

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

7:00 P.M.

August 17, 2021

MEMBERS PRESENT: Chairman David Rheaume, Vice-Chairman Peter McDonell, Jim Lee, Christopher Mulligan, Arthur Parrott, David MacDonald (via Zoom), Beth Margeson, Alternates Chase Hagaman and Phyllis Eldridge

MEMBERS EXCUSED: None

ALSO PRESENT: Peter Stith, Planning Department

I. APPROVAL OF MINUTES

A) Approval of the minutes of the meetings of July 20, and July 27, 2021.

The July 20 minutes were **approved** as amended (Ms. Margeson's first name was changed from Elizabeth to Beth). The July 27 minutes were **approved** as presented.

Chairman Rheaume said there was a request to postpone Petition C, 960 Sagamore Avenue, and asked that it be taken out of order.

Mr. Mulligan recused himself from the following vote, and Alternate Ms. Eldridge took a voting seat.

It was moved, seconded, and passed unanimously (7-0) to take Petition C out of order.
(Note: See Page 4, Petition C, 960 Sagamore Avenue).

Chairman Rheaume stated that the petition for 204 Wibird Street was **withdrawn**.

II. OLD BUSINESS

Chairman Rheaume and Mr. Mulligan recused themselves from the petition. Vice-Chair McDonell was Acting Chair and both alternates took voting seats.

A) Request for Rehearing – 105 Bartlett Street (Iron Horse Properties LLC)

Acting Chair McDonell explained that the Board granted an appeal in July for a Planning Board decision made in April for Iron Horse Properties LLC. He said the Board received and evaluated

additional information from both parties and had to decide whether to grant the request for rehearing if they thought they made an error in procedure or law in their previous decision.

Ms. Margeson said she reviewed the memos from both parties and believed that the Board's approach was a reasonable one and in accordance with the guidance from the City Attorney, and she saw no need for a rehearing and thought the other issues were better suited for a court of law to decide. Acting Chair McDonell agreed. Mr. Lee said he read in the information that the Board should grant the rehearing request if the majority of the members were convinced that some error of procedure or law was committed during the original consideration of the case, and he felt that the Board's consensus was that the request should not be granted.

DECISION OF THE BOARD

*Mr. Lee moved to **deny** the request for rehearing, and Ms. Eldridge seconded.*

Mr. Lee referred to his previous comments. Ms. Eldridge said she felt confident that the Board followed the City's instructions and saw no reason to grant a rehearing.

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

Chairman Rheume and Mr. Mulligan resumed their voting seats, and Acting Chair McDonell and both alternates resumed their normal seats.

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.

SPEAKING TO THE PETITION

The applicant Bill Southworth was present and said he wanted to replace the existing shed with a new one that had additional space for a home-based office space. He noted that the City Map had old dimensions for his house. He referred to his written criteria review.

Ms. Margeson noted that a variance was granted in 1995 for a 6'x7' shed, but the shed was now indicated as 8'x8' and created a 2-ft side yard. The applicant said the shed was present at the time the house was built and was larger than 8'x8'. Ms. Margeson asked if the shed was replaced at one point. The applicant said it wasn't replaced since the 1990s and that he bought the house in 2009. Ms. Margeson said the shed was not defined in the ordinance but the applicant wanted the structure to be a building and a place to store yard equipment. Vice-Chair McDonell asked if there were any other windows or doors other than one window on one side and sliding doors on another. The applicant said there was nothing on the other two sides except for a fence. In

response to further questions, the applicant said he wanted to heat the shed with radiant electric heating but have no cooling or running water. He said if he complied with the 10-ft setback, the shed would be in his dining room. He said there were three or four other sheds in the area with living space that he thought were nonconforming.

Chairman Rheume opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

There was no one present to speak. Chairman Rheume said the Board received a few letters in opposition and one 'to, for, or against'. He closed the public hearing.

DISCUSSION OF THE BOARD

Mr. Lee said the shed would go from a ramshackle shed to an elaborate building with heated floors and office space and wouldn't be a true shed. Ms. Margeson said she was concerned about the nonconforming structure, noting that the zoning ordinance tried to eliminate nonconforming structures and that the proposal for the office piece was a significant increase in the shed. She said she didn't see that the property had special conditions that warranted the variance. Chairman Rheume said he also had concerns, including the shed's visibility to the neighboring properties and the impact on their air and light as well as future maintenance of the structure. He said the space would also have power and lights, which was typically more bothersome than an unpowered shed or something with no window openings in the corner of a property where someone was usually just storing items. He noted that many properties in Portsmouth came with compromises, like storage wouldn't be as readily available as it would be in a less compact urban area. He said he would be okay with a shed much closer to the existing structure. Mr. Parrott said the request was pretty modest because it was a net increase of 64 square feet. He said the yard was small and the increase would be toward the middle of the property.

DECISION OF THE BOARD

*Vice-Chair McDonell moved to **deny** the petition, and Ms. Margeson seconded.*

Vice-Chair McDonell said he agreed that it was a modest increase in size but was a few feet higher, which changed the nature of the existing shed. He said the property had special conditions because it was small, so maybe some relief was appropriate, but there was a lot of relief requested as well as a change in use. He said a traditional shed had a much more innocuous use and he didn't think of a shed as having an occupant in it a large portion of the day, so there was more reason to compel something closer to compliance with the setback requirements. He said he didn't think the proposal complied with the unnecessary hardship requirements because, although there was a fair and substantial relationship between the setback provision of the ordinance and its application to the property, it was a shed of a much more intensive use. He said there was quite a bit of vertical expansion and the Board got reports from people in the area saying that their property values would be diminished. He said there would be a benefit to the

applicant but also harm to the general public, specifically neighbors, if the variance were granted in its current form. For those reasons, he said the request should be denied.

Ms. Margeson said she echoed Chairman Rheume's comments that it was a significant expansion of a nonconforming structure that would contain not only yard tools but a heated office. She said it was a very small space and thought it would be contrary to the public interest to grant the variance. Chairman Rheume said the spirit of the ordinance was a concern also.

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

C) **REQUEST TO POSTPONE** 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. **REQUEST TO POSTPONE**

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

Chairman Rheume said the applicant wanted to postpone to continue to revise his petition.

DECISION OF THE BOARD

*Vice-Chair McDonell moved to **approve** the postponement, and Mr. Parrott seconded. The motion **passed** by unanimous vote, 7-0.*

Mr. Lee recused himself from the following petition, and Mr. Hagaman took a voting seat.

D) Request of **Sarah Sommer Kaufman Revocable Trust, Owner** for the property located at **546 Sagamore Avenue** whereas relief is needed from the Zoning Ordinance to add a rear addition and vertical expansion of the garage which requires the following: 1) A Variance from Section 10.521 to allow a 4.5' 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 222 Lot 10 and lies within the Single Residence B (SRB) District.

SPEAKING TO THE PETITION

Attorney Derek Durbin was present on behalf of the applicant, along with the applicants Cliff and Sarah Kaufman. Attorney Durbin said the applicant wanted to add living space by doing a two-story infill addition and vertically expanding the existing garage. He said the nonconforming deck would be removed. He reviewed the criteria and said they would be met.

Mr. Hagaman said the 2nd floor workout room looked like a large studio with outside access and could be made into an Accessory Dwelling Unit (ADU). Attorney Durbin said the applicant intended to keep it as a utilitarian room for office space and exercise. Chairman Rheame asked if there was a laundry room due to the existing sink. Mr. Kaufman said there was one but there was no kitchen planned. Ms. Margeson said it was a significant extension of a nonconforming structure, noting that the applicant wanted to tear down the back deck and put in a new 2-story structure but didn't currently meet the right yard setback. She said there was a good-sized left yard setback on the house next to the applicant and asked how concerns for light, air, and access to emergency vehicles would be addressed. She also noted that a lot of bulk would be added to the back of the house and above the garage with the new 2-story structure. Attorney Durbin said it might appear larger but wasn't really a great deal of space. He said the downstairs part of the addition would almost be like a sunroom and enclose the existing deck, and the upstairs piece was to add space to the existing bedroom. He said the addition would have to comply with current building and life safety codes. He said it wasn't a large request for relief, noting that a fairly large deck would otherwise create additional noise for abutters, while an enclosed structure would buffer that noise. Ms. Margeson said there was a lot of space in the back. Attorney Durbin said any other space to site the addition would be difficult and the home would end up oddly configured. He said it would tie into the existing structure and roofline.

Chairman Rheame opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

*Mr. Hagaman moved to **grant** the variances for the petition, and Mr. Parrott seconded.*

Mr. Hagaman said he at first had some hesitation about the proposed workout room because he thought it could easily be converted into an ADU, but the applicant had said that wasn't the intent. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance because it was a modification of an existing home in the same footprint and wouldn't alter the essential character of the neighborhood nor threaten the public's health, safety, and welfare. He said the spirit of the ordinance would be observed because there would be proper light, air, access to the other building, and plenty of setback and offset from other properties and structures. Substantial justice would be done because the loss to the applicant would not be outweighed by any gain to the public. He said there was no evidence that surrounding properties would be diminished in value, noting that property values often went up in value when improvements like that were done. He said literal enforcement of the ordinance would result in unnecessary hardship because the lot was smaller relative to its neighbors and the house was situated such that it already encroached on the side setback, so any improvement or expansion would require a variance and it wouldn't make the existing encroachment worse. He said there was no fair and substantial relationship between the general public purposes of the

ordinance provision and the specific application of that provision to the property. He said the proposed use was a reasonable one, maintaining the structure as a single-family residence.

Mr. Parrott concurred. He said the house was situated very oddly on the lot and there had been plenty of room to put it toward the middle, but it wasn't done that way, and the garage was in the middle of the lot, all of which made any addition difficult. He said the applicant made the best of the situation and that the request was reasonable.

Chairman Rheume said 4-1/2 feet was not a huge amount but was reasonable because there was an existing 2-story structure and the applicant was just adding some length to it. He said it was oddly situated but had been satisfactorily maintained and the addition would not unduly burden the neighbors. He said the impact on air and light would also be minimal.

The motion passed by a vote of 6-1, with Ms. Margeson voting in opposition.

For the following petition, Mr. Lee resumed his voting seat and Mr. Hagaman resumed alternate status. Mr. Mulligan was recused and Ms. Eldridge took a voting seat.

E) Request of **Jeremy James Conte, Owner** of the property located at **0 Islington Street** whereas relief is needed from the Zoning Ordinance to demolish existing structures and construct new single family dwelling which requires the following: 1) Variances from Section 10.521 to allow a) a lot area of 5,225 square feet where 15,000 square feet is required; b) a lot area per dwelling unit of 5,225 square feet where 15,000 square feet is required; and c) 50 feet of frontage where 100 feet is required. Said property is shown on Assessor Map 233 Lot 7 and lies within the Single Residence B (SRB) District.

SPEAKING TO THE PETITION

Attorney Bernie Pelech was present on behalf of the applicant. He reviewed the petition, noting that the lot was originally created as a big subdivision. He said the proposal met all the requirements except for the lot size and frontage, which the owner couldn't do much about. He noted that many abutters signed a letter stating that they were opposed to the architecture, which the Board didn't have purview over. He reviewed the criteria and said they would be met.

Vice-Chair McDonell said it was fair to consider the massing because it would inform the Board whether the project could mesh with the neighborhood. He noted that Attorney Pelech said the building's height would not go over the two buildings on its sides. Attorney Pelech said it was similar and that they were at 1-1/2 feet below the maximum height. In response to further questions, Attorney Pelech said he was confident that the height was a foot, give or take, and that the building was in line with the houses on either side. He said the abutter complained because the proposed building was narrower than either house on its sides. Chairman Rheume said he didn't see anything in the plan showing where two cars would be placed. Attorney Pelech said there was an existing driveway on the right side of the property, with 58 feet of ample space for parking two cars one behind the other. Chairman Rheume said the plan showed the driving ending in the front of the house. Attorney Pelech said the aerial map showed it on the right side

of the lot. Chairman Rheume asked if the applicant met with the abutters to discuss the project. Attorney Pelech said the applicant met with as many neighbors as they could, and the neighbors said they didn't like the architecture. Mr. Parrott said there was a stamped and signed surveyed plan with no parking shown on the lot. Attorney Pelech said there would be a driveway and they could submit a driveway plan and delineation of the two parking spaces.

Chairman Rheume opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one was present to speak.

SPEAKING IN OPPOSITION TO THE PETITION

Nancy Yarmac of 1205 and 1207 Islington Street said the proposed building would be 36 percent larger, 62 percent larger than the house on the left, and larger than at least two other nearby homes. She said the neighborhood was protesting the mass and the design. She said the proposed house was a monolith that was too high and would block the sun from the two abutters.

Chairman Rheume stated that the Board received a significant number of letters and a signed petition in opposition.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Jay Kobzik of 1240 Islington Street said the building's design was outside the characteristics of the neighborhood because it was boxy and not a true four-square. He said he met with the builder, who indicated that he would make some modifications but hadn't.

Nancy Yarmac asked if the builder would address the neighbors' concerns about mass and design if the variances were granted. She noted that there wouldn't be so many people opposed to the project if the applicant or builder had talked to them from the beginning.

Attorney Pelech said the zoning ordinance did not regulate living space or gross floor area and there was no limitation on the maximum amount of livable square footage within a building. He said the ordinance regulated the exterior dimensions through setback, height, lot coverage, and open space and that the building complied with all. He noted that Ms. Yarmac actually lived in New Mexico and leased her two units.

Nancy Yarmac said she spent a lot of time in Portsmouth and only moved to New Mexico for the weather but would probably be a Portsmouth resident again.

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

Note: At this point in the meeting, the Board decided that they would hear every petition instead of reconvening for an additional meeting the next week.

DISCUSSION OF THE BOARD

Mr. Lee said he would support the project because he thought it met all the criteria. He said the lot was small and the applicant did a good job of fitting the house on it. He said he didn't think the proposed building was a monolith and that the design was irrelevant to the criteria. Ms. Margeson said the lot was unmerged by the City Council the year before and, because of that, she thought it was a textbook case of a hardship because the lot was so much smaller than the other lots and nothing could be built on it without variance relief. She said it was a residential use in the SRB district and wasn't contrary to the public interest. Mr. Parrott said the drawings in the packet showed the height as 34.6 inches higher, but the Board was told that it was perhaps 31 or 32 inches higher. Ms. Margeson said the structure was being built within conformity within the setbacks, and it was the lot size and frontage that needed relief. Chairman Rheame said the SRB district had some odd characteristics and further discussed it. He said the applicant presented a good argument that it was a buildable lot in keeping with the neighborhood's characteristics, especially on Islington Street where there were smaller lots. He said it would not be uncharacteristic to have a single-residence house in the area and that the massing wouldn't be out of place with other good-sized homes in the area. He said the Board had no control over the design. He said the proposal met the criteria and should be approved.

Vice-Chair McDonell said he was concerned that there was no front porch or deck and that there was room to expand out back, noting that an optional deck was shown on the plans. He said the building coverage was almost at the max. He said the Board was asked to approve what was inherent in the lot and that it didn't matter how big the structure was, but his concern was a future request to put on a deck or something similar. He said a buyer would have a fairly big box with no exterior amenities but might want them. Chairman Rheame said it was maxed out to the size it was allowed to be and that whoever bought the property would hopefully do their due diligence and understand the property's limitations.

DECISION OF THE BOARD

*Mr. Lee moved to **grant** the variances for the petition, and Ms. Margeson seconded.*

Mr. Lee said the proposal was not contrary to the public interest or the spirit of the ordinance and wouldn't threaten the public's health, welfare, or safety or alter the characteristics of the neighborhood. He said substantial justice would be done because the hardship was not outweighed by any benefit to the public. He said the proposal was to simply allow the property owner reasonable use of their property. As a realtor, he said he saw no impact on the values of surrounding properties. He said the special conditions on the lot included the fact that it was a challenge to build a house on it. He said the use was reasonable and there was no fair and substantial relationship between the purposes of the ordinance and their relation to the property.

Ms. Margeson concurred and had nothing to add.

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

Vice-Chair McDonell and Mr. Mulligan were recused from the following petition. Both alternates took voting seats.

- F) Request of **2422 Lafayette Road Association, LLC, Owner** for the property located at **2454 Lafayette Road** whereas relief is needed from the Zoning Ordinance to construct a standalone automated teller machine (ATM) which requires the following. 1) A Variance from Section 10.1530 to allow an automated teller machine (ATM) as defined in this section to be a principal freestanding structure and not located on the outside of a building, or in an access-controlled entrance to a building, or within a principal use in a building. Said property is shown on Assessor Map 273 Lot 3 and lies within the Gateway Corridor (G1) District.

SPEAKING TO THE PETITION

Attorney Justin Pasay was present on behalf of the applicant. He said the issue was the definition of an ATM in the zoning ordinance and that it was an accessory use permitted by right in the G1 district. He said the applicant complied with the definition because it would be attached to the primary use, which was a shopping center. He said the ATM would be shielded from view from Lafayette Road and that they had to get site plan approval and a Conditional Use Permit (CUP). He said a traffic queuing analysis was provided to the Planning Board.

Mr. Hagaman said he was concerned with the addition of some of the new commercial uses toward the front of that lot and closer to Route One that caused even more traffic in that area. He asked why the ATM couldn't be set back to the middle island in the parking lot or farther back to remove it out of the traffic. Attorney Pasay said the concerns would be addressed through the CUP process. Ms. Margeson asked whether the principal use would be the bank. Attorney Pasay said the definition of a shopping center involved a consistency of approach with parking, ownership, and management, all of which were satisfied. He said the primary use of the property was a shopping center and the definition in the ordinance didn't contemplate that. Ms. Margeson said the principal use was the bank and that the ordinance clearly prohibited unattended ATMs. Attorney Pasay said it made sense under the circumstances unique to the property to allow the use based on the existing nature of the property and the parking lot and its insulation from other uses and that it fell on the side for the ability for people to exercise their property rights. Ms. Margeson said that area of Route One was congested and right near the shopping center's ingress and egress, and it was clear that the zoning ordinance has said no. She said she wasn't persuaded by the fact that it was accessible to the primary use of a shopping center.

Chairman Rheume said part of the applicant's justification to put the ATM in that location was the fact that one of their competitors was shielding it from the street. He asked what Chase Bank would do to distinguish the standalone ATM as not being affiliated with Bangor Savings Bank to avoid confusion among the public. Attorney Pasay said a Chase Bank canopy would be over the ATM. Chairman Rheume said the emphasis was how the ATM supported the walkability of the plaza, and walkability was something the City had been encouraging, but he was concerned about someone walking up to the ATM. Attorney Pasay said the traffic queuing showed 1900 transactions in a month, indicating that people were normally already parked on the lot and that

the ATM could be accessed by walking. Chairman Rheume asked if Chase Bank would put a drive-up on one side and a pedestrian access on the other to encourage people to use that instead if they thought a primary user would be a pedestrian. Attorney Pasay said he didn't know, but said Chase anticipated that at least 40 percent of the ATM business would be by pedestrians. Chairman Rheume said the City's goal was to create an atmosphere of 'park, then walk'.

Mr. Hagaman asked if there were other locations on the lot that were considered, where walking would make more sense. Attorney Pasay said it was all retail commercial buildings and the approach was to utilize space that was underutilized and to accomplish some of the zoning ordinance's tenet in this context while also promoting the property rights of the landowner. Ms. Eldridge asked if there were other ATMs in the shopping center, and Attorney Pasay said he didn't know. Ms. Eldridge said she was having trouble seeing the overriding public interest.

Chairman Rheume opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one was present to speak.

SPEAKING IN OPPOSITION

No one was present to speak.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Project team member Chris Quinn said Chase Bank discouraged any walk-up transactions in a drive-up configuration. He said the intent of the drive-up unit was to test the markets, and if the ATM use increased, Chase would open a bank. He said the ATM would be clearly identified as Chase Bank and not Bangor Savings and that the screen would also have Chase branding.

Attorney Pasay referred to Ms. Eldridge's question about the public interest and said the general purpose of the zoning ordinance was to advance public welfare through good planning. He said the proposal met that criteria.

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

DISCUSSION OF THE BOARD

Mr. Hagaman asked if the Planning Board or TAC would have purview to change the location of the ATM, as opposed to requiring certain alterations to improve traffic patterns. Mr. Stith agreed that they would, based on the CUP process. Ms. Margeson said she didn't support the application. She said the comments from Mr. Quinn clarified that the primary use was the bank and that they were testing markets to see if they could open a branch. She said the Gateway's goal was to promote walkability and the ATM wouldn't do that because it would be in a parking lot and it was very evident that it was for people in cars. She said she couldn't get past the blanket prohibition in the zoning ordinance that only allowed an ATM as an accessory use to a

principal building, which did not exist on the site. She said there were property rights, but every property owner owned their property subject to the zoning ordinance. Mr. Hagaman said he was on the fence with the spirit of the ordinance piece because if it was truly the intent of the Gateway District to have elements of walkability and encourage that sort of centralized walkable hub feel, the proposal went in the face of that, especially when the applicant said it was just a test case for a branch. He said there were other ATM designs that encouraged walkability, like those enclosed in a glass box, and there were ways to design the structure to tie into the area as opposed to just being an island where someone drove up. Ms. Eldridge said she had an issue with the ATM itself because if the ordinance stated that it needed to be located on the outside of a building, an access-controlled entrance, or within a principal use building, it didn't mean that it had to be attached to a bank. She also didn't see why it had to be in the middle of a parking lot.

Chairman Rheume said the case wasn't giving him enough reason to say that it was such a unique set of circumstances. He said it was being done as a convenience option and he was fearful that it would be incongruent with the walkability aspects the City was trying to accomplish with the property. He said he could be more supportive if the ATM was placed on one of the buildings instead or in a location where it was more of a pedestrian draw. Mr. Hagaman said he struggled with the hardship piece as well. Mr. Parrott said he didn't think it was a good location in terms of business and didn't think anyone would walk up to that location or that the few small businesses would generate any volume, but he didn't see the harm in the applicant wanting to take a chance to see if it worked in that location.

DECISION OF THE BOARD

*Mr. Hagaman moved to **deny** the application as presented, and Mr. Parrott seconded for purposes of discussion.*

Mr. Hagaman said that, the more the Board discussed the application and the intent and purpose of the Gateway District, the more he was inclined to say that it didn't meet the variance criteria, specifically Criteria 1, 2, 3 and 5. He said the Board discussed that TAC and the Planning Board would have some say in the design and location of the ATM, but the Board also discussed how the area was becoming more walkable, and regardless of Chase Bank discouraging walk-ups to the ATM, it was possible that there would be quite a few due to the nature of the property itself, so he had concerns about public health and safety. He said, given the purpose of the Gateway District in terms of the type of zoning, putting a drive-up ATM on the property observed the spirit of the ordinance, but there was an argument that substantial justice wasn't done. He said if the Board started granting variances for uses of that nature on properties and districts like that, there would be a loss to the public and people would start seeing more vehicular traffic instead of more pedestrian traffic, or businesses would be encouraged to create an island in the middle of a parking lot for a test case and then perhaps abandon it and leave an unused object on the property that contributed to neglect. He said he didn't see a lot of hardship with regard to special conditions of the property. For those reasons, he said the request should be denied.

Mr. Parrott said he would refer to his previous comments and had nothing to add.

Chairman Rheaume said he didn't think there was enough there for him to be willing to say that the Board was good with it as long as TAC and the Planning Board addressed all the Board's concerns. He said their concerns were significant enough that it wasn't a sufficient remedy

*The motion **passed** by a vote of 6-1, with Mr. Parrott voting in opposition to the motion.*

It was moved, seconded, and passed unanimously to continue the meeting past 10:00.

I. PUBLIC HEARINGS – NEW BUSINESS

Vice-Chair McDonell resumed his seat, Mr. Mulligan was still recused, and Mr. Hagaman took a voting seat.

- A) Request of **Ricci Construction Co., Inc.**, Owner for the property located at **3400 Lafayette Road** whereas relief is needed from the Zoning Ordinance to construct a 50-unit residential development which requires the following: 1) Variance from Section 10.5B22.40 to allow buildings to be constructed outside of the 70 - 90 foot setback from the centerline of Lafayette Road. 2) Variance from Section 10.5B33.20 to allow 0% front lot line buildout where 50% is required. Said property is shown on Assessor Map 279 Lot 11 and lies within the Natural Resource Protection (NRP) and Gateway Corridor (G1) Districts.

SPEAKING TO THE PETITION

Attorney John Bosen was present on behalf of the applicant and was joined by Michael Green, John O'Neill, and Joe Coronati. Attorney Bosen said there would be 50 condo units and that ten acres of property would be donated to the City for a conservation easement. He said the lot was a very irregular shape close to the road and was identical to a project that was previously granted variances in June. He reviewed the criteria.

Mr. Hagaman asked what the building coverage percentage was for buildable property outside of the wetland buffer. Mr. Coronati said they had building coverage of 38,108 square feet in the G1 zone and 5.25 acres in the G1 zone that wouldn't be encumbered by the conservation easement, so a total of 20 percent where 50 percent was allowed. Attorney Bosen said the property was part of the mitigation site when Portsmouth Hospital was built and that the City Attorney in 1985 addressed a letter to Ricci Construction stating that if the proposed easement area was conveyed to HCA for conservation purposes, it could still be considered in density calculation for planned new development purposes.

Mr. Parrott asked if the trailers in the wetland buffer would remain. Attorney Bosen said they would not remain in the wetland and that everything in the project would be removed from the buffer. Mr. Parrott asked if the tree company would be relocated elsewhere on the property, and Attorney Bosen said they would vacate the property entirely. In response to Ms. Margeson's questions, Attorney Bosen said there wasn't any other property in the area that was in the National Resource Protection Area and that the property in the front wasn't part of the applicant's property. Mr. MacDonald said the project looked like something the City needed but

asked what the target price or income range for the units was. Attorney Bosen said they didn't have a specific price because lumber prices continued to rise, but he said the complex would attract a variety of incomes and that working people should be able to live there. Mr. Hagaman said the referenced similar development on Lafayette Road presented more detail on the units and setup to support the statement that it was meant to attract a variety of people. He asked the applicant if they had that type of information. Attorney Bosen said they submitted floor plans. Chairman Rheume asked how TAC felt about traffic impacts and if they considered that there would be another smaller development up the road. Mr. Coronati said TAC had no major concerns about the traffic but that the applicant had applied for a DOT permit.

Chairman Rheume opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one was present to speak.

SPEAKING IN OPPOSITION TO THE PETITION

Kelly Couturier of 381 Ocean Road asked the Board to consider the impacts that 50 units would have on traffic on Lafayette Road and also on neighboring schools.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DISCUSSION OF THE BOARD

Mr. Hagaman asked if the City had calculations on the potential impact on schools and populations, and it was further discussed. Ms. Margeson said she would support the proposal. She said she wasn't sure if all the wetland issues were before the Board, but she thought the project would do a lot of public good and was the textbook definition of special conditions of a property, noting that the frontage wasn't something the applicant could help or change. She said the National Resource Protection issue was also significant for the applicant and the variance requests were reasonable. Mr. Hagaman said he was always leery when it looked like a developer was building out actual livable property, but he said the math was pretty good, a little less than 2 percent of actual coverage for buildable land. Chairman Rheume said he would support the proposal, noting that although it was a lot of units on the property, there was some density to it and it wasn't greater than what the ordinance allowed. He said the Planning Board would be mindful of the traffic concerns and that the final number of units might be adjusted. He said the area was more receptive to lower prices due to its location.

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

Ms. Margeson said granting the variances would not be contrary to the spirit and intent of the ordinance or to the public interest, and would not alter the essential characteristics of the

neighborhood. She said it was a residential development allowed by right within the neighborhood that would be less intensive than it would normally be. She said the public's health, safety, or welfare would not be threatened. She said granting the variances would do substantial justice, noting that the two variance requests were to allow the buildings to be constructed out of the 70-90 foot setback from the central line of Lafayette Road, which wasn't possible due to the wetlands and the National Resource protection in the back of the property. She said allowing zero percent front line buildout where 50 percent was required could also not occur due to the lack of frontage on the property. She said she saw no evidence that granting the variances would diminish the values of surrounding properties. She said the special conditions associated with the property would not constitute necessary hardship. She said it was a textbook case of special conditions of the property due to the lack of frontage and the irregular shaped lot, the conservation easements, and the wetlands in the back of the lot. She said the use was reasonable and was a residential use permitted by right, and the fair and substantial relationship between the purposes of the ordinance as they applied to the property could not reasonably be achieved with the lot due to its configuration.

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

Mr. Mulligan resumed his seat and Mr. Hagaman and Ms. Eldridge resumed their alternate seats.

B) Request of **Lucky Thirteen Properties, LLC, Owner** for the property located at **361 Islington Street** whereas relief is needed from the Zoning Ordinance to renovate the existing building to allow for a new restaurant which requires the following: 1) Variance from Section 10.440 Use #9.42 to allow a restaurant with an occupant load of 50 to 250. 2) Variance from Section 10.5A41.10A to allow a) a 29' left side yard where a 5 foot minimum and 20 foot maximum is required and b) 17% open space where 25% is required. 3) Variance from Section 10.5A44.31 to allow parking to be located in front of the building façade. 4) Variance from Section 10.5A44.32 to allow parking unscreened by a building or street screen. 5) Variance from Section 10.575 to allow a dumpster within 20 feet of a residential zoned lot and within 10 feet of any lot line. 6) Variance from Section 10.1113.20 to allow parking in the front yard and between a principal building and a street. Said property is shown on Assessor Map 144 Lot 23 and lies within the Character District 4-L2 (CD4-L2).

SPEAKING TO THE PETITION

Attorney Larry Gormley was present on behalf of the applicant, along with the project team. Attorney Gormley said they wanted to repurpose the old Getty gas station for a restaurant and improve the overall site. He said it was similar to the 2017 Lexie's application and he reiterated the Board's decisions for that application. He distributed an email from the direct abutter at 369 Islington Street who was in favor of the project and who shared an easement with the property.

Ms. Margeson said the previous variance requests for Lexie's was not on point because it was for less than 50 occupants and didn't require a variance for that. Attorney Gormley said the building maxed out at about 50 people and that they proposed a patio to hold 90-100 people at peak. Ms. Margeson said the purpose of the district was for residential use, noting that commercial use on

the ground floor with residential use above it was allowed. She asked how that would not be in conflict with the development standards for that district. Attorney Gormley said the use in that spot was consistent with Islington Street and the direct abutters took no issue. He said it wasn't feasible to convert the property without the additional seats. Ms. Margeson said it would draw a lot more traffic to the area. Attorney Gormley said the City was becoming more walkable and the restaurant would be an amenity for people to walk to and from the area. He said the employees would park in the public garage. Mr. Hagan asked if there would be a drive-through or any eating outside in the winter. Attorney Gormley said there would be no drive-through and the seating would be seasonably appropriate. In response to further questions, he said any concern on a cap that would limit the number of people that could be outdoors or on the property would depend on the cap itself. He said the patio was part of the financial analysis. The applicant said fencing or other screening methods were feasible to block headlights from parked cars on the property that might shine on surrounding residences and businesses. Mr. Mulligan asked if any additional landscaping would be done on the site. The applicant said there would be a landscape plan as part of the site plan review process for trees, shrubs, and other plantings. Attorney Gormley said the building itself could accommodate 50 seats, as per the Lexie's application.

Chairman Rheume asked whether there was concern about the fact that one of the aspects of the design called for making use of the easements as well as concern with any rights that abutters would retain relative to the entryway. Attorney Gormley said there were no issues as far as he knew, but he said he couldn't say that he had seen affirmative evidence of approval from the abutters. In response to further questions, Attorney Gormley said the high estimate for the patio use was 90-100 people, which was an additional 40 or 50 on top of who would be inside the building at maximum capacity. Chairman Rheume asked if there would be sufficient parking to support the number of patrons. Attorney Gormley said his client envisioned customers parking in the garages and walking and thought the area would become more of a walking destination as it became more developed. Chairman Rheume said the neighbors were concerned that the neighborhood would serve as the overflow parking. Attorney Gormley said if there were 100 customers, there would be 60 cars involved. He said the concerns were the same for any restaurant in Portsmouth where people parked and walked to a restaurant. Chairman Rheume asked for examples of restaurants on the Islington Street corridor with that kind of capacity and was told that Street and the pizza place near it were two of them. Chairman Rheume said the parking at Street was challenged on the weekends. In response to further questions, Attorney Gormley said the dumpster was really a compactor that would be fenced and that it was driven by the size of the lot. He said it would be unobtrusive but didn't know how quiet it would be. He said the employees would be required to park in the garage as a term of their employment.

Chairman Rheume opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one was present to speak.

SPEAKING IN OPPOSITION TO THE PETITION

Elizabeth Bratter of 159 McDonough Street said increasing the occupancy load to 250 would be contrary to the public interest because it would increase traffic, parking demand, noise, and light. She said the L2 zoning along Islington Street was one building deep and included a maximum of 50 occupants, so the increase requested was prohibited and not allowed by special exception. She said screens for the parking and back of the building and planters around the patio should be considered to protect the neighbors. She said operating hours for the restaurant and dumpster should match the nearby eateries. She said it was anticipated that the public garage would be at full capacity in a few years. She said the addition was presented at the HDC meeting as one that was supposed to be for walk-in coolers with condensers on the outside, and not seating.

SPEAKING TO, FOR, OR AGAINST THE PETITION

James Beal of 286 Cabot Street said he was excited that a business wanted to open on the long-vacant spot but was concerned about allowing up to a 250-person occupancy. He said the requested occupancy was not permitted in the current zoning and would be an increase of 400 percent from the permissible occupancy and contrary to the public interest. He said the food dumpster would cause issues of odor, leakage, and noise that would affect seven residential units that were direct abutters, along with other residences. He said the added burden of traffic for Islington Street and surrounding streets would diminish the quality of life and increase pedestrian and motorist risks. He noted that the area already had numerous accidents on a monthly basis. He said he would be more supportive of the project if it were capped at 100 people.

Attorney Gormley said the only reason the 250 capacity figure was used was because it was the criteria that the project fell into, but they would have no problem capping it at 100. He said they would also work with shielding the property from the neighbors and street. He said drawing 100 customers regularly would not happen and that the concerns aired did not refer to the likely outcome of the business.

James Beal asked that a privacy fence be placed on the rear part of the property so that the headlights of oncoming traffic coming from the back side of the building could be blocked from shining into 286 and 287 Cabot Street.

Elizabeth Bratter said there were only 14 parking spaces on site.

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

DISCUSSION OF THE BOARD

Ms. Margeson said she appreciated the creative reuse of the Getty station but couldn't get behind the application. She said the character district allowed for some restaurant use, which was why a 50-person occupancy was allowed, but she thought the application was too much for restaurant use and she had a problem with the occupancy load. She said it was contrary to the public interest and the spirit of the ordinance and would diminish the surrounding property values. She saw no hardship because the property could be developed in accordance with the zoning ordinance with an occupancy load of 50, which was what Lexie's sought and received. For those reasons, she said she couldn't support it. Mr. Mulligan said he understood that in order to

properly convert the building to a restaurant use, additional seating might be needed, but he wasn't sure how that became a hardship under the zoning. He said a number of deed restrictions attached to the property prevented it from getting developed for residential, and he could see why a restaurant owner would want more seating than allowed by zoning, but he struggled with whether or not that was enough of a hardship. He said the Planning Board would likely require privacy fencing and screening and the HDC would make sure the design was tasteful. He wasn't sure that what was inherent in the property supported the request for 100 seats where 50 was allowed. He didn't think the parking configuration between the street and principal use was a problem because the owner would re-use the existing built environment and the lack of parking would be before the Planning Board. Mr. Parrott said the project would be a net gain to the neighborhood and the City because what was there now was an eyesore and long deserving of an improvement. He said it was the fourth time he voted on applications for that property. He said he was in favor of it because he thought it would be the greater good for everyone involved and would have a better chance of being successful than the previous tries. He suggested a stipulation for a capacity of 100 and a privacy fence at the back. Mr. Lee asked how 100 people got to be the magic number to make the place viable. He said a lot of the business would be drive-through and takeout. He suggested stipulating operating hours to avoid noise.

Chairman Rheume said he wasn't convinced that the restaurant would be a success in that challenging location because even a capacity of 100 was a lot for it and he wasn't optimistic that people would walk there. He didn't see the type of cuisine as something that would attract a neighborhood clientele and thought it would be more successful as a downtown restaurant. He said more of a drive-thru emphasis would have a better chance and be less impactful on the neighborhood. He thought there would be parking issues. He said the property was driving other compromises that told him it wasn't the right location for the restaurant. He said 50 was the cap and the project failed on that, and the dumpster issue was also a concern. He said a lot of issues were screaming that it was too much for the parcel.

*Ms. Margeson moved to **deny** the variances for the application, and Mr. Lee seconded.*

Ms. Margeson said the proposal would be contrary to the public interest and the spirit of the ordinance. She said the character district zoning in the area was very specific and the restaurant use was capped at 50, but the applicant's use could go from 50 people to 250, causing significant health, safety and welfare issues. She said it was problematic because of such intense use on the very small parcel, along with vehicular access, circulation, parking, loading, and so on. She said granting the variances would diminish surrounding property values by the intensification of the use, the vehicular traffic, the high occupancy seating load, and the dumpsters operating close to a residential area. She said residential areas generally were kept somewhat away from very intensive commercial uses.

Mr. Lee concurred and had nothing to add. Chairman Rheume said he would support the motion, noting that Variances 1 and 5 were the problematic ones.

*The motion to deny **passed** by a vote of 4-3, with Mr. Mulligan, Vice-Chair McDonell, and Mr. Parrott voting in opposition to the motion.*

- C) Request of **Faribault Family Revocable Trust of 2019**, Owner for the property located at 35 **Park Street** whereas relief is needed from the Zoning Ordinance for the conversion a single -family dwelling to a two-family which requires the following: 1) A Special Exception from Section 10.440 #1.61 to allow the conversion of a building existing on January 1, 1980, with less than the required minimum lot area per dwelling unit into 2 dwelling units where the use is allowed by special exception Said property is shown on Assessor Map 148 Lot 45 and lies within the General Residence A (GRA) District.

SPEAKING TO THE PETITION

The applicants Bill and Ruth Faribault were present to review the petition. Ms. Faribault said the house already had a kitchen on the second floor, so everything existed for an apartment and there would be no changes to the exterior except for required egress. They said they could provide three off-street parking spaces.

Chairman Rheume asked if there was a door separating the main house from the upstairs apartment. Mr. Faribault said there was an internal door and explained how they could add a separate outdoor entrance and install fire escapes on the second floor.

Chairman Rheume opened the public hearing.

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. Mulligan moved to **grant** the special exception for the petition as presented and advertised, and Mr. Parrott seconded.*

Mr. Mulligan said the conversion of a dwelling built before 1980 was permitted by special exception. He said granting it would not result in any hazard to the public or adjacent properties on account of potential for fire, explosion, or release of toxic materials because it was a residential use in a residential zone. He said there would be no detriment to property values in the vicinity or change in the essential characteristics of any area, including residential neighborhoods on accounts of the location and scale of buildings and other structures, parking, accessways, odors, smoke, gas, dust and other pollutants, heat, vibration, and so on. He said it was an existing structure and the exterior wouldn't change in any material way, and odors, smoke, gas and so on were not implicated. He said a traffic safety hazard or a substantial increase in the level of traffic would not result from the approval because there was adequate off-street parking and the increase in the number of residents was minimal to the area. He said there would be no excessive demand on municipal services such as water, sewer, waste disposal,

police and fire protection, and schools because it was just the introduction of one additional household, with no change to the exterior or built environment. He said granting the special exception would pose no increase of storm runoff onto adjacent properties and streets because there would be no significant exterior improvements or changes to the property.

Mr. Parrott concurred and had nothing to add.

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

D) Request of **261 Sagamore Ave, LLC**, Owner for the property located at **261 Sagamore Avenue** whereas relief is needed from the Zoning Ordinance to demolish the existing dwelling and construct a new single-family dwelling which requires the following: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling unit of 6,669 square feet where 7,500 is required for each; b) 60 feet of continuous street frontage where 100 feet is required; and c) 27% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Map 221 Lot 16 and lies within the General Residence A (GRA) District.

SPEAKING TO THE PETITION

Attorney F. X. Bruton was present on behalf of the applicant. He reviewed the petition and said they would remove every encroachment into any setback and bring the property more in compliance with the ordinance. He reviewed the criteria and said they would be met.

There were no question from the Board. Chairman Rheame opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

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

Vice-Chair McDonell said granting the variances would not be contrary to the public interest and the spirit of the ordinance would be observed. He saw no conflict with the purposes of the ordinance and no alteration in the characteristics of the neighborhood or any threat to the public's health, safety, and welfare. He noted that the abutter was in support. He said he hadn't heard anything to suggest that granting the variances would diminish the values of surrounding properties. He said literal enforcement of the ordinance would result in unnecessary hardship due to the property's special conditions, including the nature of the lot. With respect to building coverage, he said there were special conditions due to the size of the lot. He saw no relationship between the purposes of the ordinance and their application to the property. He said the proposed use was reasonable, a continued use, and should be granted.

Mr. Parrott concurred and had nothing to add.

Ms. Margeson said the application bothered her in some ways because she hated to see the existing structure demolished, but demolition wasn't in the Board's purview. She said it was undeniable that the new structure would bring the property within conformity to the ordinance.

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

IV. OTHER BUSINESS

There was no other business.

V. ADJOURNMENT

The meeting was adjourned at 12:25 a.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary