

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

**7:00 P.M.**

**November 15, 2022**

**MEMBERS PRESENT:** Jim Lee, Vice Chair (via Zoom); David MacDonald; Paul Mannle; Phyllis Eldridge; Thomas Rossi; Jeffrey Mattson, Alternate

**MEMBERS EXCUSED:** Beth Margeson

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

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Vice-Chair Lee was present via Zoom. Ms. Eldridge was Acting-Chair.

**I. APPROVAL OF MINUTES**

Approval of the minutes of the meetings of October 18, 2022 and October 25, 2022.

The October 18 minutes were **approved** as presented by unanimous vote, 6-0.

For the October 25 minutes, Mr. Rossi asked that the word ‘provision’ after the phrase ‘does not provide’ be deleted from the following motion on page 12 to read as follows:

Mr. Rossi **moved** that the board finds an error in the enforcement of the zoning ordinance in the July 15 decision of the Planning Board for the following reasons: the north end overlay incentive district does not extend into the 100-ft setback and therefore does not provide for the increased building lot coverage, size, square footage, and height.

The minutes were **approved** as amended by unanimous vote, 6-0.

Acting-Chair Eldridge asked the Board to elect a new Chair and Vice-Chair.

*Mr. Rossi moved to add the election of officers to the agenda, seconded by Mr. Mannle. The motion **passed** unanimously, 6-0.*

*Mr. Rossi moved to elect Vice-Chair Lee as Chairman and Ms. Margeson as Vice-Chair, seconded by Mr. Mannle. The motion **passed** unanimously, 6-0.*

**II. OLD BUSINESS**

- A. The request of **Jeffrey M. and Melissa Foy (Owners)**, for property located at **67 Ridges Court** whereas relief is needed for construction of a 518 square foot garage addition which requires the following: 1) A Variance from Section 10.521 to allow a 15.5 foot front yard where 19 feet is required per Section 10.516.10. 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 located on Assessor Map 207 Lot 59 and lies within the Single Residence B (SRB) District. (LU-22-199)

Mr. MacDonald recused himself from the petition, which left five voting members. The applicant's representative said they would proceed.

### **SPEAKING TO THE PETITION**

Attorney Tim Phoenix was present on behalf of the applicant, including the project team and applicants. He stated that they were previously denied by the Board and were now proposing a smaller project due to the concerns of the neighbors. He reviewed the Fisher v. Dover doctrine and explained why they met the requirements by removing one of the previously-proposed garages in addition to other changes.

Mr. Rossi asked if the front yard setback was always 15.5 feet. He noted that the thing that changed was the reference point of 19 ft vs. 30 ft, so he felt that had not really changed. Attorney Phoenix said the location of the front of the building has not changed, but the degree of the ask was different because they only needed 19 feet. He said the problem with 19 feet is that the back of the building would be pushed more into the wetland buffer, and the new building has to line up architecturally.

Mr. Rossi asked Mr. Stith if Fisher v. Dover required that the substantive change be impactful on the variance itself or if a major change in the project without changing the variance could be considered. Mr. Stith said the variance could be the same but it was the material change that mattered, and he didn't think the setback had to change for it to be different. It was further discussed. Mr. Mannle said all the reasons the application was denied before were still in place so it had not materially changed, and even though it was a small building, the setbacks had changed a bit. Chairman Lee agreed and said it was basically the same horse pulling a different buggy, so he did not think the application would be able to be heard. Mr. Rossi disagreed and said he felt it did pass the standard for Fisher v. Dover. He said the neighborhood's main concern previously had to do with the sight line to the waterfront and the impaired views, and the new proposal made a diligent and good-faith effort to address that concern, so he therefore believed it was a substantive difference in a material way that affects it fitting into the neighborhood. Mr. Mattson said he also wasn't at the previous meeting, but he felt that the broad definition of a garage is 'a garage is a garage', so that wouldn't be different, but applying it that broadly, he thought that no matter what addition was proposed, the Board would say that it was the same, so a two-car garage vs a one-car garage is a difference, even if it's still a garage.

### DECISION OF THE BOARD

Mr. Rossi said the petition passed the Fisher v. Dover criteria of substantive change that would allow the Board to hear the new proposal.

*Mr. Rossi moved that the Board determine that the petition does not fall under Fisher v. Dover and that it be heard. Mr. Mattson seconded. The motion **failed** by a vote of 2-3, with Mr. Mannle, Chairman Lee, and Acting-Chair Eldridge voting in opposition.*

### III. NEW BUSINESS

Mr. MacDonald resumed his voting seat.

- A. The request of **Emily-Anne Boon (Applicant)** and **Jeanne L. Wescott Revocable Trust (Owner)**, for property located at **118 Maplewood Avenue, Unit C4** whereas relief is needed to allow a medical office which requires the following: 1) A Special Exception from Section 10.440, Use #6.20 to allow a medical office where the use is permitted by Special Exception. Said property is located on Assessor Map 124 Lot 5-C4 and lies within the Character District 4-L1 (CD4-L) and the Historic District. (LU-22-205)

### SPEAKING TO THE PETITION

The applicant Doctor Emily-Anne Boon stated that she wanted to expand her medical office and would see patients only by appointment for medically aesthetic procedures. Her husband Drew Boon was also present. He reviewed the criteria for special exception and said they would be met.

Mr. Rossi asked if emergency vehicles would go in and out of the facility, and Doctor Boon said they would not. There were no further questions from the Board. Acting-Chair Eldridge opened the public hearing.

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

No one spoke, and Acting-Chair Eldridge closed the public hearing.

### DECISION OF THE BOARD

*Mr. Mannle moved to **grant** the special exception for the petition as presented, seconded by Mr. Rossi.*

Mr. Mannle said the petition met the standards in Section 10.232.21 of the ordinance for that particular use of a special exception. He referred to Section 10.232.22 and said there would be no hazard to the public or adjacent properties on account of potential fire, explosion, or release of toxic materials. Referring to Section 10.232.23, he said the project would pose no detriment to property values in the vicinity or change in the essential character of any area including residential or

business and industrial districts on account of the location, scale of buildings and other structures, parking areas, accessways, odors, smoke, gas, dust, other pollutants, noise, glare, heat, vibration, unsightly outdoor storage of equipment or vehicles. Referring to Section 10.232.24, he said the project would pose no creation of a traffic safety hazard or a substantial increase in the levels of traffic congestion in the vicinity. Referring to Section 10.232.25, he said the project would pose no excessive demand on municipal services including but not limited to water, sewer, waste disposal, police and fire protection, and schools. Referring to Section 10.232.26, he said there would be no significant runoff onto adjacent properties, noting that there would be no new construction and that the applicant would simply re-use the building.

Mr. Rossi concurred. He referred to Section 10.232.23 and said the use would be similar to existing uses in the surrounding areas, a fact that supported the lack of impact on adjacent property values. He referred to Section 10.232.24 and said there would be no impact on safety or substantial increase in traffic congestion since there wouldn't be routine traffic from emergency vehicles traveling at high speeds.

*The motion passed unanimously, 6-0.*

- B. The request Optima Dermatology (Applicant), and Seacoast Newspapers, Inc. (Owner), for property located at 111 New Hampshire Avenue** whereas relief is needed to allow a testing laboratory which requires the following: 1) A Special Exception from Part 303-A.03 (f) of the Pease Development Authority Zoning Ordinance. Said property is located on Assessor Map 306 Lot 4 and lies within the Pease Industrial (PI) and Airport Business Commercial (ABC) Districts. (LU-22-207)

## **SPEAKING TO THE PETITION**

John Crowley representing Optima Lab stated that the new testing laboratory would be a pathology lab and would have no walk-in patients but would simply receive specimen deliveries. He reviewed the PDA's special exception criteria and said they would be met.

Mr. Rossi asked if there would be any increased hazard to the public or building occupants, noting that laboratory space required special air handling, evacuation of fume hoods, and so on that would be separate and not feeding into the general HVAC system. He asked how that would be handled. Mr. Crowley said they retained a mechanical contractor and that the HVAC system in the building would be improved and their own HVAC and fans units on the rooftop would operate just within their land space to provide necessary venting. He said they also retained a fire protection engineer who would ensure that the chemical quantities would be under the maximum amount allowed and that the building capacity for fire protection would be up to code for lab use. Mr. Rossi verified that hazardous waste would be brought directly to the outside of the building without going through the office space.

Acting-Chair Eldridge opened the public hearing.

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

No one spoke. Acting-Chair Eldridge closed the public hearing.

## DECISION OF THE BOARD

*Mr. Rossi moved to **recommend approval** of the request for the special exception as presented. Mr. Mannle seconded.*

Mr. Rossi said no adverse effect or diminution of values of surrounding properties would be suffered because laboratory activities are specifically contemplated and allowed by special exception in the area, so that area already accommodates that type of use. He said the use would not create traffic or other health and safety hazards, noting the applicant attested that appropriate measures are being taken concerning air handling and handling of biohazardous and chemical wastes, which would be the only possible concern for Item 2. He said the proposed site is an appropriate location for the use and provides safe and proper access and egress, noting that there is direct external access for loading and unloading chemicals and hazardous waste that is proper for this application and this use. He said there are no additional standards provided in the zoning regulation for the zone in which it is situated, so Item 4 is by default satisfied.

*Mr. Mannle concurred. The motion **passed** unanimously, 6-0.*

Mr. Rossi recused himself from the following petition.

- C. The request **635 Sagamore Development LLC (Owner)**, for property located at **635 Islington Street** whereas relief is needed to remove existing structures and construct 4 single family dwellings which requires the following: 1) A Variance from Section 10.513 to allow four free-standing dwellings where one is permitted. 2) A Variance from Section 10.521 to allow a lot area per dwelling unit of 21,198 square feet per dwelling where 43,560 square feet is required. Said property is located on Assessor Map 222 Lot 19 and lies within the Single Residence A (SRA) District. (LU-22-209)

## SPEAKING TO THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant. He said he and the project team tried to reach the property owner but couldn't. Seeing that there were only five voting Board members, he said he wasn't comfortable taking a chance without the applicant's approval and asked that the petition be continued to the December meeting.

## DECISION OF THE BOARD

*Mr. Mannle moved to **continue** the petition to the December 20 meeting, seconded by Mr. Mattson. The motion **passed** unanimously, 5-0.*

Mr. Rossi resumed his voting seat.

- D.** The request **Donald and Rasa Stone Revocable Trust (Owner)**, for property located at **55 Gates Street** whereas relief is needed for the addition of 2 heat pumps which requires the following: 1) A Variance from Section 10.515.14 to allow a 3.5 foot setback where 10 feet is required. Map 103 as Lot 90 and lies within the General Residence B (GRB) and Historic Districts. (LU-22-43)

### **SPEAKING TO THE PETITION**

Project architect Anne Whitney was present on behalf of the applicant. She reviewed the petition and explained where the two heat pumps would be placed, noting that the property was on a corner lot and asymmetrical. She remarked that the abutter had requested a survey to prove that the fence was on the property line. She reviewed the criteria and said they would be met.

Mr. Rossi asked if the heat pumps would be on the elevation with the basement entry. Ms. Whitney said they would be on the rear elevation and that the fence would be extended to shield them, noting that there would be enough room to fit the two heat pumps in and service them.

Acting-Chair Eldridge opened the public hearing.

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

No one spoke. Acting-Chair Eldridge closed the public hearing.

### **DECISION OF THE BOARD**

*Mr. Rossi moved to **grant** the variance for the petition as presented, seconded by Mr. Mannle.*

Mr. Rossi said the spirit of the ordinance was not intended to prevent the modernization of older homes for the comfort of the occupants. He said it wasn't an addition to the house, it was just modernizing it in an energy-efficient way. He said granting the variance would do substantial justice because denying it would not create a public benefit that would outweigh the detriment to the homeowners if the application were to be denied, and a more efficient and modern cooling system for the home was preferable to the public interest. He said granting the variance would not diminish the values of surrounding properties because the units would be placed behind a short fence that would shield them from view and would also diminish the noise transmission from them to surrounding properties. He said they would basically be invisible to anyone who had an interest in purchasing any of the surrounding properties. He said literal enforcement of the provisions of the ordinance would result in unnecessary hardship and that the property's hardship was that it's an irregular polygon shape and provides no room for the heat pumps in a compliant fashion.

Mr. Mannle concurred, noting that the Board got that type of request all the time, especially from the south end where 80 percent of the homes were nonconforming, so it was a very small ask.

*The motion **passed** unanimously, 6-0.*

Mr. Rossi and Chairman Lee recused themselves from the following petition, which left only four voting members.

- E. The request of **Sara Sommer Kaufman Revocable Trust (Owner)**, for property located at **546 Sagamore Avenue** whereas relief is needed to allow a 6 foot fence in the front yard which requires the following: 1) A Variance from Section 10.515.13 to allow a 6 foot fence with a 1 foot front yard setback where 30 feet is required. Said property is located on Assessor Map 222 Lot 10 and lies within the Single Residence B (SRB) District. (LU-22-206)

### **SPEAKING TO THE PETITION**

Attorney Derek Durbin was present on behalf of the applicant and said he would proceed with the petition. He said the request was for an after-the-fact variance approval for a 6-ft high fence within the front yard setback. He said it was unknown at the time the fence was installed that it needed to be four feet in height. He reviewed the criteria and said they would be met.

The Board had no questions. Acting-Chair Eldridge opened the public hearing.

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

No one spoke. Acting-Chair Eldridge closed the public hearing.

### **DECISION OF THE BOARD**

*Mr. Mannle moved to **grant** the variance for the application as presented, seconded by Mr. Mattson.*

Mr. Mannle said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said it would do substantial justice, seeing that the fence was already in place and was put there inadvertently without a variance approval and now the applicant was seeking relief for it. He said granting the variance would not diminish the values of surrounding properties because it was a single-family house on a single-family side of the road with an apartment complex on the other side. He said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because the property has special conditions that distinguish it from other properties in the area, and owing to those special conditions, a fair and substantial relationship does not exist between the general public purposes of the ordinance provision and the specific application of that provision to the property. He said the proposed use is a reasonable one, and owing to the special conditions, the property cannot be reasonably used in strict conformance with the ordinance and the variance is therefore necessary to enable reasonable use. He said he drove by the property and noted that Sagamore Avenue was more of a highway, like Lafayette Road/Route One. He said the fence was solid wood on the bottom with about 18 inches on the top, but it gave the owner the use of his front yard. He said those were special conditions.

Mr. Mattson concurred and had nothing to add. Mr. MacDonald asked if the fence was set back far enough from the street to be out of the danger zone from snowplows. Mr. Mannle said it was set back from a stone wall. Acting-Chair Eldridge said it didn't obstruct any views.

*The motion **passed** unanimously, 4-0.*

Mr. Rossi and Chairman Lee resumed their voting seats.

- F. The request of **Aviation Avenue Group, LLC (Applicant)** and **Pease Development Authority (Owner)**, for property located at **100 New Hampshire Avenue (80 Rochester Avenue)** whereas relief is needed for the construction of an advanced manufacturing facility which requires the following: 1) A Variance from Part 304.03(c) to allow a 51-foot front yard where 70 feet is required. Said property is located on Assessor Map 308 Lot 1 and lies within the Pease Industrial (PI) District.

## **SPEAKING TO THE PETITION**

Attorney John Bosen was present on behalf of the applicant, along with the project team that included site engineer Patrick Crimmins. Attorney Bosen said the applicant wanted to build a manufacturing facility in the PDA industrial zone. He said the property was currently vacant and would be redeveloped into an advanced manufacturing facility utilizing robotized assembly. He said the project went before the PDA in October 2020 and received conceptual approval. He noted that the PDA said the use was appropriate for the site and the development could be constructed in conformance with the PDA Land Use Control with the exception of the front yard setback. He said the need for the variance was driven by the dimensional requirements of the building and the fact that the municipal sewer water main and the stormwater management servicing the surrounding properties and roadway were located in the rear of the site. He said they also needed to avoid the wetlands buffer. He said the site was consistent with others in the facility. He reviewed the PDA criteria for special exception and said they would be met.

Mr. MacDonald asked what would be manufactured. Attorney Bosen said he could not disclose the name of the tenant until they had the approved variance, but he noted that it would be advanced manufacturing with robotized use and highly-skilled labor and would result in less traffic. Mr. Mannle asked if there were any below-surface issues. Mr. Crimmins said there were not because the PDA cleaned up the site. He said the intent with the site is that it would be a balanced one, with no export or import of soils, and a slab foundation would be put in. Mr. Mannle noted that there were several vent pipes in the ground. In response to Mr. Rossi's question about the foundation location, Mr. Crimmins said the building was previously set in the rear and the parking was in the front, but that the building would now occupy the center.

Acting-Chair Eldridge opened the public hearing.

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



No one spoke. Acting-Chair Eldridge closed the public hearing.

## **DECISION OF THE BOARD**

*Mr. Mattson moved to **recommend approval** to the PDA, seconded by Mr. Mannle.*

Mr. Mattson referred to PDA Criteria Item 1 and said the project would pose no adverse effect or diminution of values of surrounding properties. Referring to Item 2, he said granting the variance would be a benefit to the public interest because it would provide more jobs. He referred to Item 3 and said denial of the variance would result in unnecessary hardship to the person seeking it. Referring to Item 4, he said granting the variance would do substantial justice. Referring to Item 5, he said the proposed use was not contrary to the spirit of the zoning rule. Mr. Mannle concurred, adding that a 19-ft request for a setback would be a huge ask in town, but it was Pease.

Mr. Rossi referred to Item 3, unnecessary hardship, and said there was a hardship for the property due to the wetlands and the municipal infrastructure, which prohibited the installation of a building farther away from New Hampshire Avenue. He said that was an important fact. Referring to Item 5 regarding the proposed use not being contrary to the spirit of the zoning rule, he said the zoning area is specific to an industrial zone and this is an industrial application and therefore not contrary to the spirit of the zoning rule. Mr. Mattson added that, across New Hampshire Avenue, the property frontage only had a 44-ft setback, so it would be further back than that.

*The motion **passed** unanimously, 6-0.*

## **IV. OTHER BUSINESS**

Chairman Lee thanked Ms. Eldridge for doing a remarkable job as Acting-Chair. He thanked the Board for electing him Chair and said he appreciated the trust and confidence they showed in him and would do his best to continue to deserve it.

## **V. ADJOURNMENT**

The meeting adjourned at 8:21 p.m.

Respectfully submitted,

Joann Breault  
BOA Recording Secretary