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

**7:00 P.M.** **September 28, 2021**

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

**MEMBERS EXCUSED:**

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

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## I. OLD BUSINESS

### A) 361 Islington Street – Request for Rehearing

Chairman Rheaume read the request into the record. He stated that the Board previously denied the applicant's request for six variances for a proposed restaurant and that the applicant provided additional information for the Board's consideration.

**DISCUSSION OF THE BOARD**

Mr. Mulligan said he would be in favor of granting the rehearing. He said the applicant pointed out that there was a defect under the State Statute and that the Notice of Decision was deficient. He said the only requested variance that caused a problem was the request for an occupancy load greater than 50. He said it was a good faith effort from the applicant for a very challenging site. Mr. Parrott agreed, noting that nothing would happen to the property unless there was further discussion. Mr. MacDonald said that nothing material in the case had changed and that the Board should not rehear the case unless something was presented that would change their view. Ms. Margeson agreed and said the zoning was clear with respect to the occupancy load. Mr. Lee also agreed that nothing had really changed since the Board first heard the case and thought the problem with the application was that it was too much in too little space.

Chairman Rheaume said the Letter of Decision was an administrative item that could be corrected and that it wasn't enough of a reason for the applicant to request a rehearing. He said the Board had a lot of discussion about the criteria and had said there were significant setback requirements that couldn't be fully met. He said the applicant felt that the Board ignored the presented examples of other properties on the street that had similar seating capacity, but the Chair said the only real exception was The Kitchen, which was grandfathered into zoning. He said the Board could have considered and/or approved some of the elements that might have had a better chance of approval, like the parking, but it wouldn't have solved the applicant's

fundamental issue, which was the occupancy load. He said in order to rehear the petition, the Board would have to fix the administrative error and potentially approve some if not all of the variances, and he wasn't sure if it was worth investing the time to do that and wasn't convinced that rehearing the petition would provide a lot of additional information to the applicant.

**DECISION OF THE BOARD**

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

Mr. Lee referred to the discussion and said the applicant had a thorough hearing. He said the argument the applicant made about not being informed of why they were denied was insignificant because the applicant had been present at the meeting and could also watch the meeting's replay. For those reasons, he said the request should be denied. Ms. Margeson concurred and had nothing to add.

*The motion **passed** by a vote of 5-2, with Mr. Mulligan and Mr. Parrott voting in opposition.*

**II. PUBLIC HEARINGS – NEW BUSINESS**

Vice-Chair McDonell was recused and Ms. Eldridge took a voting seat.

**A.** Request of **238 Deer Street, LLC (Owner),** for property located at **238 Deer Street** whereas relief is needed to demolish existing structure and construct new mixed use building with 21 residential units which requires the following: 1) Variances from Section 10.5A41.10C to allow a) 2.5% open space where 10% is required; and b) a 3.5' rear yard where 5' is required. 2) A Variance from Article 15 to allow a structure to be designated as a penthouse with an 8' setback from the edge where 15' is required and 60% floor area of the story below where 50% is the maximum allowed as outlined in the definition of a penthouse. Said property is shown on Assessor Map 125 Lot 3 and lies within the Historic District and Character District 4 (CD4). (LU-20-238)

Chairman Rheaume stated for the record that the Legal Notice that was issued referenced the wrong section of the zoning ordinance and that it was indeed Section 10.5A41.10C.

**SPEAKING TO THE PETITION**

Attorney Sharon Cuddy Somers was present on behalf of the applicant. Also present were the architects Mark Gianniny and Richard Desjardins and the owners. Attorney Cuddy Somers said the applicant wanted to build 21 micro units and had received a Conditional Use Permit (CUP) for parking relief, met with the Technical Advisory Committee (TAC), and had a few work sessions with the Historic District Commission (HDC). She said dimensional relief was sought for open space, rear yard setbacks, and the penthouse. Mr. Gianniny reviewed the petition, noting that the proposed building would have three stories with a penthouse. Mr. Desjardins discussed the rear yard setback request. He said they proposed a parapet to help shield the view of the penthouse from the pedestrian level. The criteria was reviewed.

Mr. MacDonald asked how the market rate was established for the micro units and if they would be affordable for people with ordinary incomes. Attorney Cuddy Somers said the applicant had not decided on prices yet. She said the applicant wanted to provide small downtown units that could be used by younger people who worked in the city or by older people who were downsizing. She said it wasn't affordable housing but wouldn't be out of reach for most people, and the size of the unit would drive the rent.

Ms. Margeson said the zoning ordinance was clear that the open space should be at least 10 percent but that the applicant's argument was that the public access easement on 30 Maplewood Avenue helped fulfill that request. Attorney Cuddy Somers said that property functioned as if it were open space and that the applicant could use it as a member of the public. Ms. Margeson said the access easeway was a walkway and not a land area vertically open to the sky and free of structures, parking areas, and so on as defined in the ordinance. She said it wasn't community space and would only be open to the building residents. Attorney Cuddy Somers agreed but said that technically, any open space on any private property was only available to people who owned that property. Ms. Margeson referred to the penthouse variance request and said a big part of the character district was to control the streetscape and bring lightness to the top of the building, which was the reason for the setback. She said pedestrians would see of lot of the penthouse, which was concerning. She said the hardship had to be something within the land and not something the applicant needed to make the project viable. The applicant said the penthouse's configuration provided the light needed, and that the opaque guardrail and the parapet's angle would disguise the penthouse.

Chairman Rheaume asked the applicant to explain the yellow and blue spaces on the diagram and why it added up to over 10 percent of open space, and Mr. Gianniny did so. Chairman Rheaume said the applicant was then allowed by the ordinance to include anything that wasn't five feet wide, which was a pertinent point that wasn't discussed in the applicant's argument. He said the applicant indicated that the spaces had the feel of open space but couldn't be counted due to the nuance in the ordinance. Mr. Gianniny said the public easement's open space was adjacent to the applicant's property, and it was further discussed. Chairman Rheaume noted that there were more properties affected than just 30 Maplewood Avenue. Mr. Desjardins said there was an 8-ft setback everywhere except for the stairwells because the stairs were considered uninhabitable space. Chairman Rheaume asked if the habitable units in the penthouse drove the need to bring the stairwell up to its level. Mr. Stith said the stairs were considered an appurtenance and weren't subject to the penthouse setback.

Chairman Rheaume asked if the applicant had considered making the retail area smaller but putting in a few micro units in the back to meet the goal of total residential space. Mr. Desjardins said he didn't think they were allowed to have residential units on the ground floor. It was further discussed. Chairman Rheaume said the site plan showed 20 micro units and not 21. Mr. Desjardins agreed and said the intent was to get the extra unit into the floor plan eventually.

Chairman Rheaume opened the public hearing.

**SPEAKING IN FAVOR OF THE PETITION**

No one rose to speak.

**SPEAKING IN OPPOSITION TO THE PETITION**

Elizabeth Bratter of 159 McDonough Street said the applicant got the parking CUP based on the 20 micro units but that the building was nonconforming and should have been made less conforming. She said the development should stick to the zoning regulations and not be based on the CD-5 buildings in the area or wishful thinking on what were open spaces.

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

Jeremiah Johnson of Fairview Drive said he was in favor of the project and thought it was a very appropriate use for the area. He said the two owners were local and worked for over a year to develop the building tastefully. He said the small lot was challenging and what was requested was not overbearing on the site. He said the applicant was allowed to build a penthouse by right and that it would only partially take over the top floor, and the stairs and elevator were appurtenances that didn't figure into the setbacks. He said it was important to consider what the actual use of the building would be and that it wasn't a cash grab from an out-of-town developer.

Elizabeth Bratter said Mr. Johnson was the architect and thought he had to disclose that fact.

Jeremiah Johnson said he spoke as a resident, although he used to work for McHenry Architects, so he had worked on the project.

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

**DISCUSSION OF THE BOARD**

Ms. Eldridge said she had trouble seeing four different units as a penthouse. She asked if it was possible for a penthouse to need a variance for eight feet for a staircase. Chairman Rheaume said the Board did consider the appurtenances, and it was further discussed. Mr. Mulligan said the rear yard setback request would improve the existing nonconformity, and the open space coverage request was more of an ask but ten percent of the lot would be just over 600 square feet, which wasn't a huge amount of open space being sacrificed by the relief request. He said the relief was driven by the small site, and the fact that there was a public access easement mitigated the lack of open space. He said the penthouse required more analysis, but because the footprint was cramped and would require a lot of tight design work, the small size of building envelope would require some dimensional relief and what was proposed didn't seem out of character or scale for that part of town. He said the applicant's alternative could to be to shrink the penthouse footprint and sacrifice a few micro apartments and convert it to luxury condos. He said the Board should encourage developers to promote a variety of housing diversity, like micro units, and if the Board were to strictly comply with all the various requirements, they would be encouraging development along the lines of what was already in the neighborhood, which was lots of luxury condominiums.

Mr. MacDonald said the land was an asset to the city but was in bad condition and had to be changed. He said the proposal wasn't perfect but was pretty good and would clean up a spot in the city that needed cleaning up. Chairman Rheaume said he had a lot of concerns about the project at first but that the key thing was the diagram that, once it was explained, showed that it didn't meet the ordinance's definition of open space but met a liberal open space. He said the fact that there were adjacent easements helped give the building an open feeling. He said he didn't see the 30 Maplewood Avenue side where there was parking being developed, and the rear setback was beyond what was required, but it was in keeping within the spirit of the ordinance on such a small confined lot. He said it came down to the penthouse space and that he would have liked to see more community space on the fourth floor instead of just a small deck, and at least a 15-ft setback on the front of the building. He said the majority of the side of the building facing the parking garage was pretty close to 15 feet, and Unit 4 was a bit shorter but dragged the eye back toward the surrounding higher buildings that would mute the effect of that being more visible. He said the 15-ft setback requirement was onerous because the building was small and the common areas would end up being a smaller percentage of the total square footage that needed to be there. He said the applicant made a decent argument that things get magnified as to their impact on the total percentage of usable space on the roof due to the smaller footprint. He said it was important to put in the approval that the penthouse level should have units no greater than 500 square feet because it could potentially be converted to a large unit.

Ms. Margeson said she would not support the proposal because the ten percent open space was clear in the ordinance. She said 600 square feet didn't seem like a lot but that she visited the site and saw that the walkway ended at a wall, and the walkway in the back near 30 Maplewood Avenue was confusing to figure out whether it was for 30 Maplewood or 34 Maplewood. She said having four penthouses on top was also problematic.

**DECISION OF THE BOARD**

*Mr. Mulligan moved to **grant** the variances for the petition as presented and advertised, with the following **stipulation**:*

1. *That the units on the penthouse floor shall be built so that no unit shall exceed 500 square feet.*

*Mr. Lee seconded.*

Mr. Mulligan said the rear yard setback relief wasn't problematic. The open space coverage was de minimis on a lot that small and was mitigated by some of the access easements and other items. He said the penthouse would require dimensional relief due to the small building envelope. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance, and the essential character of the neighborhood would not be altered by what was proposed. He said it was a mixed-use commercial and residential development among several similar and larger mixed-use developments. He said substantial justice would be done because the loss to the applicant would far outweigh any gain to the public if the Board required strict compliance with the open space ordinance. He said surrounding property values would not be diminished because they were either fully developed or in the process of being fully developed in ways that were much denser than the applicant's proposal.

He said the special condition of the property was that it was a small lot, so there was no fair and substantial relationship between the purpose of the open space, rear yard setback, and penthouse dimensional requirements and their specific application to the property. He said the existing rear yard setback was less compliant than the proposed one, and if the applicant complied with the open space requirement, they would still only have minimal open space. He said other factors also mitigated that noncompliance. He said the penthouse was permitted by right and the small size of the building required the dimensional relief, and if the applicant complied with the 15-ft setbacks, the building would be squeezed into something that wasn't feasible in the micro unit concept proposed and would likely drive a much different type of housing option. He said it was a permitted use and met all the criteria. Mr. Lee concurred and said he hoped the finished building would be more in character with the other buildings in Portsmouth.

Ms. Eldridge said she didn't like the stipulation that told people what they could do with their apartment in the future, so she could not support the motion.

*The motion **passed** by a vote of 5-2, with Ms. Eldridge and Ms. Margeson voting in opposition.*

Vice-Chair McDonell resumed his seat and Ms. Eldridge returned to alternate status.

**B.** Request of Neal Pleasant St. Properties. LLC, (Owner), for property located at 420 Pleasant Street whereas relief is needed to remove a rear entry and addition and replace with new three-story addition with code compliant stairs and rear porch which requires the following: 1) A Variance from Section 10.521 to allow a 1' left side yard where 10' is required. 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 56 and lies within the Historic District and General Residence B (GRB). (LU-21-126)

**SPEAKING TO THE PETITION**

Architect Jeremiah Johnson was present on behalf of the applicant. The applicant Charles Neal and architect Richard Desjardins were also present. Mr. Johnson said the multifamily house would be decreased from five units to three, and the ell and interior stairway would be rebuilt per the fire and safety inspection that was done in 2015. He reviewed the criteria.

Chairman Rheaume said the building was close to the neighboring one and asked what drove the request for six inches instead of counting the line of the original building. Mr. Johnson said it was a narrow space and they wanted to maintain as much of the building's footprint as they could. Chairman Rheaume asked why the Board shouldn't be concerned about the deck's close proximity to the neighboring structure, noting that there could be loud partying on it. Mr. Johnson said it was a single-use deck for a small apartment and would have a limited amount of use, and if there were a party, it wouldn't matter where it was on the building.

Chairman Rheaume opened the public hearing.

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

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

**DECISION OF THE BOARD**

Ms. Margeson noted that the deck wasn't before the board for a variance, but she had the same concern about it because it was on top of an existing structure that was being rebuilt. However, she thought it was a good project.

*Mr. Parrott moved to **grant** the variances as presented and advertised, and Mr. Lee seconded.*

Mr. Parrott said it was a simple and a long-delayed project that would reduce the amount of units in an already congested area and fix the house's deteriorating maintenance issues. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance because the building would continue to be residential and would not change the neighborhood's character. He said the public's health, safety, or welfare would not be threatened and would most likely be helped because the electrical and plumbing issues would be upgraded. He said substantial justice would be done because there was no public interest in retaining a deteriorating building and it would be a great benefit to the applicant in terms of the property's value and usefulness and living conditions. He said granting the variances would not diminish the values of surrounding properties, noting that they would be enhanced by the major upgrade. He said enforcing the ordinance would result in unnecessary hardship to the applicant because the buildings were very close together, which couldn't be changed, so it presented a hardship as far as doing any kind of work on the properties. He said the applicant was making the best of the situation and that the proposal would satisfy all the criteria and would be positive to the neighborhood and the entire city. Mr. Lee concurred. He said he saw the site and that the back of the building was in rough shape and needed some help.

Chairman Rheaume said he would support the motion but would have liked to see that extra foot and thought it would have made more sense to continue the existing line of the house. He said the deck was a general concern but thought Mr. Johnson did a good job in explaining that there was a large open space to the rear of the property and the neighbor's property was very close.

*The motion **passed** by a unanimous vote of 7-0.*

Chairman Rheaume and Mr. Mulligan were recused from the following appeal. Vice-Chair McDonell assumed the seat of Acting Chair and both alternates took voting seats.

**C.** Appeal of **Duncan MacCallum, (Attorney for the Appellants**), of the July 15, 2021 decision of the Planning Board for property located at **53 Green Street** which granted the following: a) a wetlands conditional use permit under Section 10.1017 of the Zoning Ordinance; b) preliminary and final subdivision approval; and c) site plan review approval. Said property is shown on Assessor Map 119 Lot 2 and lies within the Character District 5 (CD5) and Character District 4 (CD4). (LU-21-162)

City Attorney Robert Sullivan was present and explained the procedural ways the Board could approach the complicated issues in the appeal. He said the appellant was in support of the idea that the Board should overrule the Planning Board's decision. He explained what the merits, standing, and other issues were. If the Board determined that there was no standing, then the case could be dismissed. He said it was raised by Attorneys Ramsdell and Mitchell that in dealing with the Planning Board's exercise of the discretion granted to it by the zoning ordinance the CUP, the proper route of appeal was not to the Board of Adjustment but was to the Superior Court or the Housing Appeals Board. He said if the BOA agreed with that, then they could decide whether any of the merits questions could be dismissed and handled elsewhere. He said the burden was on Attorney MacCallum to convince the Board of the three merits questions, but the preliminary questions were brought by Attorney Ramsdell. He also noted that Attorney Mitchell would represent the Planning Board.

The Board discussed how to address the appeal as well as how much time should be allocated to the presenters and public.

*Mr. Hagaman moved to address the questions in the order suggested by Attorney Sullivan -- the standing, the CUP, and the merits – and in accordance with the timeline outlined by Acting Chair McDonell. Mr. Parrott seconded the motion. The motion* ***passed*** *unanimously, 7-0.*

Attorney Michael Ramsdell was present on behalf of Stone Creek Realty. He stated that standing was one of the most fundamental principles of the law, and in order to have a standing to appeal a Planning Board decision to the BOA, a person must have been aggrieved by the Planning Board's decision. He said none of the appellants appeared before the Planning Board to participate in the proceeding, so they could not be aggrieved. He said the appealing person must have a direct and definite interest in the outcome of the appeal, but in this case, nothing in the original appealing documents gave any indication of standing. He said none of the appellants raised any issue about being impacted by the project, and that was because a person must be an abutter or have their property directly affected by the decision by adjoining or being directly across the street or streams. He noted that, two weeks before, the NH Supreme Court and Seabrook One Stop were challenged by someone who said he was diagonally across the street from the project. The Supreme Court said it wasn't enough. He said none of the appellants fell within that definition. He said there was nothing in the original appeal that someone was able to demonstrate that their land would be directly affected by the proposal. He said what was filed that day was a concern about a possible construction accident that would pollute North Mill Pond, which he said wasn't a direct definite interest in the outcome of the appeal because it was speculative. He said therefore none of the appellants had established standing and had no basis to be there, and he said the appeal should be dismissed.

Mr. Hagaman asked if the Court relied on Seabrook's standard for abutter notification in determining the diagonal property. Attorney Ramsdell said the diagonal property owner said he hadn't received notice and was entitled to notice because he was diagonally across the street. The Court said that person was not entitled because his property didn't adjoin or wasn't directly across the street. Acting-Chair McDonell said the golf course investment case cited in Attorney

Ramsdell's brief listed the criteria that included the type of change proposed. He said the golf course was a minimal change to the property, but the change proposed here was larger in nature. Attorney Ramsdell said there was no change to the 17 appellants' properties because their properties wouldn't be touched. He also noted that they did not participate before the Planning Board and there would be no immediate impact to their properties because they were too far away. He said the appellants said the pond could become polluted, but actually the project would improve the pond and wetland area by putting in a stormwater management system. He said it was completely speculative that the appellants' properties could be touched or affected in any way, let alone not having an immediate or direct impact. Acting-Chair McDonell said the type of change proposed was the one proposed for the Green Street property. He said he took Attorney Ramsdell's point that if it was very minute, the other criteria were considered. He said it was different if there was a very minute change and someone across town said they had a problem with it than a change that was a monumental one to a parcel. Attorney Ramsdell said it all went back to whether the change was small and whether a large change would directly impact the person who was claiming standing. He said a huge Walmart a half mile down the road would impact traffic and so on, and that might affect someone's property.

Attorney Duncan MacCallum representing the appellants spoke next and said the test for standing was whether the appellant would be directly affected by the project. He said a few of the people who were appellants would be affected because the tide would bring in chemical waste or issues caused by construction and would affect the entire North Mill Pond. He said some appellants owned property right on the pond and that chemical waste would adversely impact animal life and vegetation. He said one did not have to be an abutter to have standing and that the issue was whether the person would be directly affected by the land use board's decision. He said only one of his clients had to have standing for the case to go forward. He said four of the appellants would be affected.

Ms. Margeson asked if the four people were abutters under the law and if they received abutter notices. Attorney MacCallum said that wasn't the point because the test was whether they were going to be directly affected by the Planning Board's decision. He said they didn't speak at the Planning Board meeting because they didn't receive any notices and that the Planning Board should have sent notice to everyone who would be directly affected by the project, including all the property owners on North Mill Pond and those who lived a street or two away from the project. Ms. Margeson said the reason the appellants weren't there was because they did not qualify as abutters under the State Statute. Attorney MacCallum said their properties adjoined the stream and their land would be affected. Mr. Hagaman referred to the argument about how the pond itself and vegetation and life within the pond could be impacted and asked how the property owners or their properties could be impacted. Attorney MacCallum said if the vegetation was killed 'in your neck of the woods and also caused animal life to disappear, you're directly affected', so the quality of life for those people who liked animals would be impaired.

Acting-Chair McDonell opened the public hearing for standing.

**SPEAKING IN FAVOR OF THE RESPONDENTS' ARGUMENT THAT THE APPELLANTS DO NOT HAVE STANDING**

No one rose to speak.

**SPEAKING IN OPPOSITION**

Liza Hewett of 169 McDonough Street said the pond was a tidal one, and any disturbance would affect the people toward the west end, and an assault to the buffer would affect the entire pond and anyone living on it

Abigail Gindele of 229 Clinton Street said she lived across the street from the abutters and hadn't found out about the proposal until it was already approved by the Planning Board. She said the pond affected her directly because it had the wild life. She said the city's parameters for the definition of an abutter were too narrow, especially with the impacts the proposal would have on surrounding neighborhoods and the whole city. She said the project's impact would be far reaching throughout the whole North Mill Pond, which was a quality of life aspect for the neighborhood, and toxins, noise, light, and air pollution traveled beyond man-made boundaries.

Esther Kennedy of 41 Pickering Avenue said she was told by the city when she was doing work on her house that she had to send abutter notices across the waterway because the law talked about a stream and her runoff would affect those people. She said the people who lived on North Mill Pond were abutters because of the stream, and the project would change their environment by going into the buffer zone.

John Howard of 179 Burkett Street said he and his wife abutted North Mill Pond and constantly had items landing on their shore. He said anything that went around the pond affected them.

Mark Brighton of Richards Avenue said the reason there was a 100-ft setback for the wetlands was because there was a substantial increase in pollution when it was encroached upon and that the water spread very quickly up the pond. He said the people living on that pond had standing.

**SPEAKING TO, FOR, OR AGAINST**

Peter Weeks of 18 Congress Street said he had done work as a real estate consultant for the applicant, including 53 Green Street. He said he attended every hearing at TAC and the Conservation Commission as well as design reviews and no one at those hearings spoke in opposition, even though there was a lot of advertising about the project. He said the Conservation Commission voted unanimously to recommend approval to the Planning Board. He said the place for appealing was the Superior Court, not the Board of Adjustment.

No one else rose to speak, and Acting-Chair McDonnell closed the public hearing.

**DISCUSSION OF THE BOARD**

Mr. Hagaman said he was torn because if there was standing, it was a close call. He said given the nature of the issue being a wetland CUP and hearing testimony on quality of life that could

impact neighboring property values, the property owners on the pond had standing to at least bring the appeal forward. Ms. Margeson said the appellants' attorney was right in saying that just one person who had standing was enough, but she didn't find that any of the appellants had standing. She said it was clear that it had to be an abutter who had a direct interest in the property. She said the State Statute talked about across the street or stream, and stream usually did not mean a large body of water. She said she was sympathetic but didn't feel that the BOA was the board that should address those issues. Acting-Chair McDonell said he assumed that there was presumption of standing if a person was an abutter, but if not, then the person could still show that they were directly aggrieved. Ms. Margeson disagreed and said one had to be an abutter within the definition of the Statute and normally had to participate in every aspect of the project before it went to an appeal. Mr. Hagaman said someone didn't have to be an abutter for the appeal but had to demonstrate direct and definite interest for the standing. He said the Board was determining who had standing, not who was an abutter. It was further discussed.

Ms. Eldridge said she was concerned with not only who had standing but who was aggrieved. She said she didn't see the fish and plants dying as an immediate impact, but rather it was the question who was aggrieved. She noted that the Conservation Commission was unanimously in favor of the project and that the project was also doing improvements to the water. Mr. MacDonald said it was pointed out that having standing was a status that belonged to anyone who was directly affected, but he said that could be over a wide area, like tidal areas where things move. He said it was possible to have direct effects and be far away and that it was hard to imagine that any entity would enact a law that would be so ridiculous. Mr. Lee said the key element was the issue of water because every body of water around Portsmouth was tidal, so pretty much everyone in Portsmouth was affected by the issue and had standing to go forward with the appeal. Mr. Parrott said the wording of the law could be read in either a narrow way and conclude that a very small number of people were affected by a project, or it could be read broader. He thought that when it was drafted, no land use board was thinking about this type of situation because they were thinking of land, not water and land. He said the broader reading of it was fairer to most people and he thought the folks who lived on the pond should have standing.

Mr. Hagaman said the more he listened to the Board's arguments, a lot of the language focused on the direct and definite interest, so he didn't think it was a question of whether something bad would happen definitely. He said in similar cases, the Court didn't desire to have such a narrow case of standing, but in this case, it could still come out that there was enough to demonstrate standing. Acting-Chair McDonell agreed. He said the criteria for someone who wasn't an abutter and was trying to demonstrate that they're aggrieved should have their proximity to the project considered. He said some of the appellants were nowhere near the project and a few were relatively close. He said the type of change proposed was more substantial than a lot of the cases the Court had decided, so that broadened the pool of people who could be affected. He said the box wasn't checked when it came to someone having an immediate injury or that there wasn't much participation in the prior hearing, so some things weighed in favor and some didn't, but he didn't think it was fair to say that the appellants, or at least one, didn't have standing.

**DECISION OF THE BOARD**

*Mr. Hagaman moved to determine as a Board that the appellants have standing to bring the appeal forward. Mr. Lee seconded.*

Mr. Hagaman referenced his previous comments. He said that the combination of what the Board heard from the attorneys and community members, the nature of the appeal being on the basis of a Planning Board decision for a wetland CUP, and some of the appellants being property owners on the body of water impacted by the wetland buffer and the project was enough to determine that at least some of the appellants have standing and can identify a direct or definite interest and that they are directly affected by the Planning Board's decision with regard to the CUP. Mr. Lee concurred and had nothing to add.

*The motion **passed** by a vote of 5-2, with Ms. Eldridge and Ms. Margeson voting in opposition.*

*At this time, it was moved, seconded and passed to suspend the 10:00 rule and continue the meeting.*

The issue of whether the wetlands CUP was appealable to the Board was next. Attorney Mitchell representing the Planning Board was present. Mr. Margeson asked him if the Planning Board authorized him to represent them. Attorney Mitchell said he didn't know and that he was contacted by Attorney Sullivan. Ms. Margeson said it was highly unusual and seemed inappropriate that an attorney for another land use board would come before the BOA. Mr. Lee agreed. Attorney Sullivan stated that Chairman Legg of the Planning Board requested of the city manager that the Planning Board retain counsel and hire Attorney Mitchell. Mr. Lee asked if the whole Planning Board voted on it and Attorney Sullivan said he didn't believe so. In response to the question of whether the Chair of the Planning Board had the authority to make such a request or whether it would have been proper for the Planning Board to do such an act, Attorney Sullivan said it was an unusual situation and he didn't think it had ever happened in the past. He said there was no established procedure but that the position of Planning Board Chair carried significant authority and he could make the request. He said he didn't know if the other members of the Planning Board were notified.

Mr. Parrott said he was concerned because he had always considered the City Attorney as the legal advisor for the land boards, and now there was an attorney from outside. He asked what would happen if Attorneys Mitchell and Sullivan disagreed. Attorney Sullivan said Chairman Legg wanted to have arguments made on behalf of the Planning Board to the BOA, whereas the legal department offered advice and represented the BOA. Ms. Eldridge said she was uncomfortable because the rest of the Planning Board didn't know about it and she didn't know if Chairman Legg had the power to set the agenda for the BOA's meeting. Ms. Margeson agreed and said she would vote to not hear from Attorney Mitchell and just hear from Attorney Ramsdell. It was further discussed. Acting-Chair McDonell suggested that the Board hear from the respondent's representative and from the appellants and then open it up to the public.

*Mr. Lee moved to disqualify Attorney Mitchell as the Planning Board representative until the BOA had evidence that he represented the entire Planning Board.*

*After further discussion, it was decided that the motion would not be voted on.*

*Mr. Hagaman moved to hear Attorney Mitchell speak as a member of the public, and Mr. Lee seconded. The motion **passed** by unanimous vote, 7-0.*

Attorney Ramsdell representing Stone Creek Realty stated that the BOA lacked jurisdiction over a Planning Board decision regarding a CUP because by Statute, CUPS were innovative land use controls and there was only one place in the NH Statute where the phrase 'innovative land use control and CUP' appeared. He said no municipality could pass a CUP without it being under RSA 674:21. He said the zoning ordinance placed the administration and authorization of the wetlands CUP solely in the jurisdiction of the Planning Board, but an appeal must go before the Superior Court or the Housing Appeals Board.

Ms. Eldridge asked how the word 'innovative' changed the whole thing. Attorney Ramsdell said Section 674:21 described a list of innovative land use controls, and CUPs were innovative land use controls, so they fell under that category. He said all CUPs were innovative land use controls as long as the administration and authorization was delegated solely to the Planning Board and that he wasn't aware of any exceptions. Ms. Margeson disagreed and said the BOA didn't assume jurisdiction on the 105 Bartlett Street case when the City Attorney suggested that they deal with the appeal before them.

Attorney MacCallum said RSA 676:5,III stated that the BOA shall have jurisdiction whenever the application of a zoning ordinance is an issue and that it depended on the criteria. He said there was no room for discretion in the Board's decision and that the applicant had to either meet the criteria or didn't. He said Attorney Ramsdell didn't cite any authority when he said that the CUP was an innovative land use control. He said a CUP was required before the building could exceed 20,000 square feet, and the issue wasn't whether the Planning Board was right or wrong in granting a CUP, it was that they didn't even try to grant a CUP at all. He said that was subject to jurisdiction by the BOA.

In response to Mr. Hagaman's question, Attorney MacCallum said it wasn't clear that a CUP was an innovative land use control because there was an absence of information as to what the source of that use was and there was no mention of the Statute that Attorney Ramsdell quoted. He said the connection between the CUP as used in the ordinance and in the RSA wasn't made.

Acting-Chair McDonell opened the public hearing.

**SPEAKING IN FAVOR**

Attorney Mitchell gave copies of RSA 676:5 to the Board, noting that people didn't want to discuss what the entire Statute said. He said Attorney MacCallum talked about the first part of the Statute in Section III but it didn't mention the rest of the language: 'provided, however, that if the zoning ordinance contains an innovative land use control enacted under 674:21, which delegates administration including the granting of a conditional or special use permit, it cannot be appealed to the BOA.' He said that answered all the questions. He said he was asked to get

involved because his firm did not represent developers but represented 60 New Hampshire towns and cities and that they regularly handled appeals on CUP decisions. He said Attorney MacCallum's argument that because RSA 674:21 is not mentioned in the ordinance, there was no connection between the two was nonsense.

No one else rose to speak.

**SPEAKING IN OPPOSITION**

Liza Hewitt of 169 McDonough Street said she had a problem with a consultant paid by the city speaking as a member of the public and felt that he should not have been able to speak.

Esther Kennedy of 141 Pickering Avenue said she heard from a Planning Board member who had no idea this issue was coming forward and who said there was no vote from the Planning Board taken. She said no board should have to go through what the BOA was going through and that she would support whatever decision the BOA made.

Abigail Gindele of 229 Clinton Street said she didn't feel comfortable with the Planning Board having a paid lawyer speaking as a member of the public.

Petra Huda of 280 South Street said she was speaking as a resident. She said she heard five members of the Board say they were uncomfortable, yet they still proceeded. She said an attorney spoke as a resident when he wasn't even a resident. She asked if someone would clarify that the Planning Board doing innovative decisions did not mean ignoring what the requirements were. She pointed out that there were six requirements for the wetlands and that the project clearly failed all those criteria, yet it was still being discussed. She said she was baffled by what happened and disgusted about the proceedings and the pressure put on the BOA.

Mark Brighton of Richards Avenue said it was disgraceful for the Planning Board to hire a paid consultant.

**SPEAKING TO, FOR, OR AGAINST**

No one rose to speak, and Acting-Chair McDonell closed the public hearing.

**DISCUSSION OF THE BOARD**

Acting-Chair McDonell said it was clear that Attorney Mitchell was not speaking at the request of every member of the Planning Board but just at the request of their Chairman, with the approval from the City Attorney. He said the BOA could understand who they were hearing what from and could make their decision. Ms. Eldridge said she was convinced about what Attorney Ramsdell said about RSA 674:21 taking precedence in New Hampshire State law, so she didn't think the Board should hear the appeal. Ms. Margeson said what happened with the Planning Board was concerning and that she knew the BOA did not have jurisdiction on the appeal of the

CUP. Mr. Lee said Portsmouth had granted over 100 CUPs over the last four years, so they stopped being innovative a long time ago, and because of that, they could be appealed.

*Mr. Hagaman moved that the Board determine that they do not have jurisdiction to hear the merits of the case being appealed, specifically three areas that pertain to CUPs and specifically a wetland CUP, in accordance with RSA 676:53, which references definitions under RSA 674:32, which specifically considers CUPs, even though it's not listed in 674:21,I but is discussed in 674:21,II. For those reasons, Mr. Hagaman said that the proper approval is not to the BOA but to the Superior court.*

*Ms. Eldridge seconded.*

Mr. Hagaman stated that RSA 676:5,III and 674:21 took into consideration the situation. He said RSA 676:5 specifically says that if the zoning ordinance contains an innovative land use control adopted or pursuant to RSA 674:21, which delegates the administration including the granting of conditional or special uses to the Planning Board, then the decision made pursuant to the delegation cannot be appealed to the BOA but may be appealed to Superior Court. He said, given that language in the State Statute and given that the CUPs are taken into account and into consideration under RSA 674 that this appeal is based off of, the Planning Board's determination that a wetland CUP was appropriate and that the first point of the appeal also had to do with CUPS, none of the merits of this appeal should be before the BOA.

Ms. Eldridge concurred and had nothing to add.

Mr. MacDonald said it hinged on the question of innovation and the decision would swing on what was innovative and what wasn't, so the Board couldn't make a decision on whether to adopt the language until they decided what innovative was or was not, and he recommended that the Board defer a vote on it until they agreed on what constituted innovation. Acting-Chair McDonell said the fact that they were called innovative land use controls wasn't relevant, and it was further discussed.

*The motion **passed** by a vote of 4-3, with Mr. Lee, Mr. MacDonald, and Mr. Parrott voting in opposition.*

There was further discussion, and Mr. Hagaman amended his motion.

*Mr. Hagaman moved that the Board did not have the jurisdiction to make a determination under Count 2 in the appeal, which pertains to the wetlands CUP, for all the reasons he already said. Ms. Eldridge seconded. The motion **passed** by a vote of 4-3, with Mr. Lee, Mr. MacDonald, and Mr. Parrott voting in opposition.*

Acting-Chair McDonell said the Board still needed to hear Counts 1 and 3, the merits discussion on the size of the building footprint and the number of stories allowed.

*It was moved, seconded, and passed unanimously to **continue** the appeal to the October meeting.*

## III. OTHER BUSINESS

There was no other business.

## IV. ADJOURNMENT

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

Respectfully submitted,

Joann Breault
BOA Recording Secretary