according to the total length of a continuous building façade measured along a street, public way, or greenway. Building Block B was the largest but was a total building block length of only 185 feet, fifteen feet shorter than the maximum allowed by the ordinance.

Count 3 says the Planning Board approval counteracts a previous denial. Attorney Ramsdell said that wasn't true because Iron Horse listened to the Planning Board and changed their plans. The variance application only sought to shift the view corridor 90 degrees west, and the approved site plan allowed the Dover Street view corridor to run from the Islington Street intersection to the furthest part of North Mill Pond. He said after the plan changed, there was no interruption.

Count 7 says that, through sleight of hand, Iron House circumvented another decision by increasing the property grade. He noted that the minutes of that meeting stated that Mr. Parrott

asked if the building heights would be measured from the railroad or the present ground, and Mr. the applicant's project engineer Patrick Crimmins said the first floor would be in line with the railroad. Attorney Ramsdell said there was no sleight of hand and the plan was adjusted based on the Board's concern. He said the building height was also no sleight of hand because the height was measured from the average grade plane elevation to the height of the building and all of them were under the 50-ft maximum.

Count 2 – the appellant contends that the Planning Board approval will let the project block the Dover Street view corridor. Attorney Ramsdell said it would not because the elevation of the terrace was 17.5 feet above sea level, the same elevation as the first floor, and the lowest point on Dover Street was 21 feet above sea level, with the highest being 31 feet above sea level. He said there would be no obstruction from the terrace because it was 3-1/2 feet lower than the lowest elevation on Dover Street. He said there was really no existing view of North Mill Pond because it was blocked by the foliage, the railroad, and the Round House building. He said the Round House building would be removed and the railroad might take down the foliage, so the view would be improved but the view of the Dover Street view corridor would not be blocked because Dover Street was a higher elevation than the terrace.

Attorney Ramsdell said he would not refer to the preservation arguments made before or what a *de novo* appeal was. He said the Board had an appeal of a decision.

Mr. Hagaman said the Statute talked about innovate uses within the ordinance and asked if Attorney Ramsdell thought that did not indicate that the CUP had to be allowed. Attorney Ramsdell said it depended on what the ordinance said, but in this case it gave total administration of CPUs to the Planning Board. He said it was an innovative land use control and any appeal had to go to the Housing Appeals Board. Mr. Hagaman asked if the client received any incentives from the City relative to density or building height, or if there were tradeoffs that were incentives built in the ordinance that the applicant could do with the improved plan. Attorney Ramsdell said some of the greenspace was dedicated to the City in exchange for increased density.

Mr. Parrott said he asked the railroad question at the previous meeting because there was so much talk about digging into the ground, and his experience was that there were a lot of buildings post-construction that were a lot taller than the Board expected. He said he also asked if the railroad tracks were likely to stay where they were, and the engineer agreed. So, using the tracks as a baseline, he asked what the relationship would be between the height of the railroad tracks and the finished first floor of any of the buildings. Mr. Crimmins said the elevation of the railroad track was 17 and the finished floor was 17.5, so it was approximately the same elevation. Mr. Parrott said the appellant had stated that it was four or five feet higher. Mr. Crimmins said that was incorrect and that it was measured off the mud at zero elevation.

Ms. Margeson said the applicant also had the constraint of the easement from the City in addition to the railroad tracks and had said the buildings could be moved out of the wetland buffer even with those constraints in the back. Mr. Crimmins said it wasn't this project. Ms. Margeson asked Ms. Walker if, when the project went before TAC and the Planning Board, there were any calculations done of the Dover Street vista and also whether the building met the ordinance by going from the grade plan to the top. Ms. Walker said those things were considered.

Acting-Chair McDonell said the applicant stated that the proposed terrace was located within the view corridor and wouldn't disrupt or diminish the near view of North Mill Pond. He asked whether the applicant was saying that their proposal to build in the view corridor may obstruct the end of the pond. Attorney Ramsdell said they never suggested that there would be an obstruction of the view corridor and that they were not obstructing any of the near view of the pond, noting that the near view of the pond couldn't be seen today. Acting-Chair McDonell said the applicant said the ordinance stated that the applicant had to maintain the existing public view of the terminal vista of North Mill Pond. He said the applicant said the Dover Street view from North Mill Pond was nonexistent due to the foliage and the building, and he asked if the applicant meant it was the day he asked to put something there or the day that the ordinance provision was passed. Attorney Ramsdell said he didn't believe that it could be at the time the ordinance was passed, but the reality was that it was always a snapshot in time because trees grow. He said it was the view that existed at the time the plan was approved. He said trees were not structures but would obstruct the view.

Acting-Chair McDonell said the applicant suggested that what they proposed wasn't even a structure because the wall was shorter than four feet. He said there was a list of structures that weren't limited to fences over four feet, so the only way the applicant would prevail in that argument was if they were building a fence. Attorney Ramsdell said that wasn't what they intended to say, and explained that because there was a reference to something four feet high, it may be that the ordinance intended that it didn't qualify as a structure, whether it was a wall, shed, box, or terrace, because it wasn't four feet high.

Mr. Hagaman asked whether every past proposal required the need for fill to be brought in or if it was a new thing. Attorney Ramsdell said it wasn't new and that they were asked whether it was going to start at the railroad height or lower, so there wasn't anything hidden about it. Mr. Crimmins said other recent buildings constructed in Portsmouth were similar to their design.

At this point in the meeting, the Board discussed postponing some petitions to the July 28 meeting due to the late hour.

*Mr. Hagaman moved to **postpone** Petitions D, E, and F to the July 28 meeting, and Mr. Parrott seconded.*

Mr. Hagaman said that, given the late hour and in fairness to the applicants, it was wise to postpone the petitions to the July 28 meeting. Mr. Parrott concurred. Ms. Walker noted that those petitions would be placed under Old Business at the beginning of the July 28 meeting.

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

Acting-Chair McDonell opened the public hearing.

SPEAKING IN FAVOR OF THE APPELLANT

Liza Hewitt of 169 McDonough Street said the railroad was a great reference, but it was raised above the developer's property. She showed a photo to the Board that proved that the water

could be seen from the corridor and that the terrace would block the view of it. She said one of the wetlands CUP criteria was that there is no alternative location outside the buffer that is feasible, and she didn't feel it was met because it could be built outside the wetlands buffer. She said the developer chose to maximize financial return, noting that they told the Conservation Commission that the project didn't want to reduce the building size because it needed to work economically and that the developer's attorney admitted that the reason they couldn't build outside the buffer was financial. She said it didn't meet the CUP criteria.

Abigail Gendell said the applicant bought the land recently, knowing that they had to adhere to the setback, but they thought they could bend the rules. She said they designed their project to go into the wetlands and kept finessing it through the Planning Board. She said the Dover Street view corridor and other views would be impacted.

James Hewitt said he wanted to correct what he said about the track elevation because he realized that the grade began to rise going south, so he agreed with Mr. Crimmins that it was closer to 17. He said the project couldn't go ten feet down due to the soils and water table being too high, so they had to partially start their grade from the brought-in fill.

John Howard of 179 Burkitt Street reviewed the six criteria and explained why they wouldn't be met. He said the developer should be required to build outside the 100-ft buffer and should not be allowed to set a precedent.

James Beal of 286 Cabot Street said the terrace was part of the underground parking, so it was considered shelter for the vehicles underneath, and the building exceeded the 200-ft length because it would be part of Buildings A and B. He said Iron Horse stated that they creating lots under the buildings and raising the buildings above the floor plane. He asked why they were allowed to build within the 100-ft buffer, especially with the climate change. He said the loss of the greenway and the costs to protect the invading shorelines would fall on the citizens.

Esther Kennedy of 41 Pickering Avenue said her sole concern was the buffer zone. She found it hard to believe that the City would allow a building in the buffer zone and hoped the Board would realize the seriousness of losing the algae, grasses, aquatic species, and the runoff from a project like that. She said the project proposed a roadway in the buffer zone for a fire truck to get through. She said the citizens voted to have a buffer zone and hoped it would be kept.

Nan Brown of Bartlett Street said she was disappointed with Portsmouth in the last decade due to all the development. She supported the previous comments and wanted to get to a point where the City would take a break from all the development. She said the City didn't need 400 more housing apartments in that area and that Bartlett Street already had a lot of traffic.

Paige Trace of 27 Hancock Street said she believed that more affordable housing was needed but also believed that the ecological system in North Mill Pond had a right to survive, and allowing a development to build inside a buffer zone that was so important to the estuary wasn't necessary. She said the applicant could construct a building that didn't fall into the estuary and wouldn't cause a problem later on with stormwater abatement. She said the BOA was in charge of saying the development could happen but not in the manner proposed/

SPEAKING IN OPPOSITION OR
SPEAKING TO, FOR, OR AGAINST THE APPELLANT'S REQUEST

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

DISCUSSION AND DECISION OF THE BOARD

Mr. Lee said he felt that all the Board had to deal with was what they heard tonight. He said the applicant may have changed a few things by bringing in some dirt and moving the elevation up, but he was prepared to uphold the appeal. Ms. Walker noted that if the appeal was granted, the Planning Board decision would be overturned. Acting-Chair McDonell said when the applicant was previously before them, they were asked to grant some variances, but now they were looking at the Planning Board criteria. Mr. Lee said he didn't think a lot had changed. Mr. Hagaman asked if the appeal was on the entire decision of the Planning Board in every aspect or just portions of it, noting that the brief only identified three or four aspects of the Planning Board's decision. Ms. Walker said the lot line revision was mentioned but was not under appeal, and the site plan approval included a CUP for development and the wetlands. She said the wetland CUP was part of the zoning ordinance and the site plan regulations were separate regulations, so the BOA was looking at those two decisions.

Mr. MacDonald said he would support the appeal, noting that the City in the last decade had gone through a surge of developing buildings that the City didn't really need and that consumed services and generated costs for the citizens. He asked how much better off Portsmouth would be if the proposal was approved. He said there were enough places to live for residents that people who didn't live in Portsmouth but wanted to saw a shortage of housing. He said there was a shortage of natural waterfront and wild species and that the City didn't have to approve giant residential buildings or corrupt shorelines and estuaries to make the planet a better place to live. He said he supported the appeal. Ms. Margeson said she understood the lot line revision but the wetlands CUP was a standalone issue and the Board's review was based on the six criteria. She asked if the site plan CUP included the shared parking and was told that it did, and she suggested that the three sections be broken down. Acting-Chair McDonell said it should be looked at in the same format that the appellants raised it, and if the Board didn't agree with any of the appellant's reasons, they would not overturn the Planning Board's decision, but if they did agree with some of the counts, they could say that they did. Mr. Hagaman said he was torn because he felt that the CUPs were out of the BOA's jurisdiction. He said other aspects that indicated that past decisions of the BOA were circumvented were not accurate, and the view corridor representation changed. He said there were was different criteria for the CUP and the argument didn't justify overturning the Planning Board's decision. Mr. Lee said the Board should just consider the totality of the appeal and say yes or no.

*Mr. Lee moved to **grant** the appeal for the applicants, and Mr. Parrott seconded.*

Mr. Lee said that, after spending several days going through the issue, he felt it was the right thing to do. Mr. Parrott said it was one of those cases where you had to find that it was either all valid or not valid. He said one of the important aspects was the wetland setbacks and the six points, and he had a problem with Points 2 and 5. He said the applicant's claim that there was no

alternate location outside the buffer that was feasible or reasonable wasn't true because it was shown that there was an alternative outside the buffer only a few feet away. He said it had been shown and admitted to by the developer that moving the project outside the buffer would have less impact and was feasible. He noted that the area had been used and abused by a lot of different entities over a long period of time, and the impermeable areas would have been moved a long time ago if there was any concern. He said the Board wasn't taking anything away from anyone because there was nothing there, it was underdeveloped property, so the design possibilities were wide open and could respect the setback. He said it was clear that the proposal wasn't the alternative with the least adverse impact because it dug in and built structures within the setback. He said the language of the ordinance was clear.

Ms. Margeson said she would support the appeal, noting that she watched the entire Planning Board meeting and walked the site. She said the central thing was building in the wetlands. She said the encroachment on the wetlands made the project unsuited to the building and that the developer could build outside the buffer. She said anything that purported to protect the wetland needed to take the least adverse impact, and she didn't believe the project did that.

*The motion **passed** by a vote of 5-2, with Mr. Hagaman and Acting-Chair McDonell voting in opposition to the motion.*

Chairman Rheaume resumed his seat and Acting-Chair McDonell resumed his chair as Vice Chair.

*It was moved, seconded, and passed unanimously to **suspend** the ten o'clock rule and continue the meeting.*

Mr. Hagaman took a voting seat for the next petition.

B) Petition of **William H. and Barbara Ann Southworth, Owners,** for property located at **39 Pickering Street** whereas relief is needed from the Zoning Ordinance to replace existing 8' x 8' shed with a 10' x 12' shed which requires the following: 1) Variances from Section 10.521 to allow a) a 2' rear yard where 10' is required; b) a 2' right side yard where 10' is required; and c) 40.5% building coverage where 30% is the maximum allowed. 2) A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on Assessor Map 102 Lot 5 and lies within the General Residence B (GRB) District.

The applicant was not present.

DECISION OF THE BOARD

*Mr. Parrott moved to **postpone** the petition to the August 4 meeting, and Mr. Hagaman seconded.*

Mr. Parrott said the applicant wasn't present to speak and that the agenda for the July 28 meeting was quite full, so postponing it to the August 4 meeting made sense. Mr. Hagaman concurred.

*The motion **passed** unanimously, 7-0.*

Ms. Eldridge took a voting seat for the next petition.

C) Request of **Bucephalus LLC, Owners**, for the property located at **650 Maplewood Avenue** whereas relief was needed from the Zoning Ordinance to change of use to allow motorcycle sales which requires the following: 1) A Special Exception from Section 10.440, Use #11.10 to allow the sales, renting or leasing of motorcycles where the use is permitted by Special Exception. 2) A Variance from Section 10.592.20 to allow the proposed use to be located adjacent to a Residential district where 200 feet is required. 3) A Variance from Section 10.843.21 to allow areas for parking, outdoor storage and outdoor display of vehicles or equipment to be setback less than 40 feet from the street right-of-way where 40 feet is required. Said property is shown on Assessor Map 220 Lot 88 and lies within the Business (B) District.

SPEAKING TO THE PETITION

Attorney John Bosen was present on behalf of the applicant and the co-owner John Thompson was also present. Attorney Bosen reviewed the petition, noting that Motorbikes Plus had been in Portsmouth for over 40 years and specialized in motorcross bikes, which were different from a traditional motorcycle because they were off-road bikes. He said the site abutted residential districts so the relief was required. Mr. Thompson said it wasn't a large dealership and that most of their business was parts, apparel, and accessories. He said he reached out to the neighbors and that the main concerns were increased traffic, noise, pedestrian safety, and light pollution. He said there weren't many customers because the business was mostly mail order. He said customers did not test drive the bikes and almost all the sold bikes were removed by a truck and not driven off the lot. He said their products didn't create disruptions or noise and that they would be kept inside, so there would be no outdoor storage or bright lights.

Attorney Bosen reviewed the special exception and variance criteria and said they would be met.

In response to Mr. Lee's question, Attorney Bosen said test drives rarely occurred because only five percent of the sales were bikes that could be ridden on and off the road. Mr. Thompson agreed and said people didn't do test drives due to the nature of the business and liability purposes and usually bought the bikes due to a magazine review or a friend's recommendation.

Chairman Rheaume said the Board would be granting the request in perpetuity as a site suitable for a motorcycle-selling business, and he couldn't guarantee that the applicant wouldn't close up shop and someone else would come in and put a different business in place. He recommended stipulating that test drives would not be allowed on the property. Chairman Rheaume asked the applicant why he was moving. Mr. Thompson said the current location was too small and the business included apparel and accessories, so they were running out of room. He said they could stock more inventory at the new place, be more efficient, and have a larger parking lot.

Mr. Lee asked what brands of bikes were sold. Mr. Thompson said they were mostly Austrian bikes that were specialty products. He noted that all three brands offered electric versions, which he expected would increase in the near future. He said the electric bike test drives would be confined to the parking lot. Chairman Rheaume said that was part of the Board's concern, a test track in the parking lot. He asked what the engine sizes were. Mr. Thompson said they went from 50 cc to 690 cc, with a very small segment of mountain bikes that went up to 1200 cc. Mr. MacDonald suggested stipulating that no internal combustion vehicles would be operated on the property. Mr. Thompson said that wouldn't work because a new bike would be started up to ensure that it was in condition before being delivered. Mr. Lee asked if there would be a merchandise display in the parking lot. Mr. Thompson said they would like to display a few pieces of equipment near the front door during business hours for passers-by to see.

Chairman Rheaume opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one was present to speak. Chairman Rheaume noted that the Board received several letters, some in favor and some opposed, and some were concerned about the business but changed their minds. He closed the public hearing.

DISCUSSION AND DECISION OF THE BOARD

Mr. McDonell said he was inclined to approve the petition and didn't feel that a stipulation restricting test drives was necessary because it was a small enough space and there was no concern with test drives and he didn't want to burden the site with something it didn't need. Chairman Rheaume said the Board had had similar cases before. He said the special exception was allowed in the district, but a concern could be for excessive noise and traffic. He said the variance request to allow the proposed use near a residential district where 200 feet was required had come back to the Board as a major issue for properties doing things with automotive businesses on the turnpike near the traffic circle. He noted that the abutters withdrew a lot of their concerns after seeing the business model, but the request was being granted in perpetuity, so the Board had to be careful. Ms. Margeson agreed and said the residential district gave her pause because the variances ran with the land. She said the perpetuity issue was well stated and she would be more comfortable with a stipulation because it was a significant situation.

*Ms. Margeson moved to **grant** the special exception for the petition, and Mr. Parrott seconded.*

Mr. Margeson said the use was permitted by special exception and would pose no hazard to the public or adjacent properties on account of potential fire, explosion, or release of toxic materials because the business did not have any of those potential hazards. There would be no detriment to property values in the vicinity or change in the essential characteristics of any area including residential hoods or business and industrial districts on account of the location or scale of buildings and other structures, parking areas, accessways, odor, smoke, gas, dust or other pollutants, noise, glare, heat, vibration, or unsightly outdoor storage of equipment, vehicles or other outdoor materials. She said the application met that criteria. She noted that some vehicles would be seen on site but given their diminutive nature, they met the unsightly criteria and there

would be no detriment to the property values because it was a residential neighborhood and the business was previously zoned a business, and an existing business had been operating in that location. She said granting the special exception would pose no creation of a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity, noting that there would be very little increase in traffic in and around the business due to it being a motorbike business and having very few test drives. She said it would pose no excessive demand on municipal services including but not limited to water, sewer, waste disposal, police and fire protection, and schools. She said the applicant would create no excessive demand on those services. She said the project would pose no significant increase in stormwater runoff onto adjacent properties or streets, noting that it wasn't a business that would create any kind of stormwater runoff.

Mr. Parrott concurred and had nothing to add. *The motion **passed** by unanimous vote, 7-0.*

*Vice-Chair McDonell moved to **grant** the variances for the petition, with the following **stipulation**:*

- *No test drives shall occur outside of the property itself.*

Mr. Parrott seconded.

Vice-Chair McDonell said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said in both cases there was a good argument that the purpose of the ordinance was more geared toward a large-scale car or motorcycle dealership with a large display area, a lot of light and noise and so on, and he didn't think those issues were implicated here or would be for a potential later use of the property, so he saw no conflict with the purposes of the ordinance and no alteration in the essential character of the neighborhood, no threat to the public's health, safety, or welfare, and no injury to public rights. He said it was an eclectic area on the border of a residential area and the use fit in well. He said substantial justice would be done because it was a clear benefit to the applicant and he didn't see any harm to the general public. He remarked that the Board received feedback, most of which was assuaged by discussion with the applicant. He said there were some concerns with any business use near a residential zone but didn't think there would be any real harm to the general public in this case. He said literal enforcement of the ordinance would result in unnecessary hardship because the business location on the street and location of the use were special exceptions. He said the property was suited for the use but wasn't big enough to support a large-scale use that would be detrimental to a residential area. He concluded that there was no fair and substantial relationship between the purposes of the ordinance and their application to the property, and that the proposed use was reasonable and the variances should be granted.

Mr. Parrott concurred and had nothing to add.

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

D) Request of **The Elizabeth B. Larsen Trust of 2012, Owner**, for the property located at **668 Middle Street** whereas relief is needed from the Zoning Ordinance to subdivide lot into three lots which requires the following: 1) A Variance from Section 10.521 to allow 114' and 100' of frontage on a private way where 100' of frontage on a formally accepted

street or other road approved by the Planning Board and constructed to City subdivision standards. 2) A Variance from Section 10.521 to allow 69.83' of frontage on Middle Street where 100 feet is required. 3) A Variance from Section 10.512 to allow construction of a structure on a lot with access to a private right of way. Said property is shown on Assessor Map 147 Lot 18 and lies within the General Residence A (GRA) District.

DECISION OF THE BOARD

The petition was **postponed** to the July 28 meeting.

E) Request of **Cate Street Development LLC, Owner**, for the property located at **428 US Route 1 Bypass** whereas relief is needed from the Zoning Ordinance to replace two existing free-standing signs with new signs for mixed-use development which requires the following: 1) A Variance from Section 10.1251.20 to allow a 388.5 square foot sign where 100 square feet is the maximum allowed. 2) A Variance from Section 10.1251.20 to allow a 60 square foot secondary sign where 40 square feet is the maximum allowed. Said property is shown on Assessor Map 172 Lot 1 and lies within the Gateway Neighborhood Mixed Use Corridor (G1) District.

DECISION OF THE BOARD

The petition was **postponed** to the July 28 meeting.

F) Request of **Wentworth Corner LLC, Owners**, for the property located at **960 Sagamore Avenue** whereas relief is needed from the Zoning Ordinance to demolish existing structures and construct an 8 unit residential building which requires the following: 1) A Variance from Section 10.521 to allow a lot area per dwelling unit of 5,360 square feet where 7,500 square feet is required. 2) A Variance from Section 10.1114.31 to allow two driveways on a lot where one driveway is permitted. Said property is shown on Assessor Map 201 Lot 2 and lies within the Mixed Residential Business (MRB) District.

DECISION OF THE BOARD

The petition was **postponed** to the July 28 meeting.

G) Request of **Stephen G. Bucklin LLC, Owners**, for the property located at **322 Islington Street** whereas relief is needed from the Zoning Ordinance to request to amend variances that were granted to move an existing carriage house to a new foundation and add a one-story connector to the existing house by removing the stipulation that required a signed letter of approval from the property's rear neighbor. Said property is shown on Assessor Map 145 Lot 3 and lies within the Character District 4-L2 (CD4-L2) District.

DECISION OF THE BOARD

Per the applicant's request, the petition was **postponed** to the July 28 meeting.

III. PUBLIC HEARINGS – NEW BUSINESS

There were no public hearings - new business.

IV. OTHER BUSINESS

There was no other business.

V. ADJOURNMENT

The meeting was adjourned at 11:30 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary