

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

7:00 P.M.

January 18, 2022

MEMBERS PRESENT: Arthur Parrott, Chairman; Members Jim Lee, David MacDonald, Beth Margeson, Thomas Rossi, and Paul Mannle; Alternates Phyllis Eldridge and Chase Hagaman

MEMBERS EXCUSED: None.

ALSO PRESENT: Peter Stith, Planning Department

Chairman Parrott opened the meeting. He noted that the application for 437 Lafayette Road was withdrawn. He said a new vice-chairman needed to be elected.

*Mr. Lee moved to elect a new vice chairman at the February 15, 2022 meeting, and Ms. Eldridge seconded. The motion **passed** by unanimous vote, 7-0.*

*It was moved, seconded, and passed by unanimous vote, 7-0, to take the 389 Lincoln Avenue petition out of order and to **postpone** it to a future meeting per the applicant's request.*

I. APPROVAL OF MINUTES

A) Approval of the minutes of the meeting of December 21, 2021.

*The December 21 minutes were unanimously **approved** as submitted*

II. OLD BUSINESS

A) **132 & 134 Middle Street LLC and MAC Properties (Owners)**, for the Properties located at **132 and 134 Middle Street** request a **one-year extension** on variances granted on February 19, 2020. The current expiration is February 19, 2022. Said properties are shown on Assessor Map 172 Lot 12 and Map 127 Lot 11 and lie within the Character District 4-L1 (CD4-L1).

Mr. Hagaman was the voting alternate.

SPEAKING TO THE REQUEST

Attorney Derek Durbin was present on behalf of the applicant. He said his client was unable to complete a full-scale renovation of the building for several reasons, including the pandemic, rising costs, and lack of labor. He requested a two-year extension instead of the one-year extension that was filed for because he thought it was likely that he would have to return for another year's extension. Mr. Stith said the ordinance stated that the Board could extend a petition by as much as one year only, and Attorney Durbin agreed to modify the extension request to one year.

DECISION OF THE BOARD

*Mr. Hagaman moved to **grant** the one-year extension, seconded by Mr. Lee.*

Mr. Hagaman said the reasons brought forth for requesting an extension made sense. Mr. Lee concurred.

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

B) Request for Reconsideration of Rehearing for 53 Green Street

Ms. Eldridge was the voting alternate.

DISCUSSION OF THE BOARD

Ms. Margeson said she continued to think that the rehearing should not have previously been granted. She said she did some research and saw nothing that indicated that the Board could entertain a motion for reconsideration of rehearing, according to RSA 677. She said the petition just needed a rehearing and not a reconsideration of a rehearing. Mr. Lee asked if there was anything that prohibited reconsidering the rehearing. Ms. Margeson said the BOA was a jurisdictional board and could only grant according to acts and powers under the rule of the ordinance, and she didn't see anything that allowed the Board to reconsider the rehearing.

DECISION OF THE BOARD

*Ms. Margeson moved to **deny** the motion for reconsideration of rehearing, for reasons she stated previously. Ms. Eldridge seconded.*

Ms. Margeson said she had not agreed with the previous motion for a rehearing, and her research into the Board's rules and the applicable RSA 677 showed that there was no provision that allowed the Board to entertain a motion of reconsideration for a motion for a rehearing. She said RSA 677 stated that after a motion is granted, it goes to a rehearing. Ms. Eldridge concurred and said it was a confusing issue.

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

- C) **WITHDRAWN** Request of **Artwill, LLC, (Owner)**, for the property located at **437 Lafayette Road** whereas relief is needed from the Zoning Ordinance for a proposed four (4) lot subdivision which requires the following: 1) Variances from Section 10.521 to allow a) 60.6' of continuous street frontage where 100' is required for proposed Lot 3; and b) 67.2' of continuous street frontage where 100' is required for proposed Lot 4, and c) A Variance from Section 10.521 to allow a 29.5' front yard where 30' is required. Said property is shown on Assessor Map 229 Lot 1 and lies within the Single Residence B (SRB) District. **WITHDRAWN** (LU-21-196)

The petition was withdrawn by the applicant.

III. NEW BUSINESS

- A) **REQUEST TO POSTPONE** Rehearing of the **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). **REQUEST TO POSTPONE** (LU-21-162)

Mr. Hagaman was the voting alternate.

DISCUSSION OF THE BOARD

Mr. Hagaman asked if the rehearing would be held that evening if it wasn't postponed. Mr. Stith said only one party was present and the Board didn't have any materials related to the hearing. Ms. Margeson suggested continuing the rehearing to the February 15 meeting.

DECISION OF THE BOARD

*Mr. Hagaman moved to **postpone** the rehearing to the February 15, 2022 meeting, seconded by Mr. Mannle.*

Mr. Hagaman said it was incumbent upon the Board to postpone the rehearing, given that one of the parties wasn't present and the Board lacked the information needed to rehear the rehearing and whatever merits were brought forth, especially since it was deemed appropriate to address the request for reconsideration of the rehearing before going to the rehearing. Mr. Mannle concurred and had nothing to add.

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

- B) Request of Camellie Development LLC (Owner), for the property located at 232 Wibird Street** whereas relief was needed to demolish existing detached garage and construct two-story rear addition with attached garage which requires the following: 1) A Variance from Section 10.521 to allow a 6 foot right side yard where 10 feet is required. 2) A Variance from Section 10.321 to allow a nonconforming building or structure be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on Assessor Map 149 Lot 14 and lies in the General Residence A (GRA) District. (LU-21-218)

Ms. Eldridge was the voting alternate.

SPEAKING TO THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant and reviewed the petition. He said the variances were needed because the renovation called for a two-story addition on the right side of the lot. He distributed to the Board a letter of support from the abutter at 222 Wibird Street. He said there was also an email from the neighbor on the other side of the lot who had no problem with the overall concept but did have an issue with the second-floor windows facing his yard. Attorney Phoenix distributed a replacement set of plans to the Board and said the second-floor windows would be frosted. He reviewed the criteria in full and said they would be met.

Mr. Hagaman asked if the new plans were filed with the City or if there should be a stipulation. Mr. Stith said the plans would be in the City's file, so no stipulation was necessary. Mr. Lee asked if the frosted windows would be operable, and Attorney Phoenix agreed.

Chairman Parrott opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Doctor David Gray said he was the abutter who had an issue with the windows facing his yard. He said he wasn't opposed to the project but wanted to verify that the garage bay second floor wasn't intended to be an Accessory Dwelling Unit (ADU) in the future, noting that it had the look of an apartment due to the bathroom and kitchenette. Attorney Phoenix said the owner had no intention to make it an ADU at any time. He said the small bathroom, dishwasher, and refrigerator were just amenities for the family when they used the space. Doctor Gray asked whether the frosted glass windows would remain in perpetuity. Attorney Phoenix said someone would have to appear before the Board to request a change.

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

DECISION OF THE BOARD

*Mr. MacDonald moved to **grant** the variances for the petition as presented, and Ms. Margeson seconded.*

Mr. MacDonald said he drove by the property and that it was clear that the building would fall down eventually if someone didn't do anything to improve the property. He said it was therefore in the public interest for the project to proceed. He noted that there were no objections to the project heard and the criteria were met, so he was in favor of it. Ms. Margeson concurred. She said the criteria were met because the petition was not contrary to the public interest and would observe the spirit of the ordinance. She noted that the variance request was for a 6-ft right side yard instead of a 10-ft one but that it brought the property more in conformance with the ordinance, so the spirit and intent of the ordinance were satisfied. She said surrounding property values would not be diminished, seeing that any renovation or update to a home normally increased property values next to it. She said it would not pose an unnecessary hardship to the applicant because there was no loss to the public that would outweigh the benefit to the owner. For those reasons, she said she supported the motion to grant.

Mr. Stith asked the Board to confirm that they were not adding the stipulation for frosted glass and was told that it wasn't necessary because the petition was approved as presented and the issue was recorded in the deliberations.

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

- C) Request of Sherbeth Young and Joseph Dibella (Owners), for the property located 0 Woodbury Avenue** whereas relief was needed from the Zoning ordinance to construct a single-family home which requires the following: 1) Variances from Section 10.521 to allow a) a lot area of 7,436 where 15,000 is required; b) a lot area per dwelling unit of 7,436 where 15,000 square feet is required; and c) 60' of continuous street frontage where 100 feet is required. Said property is shown on Assessor Map 220 Lot 16-1 and lies within the Single Residence B (SRB) district. (LU-21-219)

Mr. Hagaman was the voting alternate.

SPEAKING TO THE PETITION

Attorney Derek Durbin was present on behalf of the applicant. He reviewed the petition, noting that the lot was currently a vacant parcel of land and one of two involuntarily-merged parcels. He explained that the owner bought the land in 2021 with the intention of building a modest two-story single-family home of 1,806 square feet. He said the property was nonconforming, otherwise the home would meet the setback, building coverage, and open space requirements. He said the applicant disagreed with the City that the lot area variance was needed, given the fact that the City Council did restore what was a nonconforming lot of record back to its premerger status but didn't take into account the deficiencies of trying to develop that property and any relief related to that. He reviewed the criteria and said they would be met.

Mr. Hagaman verified that there would be a garage under the house. He said the lot appeared to be flat, and he asked if the elevation around the house or beside it would be significantly altered in order to get a driveway down far enough to enter a garage under the house. Attorney Durbin

said the property sloped down to the abutting property on the right and that the terrain wouldn't be altered much. He said the planned configuration was the easiest way to get a garage in that wouldn't take away the backyard space and also for access in and out of the property. He said there would be a basin installed to deal with any on-lot drainage and to manage any runoff. He said there would be enough room for a car to get in and out. He noted that the temporary shed near the rear abutting property line as shown on the plan would be removed.

Mr. Rossi asked what kind of due diligence the client did when he purchased the property to ensure that it would be a buildable lot. Attorney Durbin said the client looked at the City Council's approval that went into restoring the property to its pre-merged status and the records associated with the property to ensure that it would be buildable. He said it needed variance relief from the Board because there was no automatic right to build on a lot like that due to zoning, but he thought there were rights that went along with the property.

Mr. Hagaman noted that a lot of the letters received from the neighbors mentioned that the original purpose of separating the lot was to discourage future development, and there was some indication that future real estate agents might have to disclose to a future buyer that the lot was a non-buildable one. Attorney Durbin said that was the first he'd heard of it. He said the lot was marketed and listed as a lot restored to its premerger status and there were no deed restrictions indicating that it would be non-buildable. Chairman Parrott verified that it was a registered lot and asked when the City Council's action was made. Attorney Durbin said it was in 2018.

Ms. Margeson asked what the process was for giving the property an address. Attorney Durbin said if the Board approved the petition, it would then go through the Planning Board and the Division of Public Works. Mr. Rossi asked if the fact that the lot was listed as a lot relegated previous statements that it wasn't intended to be redeveloped. Mr. Stith said he didn't believe those statements were binding.

Chairman Parrott opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one was present to speak in favor.

SPEAKING IN OPPOSITION TO THE PETITION

Anne Perkins of 759 Woodbury Avenue said she lived one house away from the applicant's property. She said the applicant wanted to wind back the clock to when zoning laws were different. She said the lot was practically half of what a conforming lot should be in 2022 in Portsmouth. She said it was subdivided and was intended to be a non-buildable lot. She said when someone bought a property, it was up to that person to do the due diligence, so she didn't think any financial hardship was relevant. She said it could set a precedent and create future headaches for other nearby properties.

Edward Baldassarre of 717 Woodbury Avenue said he lived next door to the property. He said a buyer took a risk in purchasing a property without a contingency. He said the lot was less than

half the square footage of a normal building lot, with 60 feet of road frontage instead of 100. He also noted that there was a utility pole there. He said the proposed driveway would be right on his property line. He said there would be stormwater runoff issues, and he distributed photos to the Board of a past stormwater incident in the area. He asked if it was allowed to have a driveway with no space between properties.

David Perkins of 759 Woodbury Avenue said he lived two houses from the lot. He said when cars were parked on the edge of that lot, it blocked the vision of people coming out of their driveways and created a safety hazard. He noted that there was other similar-sized lots in the area. He said the ordinance protected the residents' greenspace and neighborhood and that the shrunk lot size would take away that greenspace.

Stacy Szmyt 690 Woodbury Avenue said she lived directly across from the lot. She said the majority of homes on Woodbury Avenue were closer to the 15,000-sf requirements and that granting the variance would significantly affect the natural boundaries. She said two Japanese maples were removed from the property and that there could be stormwater problems because the lot was at a lower grade. She said the lot was previously approved as a separated one because it wasn't supposed to be used as a buildable lot but was to provide greenspace for gardening.

Kathryn Auger-Campbell of 75 Ruby Road said the land was cleared without considering the neighbors, which significantly impacted the abutting properties by removing any privacy they once had. She said the greenspace was a priority and that removing the trees was a significant impact to the neighbors being able to enjoy their properties. She said the neighbors all purchased their properties with no expectation that an additional property would be added and built upon.

Steven Rodriguez of 737 Woodbury Avenue referred to the notes on the variance relief application indicating that it was a significant injustice to deny the right to build. He said the purpose of the unmerged lot was to keep it out of developers' hands and that the real estate company was provided with the applicable previous meeting minutes and the lot's history, and he questioned whether that information was passed along to the buyers or the attorney.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Durbin said he knew that the City Council didn't act based on representations of whether or not the lot is unmerged, but rather that it was whether or not it was a pre-existing lot of record, which it was. He said it was determined that the lot was a buildable lot of record at that time, and that there was no restriction on the buildability of the lot. He said he couldn't see that there was any other intention otherwise, by evidence that it was marketed to the public and sold without any restriction on it. Relating to greenspace, he said the lots in the area were different shapes and sizes and the prevailing trend was that there weren't a lot of properties that did comply with the 15,000-sf requirement. He said the trees were removed because it was determined by an arborist that they were diseased. He said there was no setback for driveways and that the configuration maintained the most open space on the property and was the best way for ingress and egress into the garage and driveway. He also noted that the driveway eliminated any issue with street parking. He said he understood the abutters' concerns that the greenspace

they were able to enjoy was taken away to build on it but that the petition still meet the spirit of the ordinance. In response to Mr. Hagaman's question, he said the applicant wasn't aware of any agreement to not cut down trees on the property, and the trees were diseased anyway.

Edward Baldassarre of 717 Woodbury Avenue said that in 2019, the Board denied approval on a lot across the street with more square footage due to stormwater runoff problems. He said the lot was much bigger and flatter than the applicant's lot. Chairman Parrott noted that Mr. Baldassarre made the statement several times that the lot was non-buildable, and he asked what the source for that impression was. Mr. Baldassarre said the previous owner bought the original house at auction and subdivided the lot and said it would be used for gardening and would never be developed, but she sold it a few years later during the pandemic when property values were very high and there weren't many lots available. He said many people bid on the lot, which created a situation where one buys in a panic without going through the proper procedures to protect their investment. He said the buyer took a risk by buying the lot and knowing he might not get approval to build on it. Ms. Margeson said she heard the word 'subdivided' a lot and asked if Mr. Baldassarre meant the merger. Mr. Baldassarre said the property was two properties years ago and was unmerged through the City Council. Ms. Margeson said that wasn't a subdivision and that there was a difference between subdivided and merged. She said the lot was deemed unbuildable because it didn't comply with the ordinance but was contingent on approval of the variances and that the owners were aware of that when they bought the lot.

David Perkins of 759 Woodbury Avenue said the neighbors were concerned about preserving the ordinance and protecting their greenspace. He said a hardship was not created and that a lot of the abutters had bought their properties based on preserving those ordinances.

Stacy Szmyt of 690 Woodbury Avenue said the land was originally merged due to the very small lot size but was then unmerged by the Planning Board for a non-buildable purchase. She said it should have remained greenspace. She said the ordinances were in place for a reason, and the property wasn't even half the size of what it should be to meet the ordinance.

Kathryn Auger-Campbell of 75 Ruby Road said the neighbors were looking at the petition in the spirit of the ordinance. She said the lot didn't have an existing structure and the space was too small to fill it with a home, which would be out of the spirit of the ordinance.

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

DISCUSSION OF THE BOARD

Ms. Margeson noted that the petition stated that the proposed right yard setback was 16 feet and the minimum was 30 feet. Mr. Stith said it was 10 feet.

Mr. Hagaman said he read all the communications from the public and heard all the testimony, so he understood the concerns about what the property might end up being. He said the unmerging could be done by right because of the law at that time. He said the reason that the owner sold it at a time when development was at peak might mean that her sentiment about what

the property could be had changed and what the property could be used for, longer term. He said there were no binding contracts or deed restrictions on the property. He said the spirit of the ordinance was diminished a bit, given the context in which the property was sold and how it was unmerged. He said he was on the Board in 2019 when the neighborhood property was denied a variance, but he remembered that the property also had a large telephone wire easement going through it and the property that would have remained from the subdivision was a basin to catch all the neighborhood water, so he didn't think it was comparable to the applicant's lot. Ms. Margeson said she always had sympathy for abutters and stormwater concerns and the desire for greenspace, but the property was a private one and the City had no purview to keep it as greenspace, and there was nothing the Board could do to ensure greenspace. She said the property was very unique. She said she looked at other properties in the area and found that the sizes varied and that some properties were actually smaller than the applicant's. She said the neighborhood appeared to be all over the place.

Mr. Rossi asked how the Board addressed substantial justice when there was so much opposition to a project that the neighbors felt wasn't conforming. Mr. Lee said the benefit to the applicant should not be outweighed by any harm to the general public or other individuals. Mr. Rossi concluded that the impact to the abutters was a factor in that consideration, and it was further discussed. Mr. Lee said a deed restriction would have been simple if the previous owner had really wanted the space to be used as greenspace. He said it also would have been simple for the buyers to add a contingency to the property, so he felt that due diligence wasn't done. He said the lot was pretty small and the request for the variance was pretty big, and he thought that building a house on that lot would be contrary to the public interest and the spirit of the ordinance, so he could not support the application.

DECISION OF THE BOARD

*Mr. Lee moved to **deny** the variances for the petition, and Mr. Rossi seconded.*

Mr. Lee said his motion was for the reasons he previously stated, that the variance requests were contrary to the public interest and to the spirit of the ordinance. He said the variance request was massive by asking to build a house where 15,000 square feet was needed and they only had 7,000, and where a 100-ft continuous street frontage was needed and they only had 60. He said it just wasn't enough. Mr. Rossi concurred and said it didn't meet the substantial justice criteria.

Ms. Margeson said she would not support the motion. She said the property did have special conditions because it was a nonconforming lot that was unmerged through the City's process, and without some kind of zoning relief, it wouldn't be able to be built upon. She said it was a matter of right in the Single Residence B district. Mr. Hagaman agreed. He said that, after reviewing the application and the criteria and hearing all the testimony, he thought the variance requests were due to how the lot itself existed as a result of an unmerger and that it was a statutory right. He said what was proposed was reasonable – a modest house that fit within all the requirements of the lot's envelope in terms of setbacks. He said there was no indication that building on the lot would worsen the stormwater runoff or alter the character of the neighborhood. He said it would be a single-family residence on a busy street and a lot of the

other properties weren't much bigger, so he didn't know if focusing on the houses immediately around the applicant's property was fair.

*The motion **failed** by a vote of 3-4, with Ms. Margeson, Mr. Mannle, Mr. Hagaman, and Chairman Parrott voting in opposition to the motion.*

*Mr. Hagaman moved to **grant** the variances for the petition as presented, and Ms. Margeson seconded.*

Mr. Hagaman said the variance request wasn't contrary to the public interest and would not violate zoning objectives, and there would be no alteration of the essential character of the neighborhood nor any threat to the health, safety, and welfare of the public. He said the Board heard a lot of concerns about what could impact stormwater or how it might change the neighborhood, but the application was for a single-family home in a single-family neighborhood, and there was no indication that there would be any impact on stormwater or runoff, so the spirit was observed. He said a modest home on a small lot caused no issues with air, light, and water, so substantial justice was done. He said there would be no gain to the public that would outweigh the loss to the applicant if the variances were denied and the single-family residence wasn't permitted to be built. He said there was no evidence that the values of surrounding properties would be diminished because anything on the lot would increase that lot's value as well as surrounding properties. He said literal enforcement of the ordinance would result in unnecessary hardship because the size of the unmerged lot and the lot's frontage couldn't change, so there was no fair and substantial relationship between the general public purpose of the ordinance and its specific application. He said the proposed use was a reasonable one, a single-family home in a single-family neighborhood with comparable lot sizes, and he believed it was worth granting.

Ms. Margeson concurred and had nothing to add.

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

D) REQUEST TO POSTPONE Request of **Evan C. Maloney and Jill Maloney (Owners), and Duncan McCallum (Applicant)**, for the property located at **389 Lincoln Avenue** requesting an equitable waiver or variance for approval of a previously constructed tree house which requires the following: 1) A Variance or Equitable Waiver from Section 10.521 to allow a) a 0 foot rear yard where 8 feet is required; and b) a 5' left side yard where 8 feet is required. Said property is shown on Assessor Map 135 Lot 17 and lies within the General Residence A (GRA) District. **REQUEST TO POSTPONE (LU-21-221)**

DECISION OF THE BOARD

*It was moved, seconded, and passed unanimously (7-0) to **postpone** the petition to a future date.*

IV. OTHER BUSINESS

Chairman Parrott said the former Chairman David Rheaume, Vice-Chair Peter McDonell, and Christopher Mulligan invested a lot of time and effort into the Board and that the public and the Board thanked them for their long and dedicated service.

V. ADJOURNMENT

The meeting was adjourned at 8:55 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary