

**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 16, 2021**

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

**MEMBERS EXCUSED:** Jim Lee

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

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**I. APPROVAL OF MINUTES**

A) Approval of the minutes of the October 19, 2021 meeting.

The minutes were **approved** by unanimous vote.

**II. OLD BUSINESS**

**A.** Request of **Ashley Dickenson** and **Elyse Hambacher, (Owners)**, for the property located at **125 Elwyn Avenue** whereas relief was needed from the Zoning Ordinance to demolish existing garage and rear addition on main structure and construct a new garage with dwelling unit above and reconstruct rear addition on main structure including two shed dormers which requires the following: 1) Variances from Section 10.521 to allow a) lot area per dwelling of 2,559 square feet where 7,500 is required; b) a 1' secondary front yard where 15' is required; c) a 5' left side yard where 10' is required; d) a 2' right side yard where 10' is required; and e) 39% building coverage where 25% is the maximum allowed. 2) A Variance from Section 10.513 to allow more than one free-standing dwellings on a lot. 3) 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 112 Lot 47 and lies within the General Residence A (GRA) District. (LU-21-172)

Alternate Ms. Eldridge took a voting seat.

**SPEAKING TO THE PETITION**

The applicants Ashley Dickenson and Elyse Hambacher were present to speak to the petition, along with their project designer Hubert Krah. Ms. Hambacher reviewed the petition and criteria and noted that the neighbors were in support of the petition.

Mr. MacDonald asked if the applicant received any approvals or rejections from other city boards or committees, and Ms. Hambacher said she had not. Ms. Margeson said the ordinance was clear that it allowed only one dwelling unit per lot in the GRA District, and she asked the applicant how having a unit above the garage didn't violate that. Ms. Hambacher said the second dwelling already existed in the current structure and they just wanted to relocate it above the garage. She said the lot was already a two-family one and had unique issues that made for a hardship. In response to further questions from the Board, the applicant said the second floor would be separate from the first floor and that the occupant would not have access to it, and the current parking would remain next to the garage. Mr. Krah said there were 700 square feet of space for the unit above the garage out of an overall 795 square feet and that the current garage's height was about 16-18 feet, resulting in up to a 10-ft increase in overall height.

Chairman Rheume said the applicant proposed two substantial dormers and asked what the impact would be if the dormer on the side of the house that needed relief wasn't allowed. The applicant said it wouldn't be a problem. Chairman Rheume asked if the garage could be moved closer to the center line instead of staying up against the property line. Ms. Hambacher said they chose to keep the garage in its current location so that they wouldn't lose a parking spot and the neighbor's gardening wouldn't be impacted by a loss of sun and light. Mr. Dickenson said the neighbor on the other side had a similar garage, which would result in two garages being next to each other. Chairman Rheume said he was okay with bringing the garage up against the property line in terms of it being backed onto the street and being congruent with the neighbor. He noted that the Board received two letters of support from abutters and asked if the applicant spoke with all the neighbors. Ms. Hambacher said she spoke with all the abutters and several neighbors on Elwyn Avenue and a few on McNabb Court.

Chairman Rheume opened the public hearing.

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

No one spoke, and Chairman Rheume closed the public hearing.

### **DISCUSSION OF THE BOARD**

Ms. Eldridge said it was a big variance to ask for a second dwelling on the property, but the property was unusual and was located between two streets, making the second dwelling unit seem like it was on a different street. She thought it was an important consideration that someone entered from another street. Ms. Margeson said she would not support the application for that reason because the zoning ordinance was clear that there would not be more than one dwelling unit per lot. She said it backed onto McNabb Court but the frontage was clearly on Elwyn Avenue. Mr. Mulligan said two-family dwellings were permitted by right in the GRA District and that there were already two dwellings on the property. He said the proposal wouldn't change

the residential density but would just move one of the dwelling units into a separate detached property. He said he agreed with Ms. Eldridge that there were unusual aspects to the property, but what the applicant proposed would correct some of the improvements previously made on the property, which he didn't think really improved it in terms of the addition being removed and corrected. He said those unique aspects distinguished it from others in the immediate vicinity and, given that two dwelling units could exist by right on the lot, he didn't have such a problem with the spirit and intent of the ordinance. He said he was in favor of the proposal. Mr. MacDonald agreed and said he didn't think what was proposed was a significant enough departure from the ordinance to worry about and that the neighborhood would be fine.

Chairman Rheume said the ordinance stated that only one structure that had a dwelling unit was allowed in that zone and that it came down to whether it met the criteria or not. He said he was okay with moving part of the two-family dwelling out to the garage area and was only concerned with some of the height of the garage and its positioning. He said that it seemed already set back from the street and was consistent with a few of the other nearby garages. He said McNabb Court wasn't simply a garage back street for other streets but had been used that way. He said his concern was the left side yard setback in regards to the dormering on one side of the house. He said that was a lot of height on such a small lot and that he was uncomfortable with the relief asked for that dormer.

## **DECISION OF THE BOARD**

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

Mr. Mulligan said most of the relief requested was driven by a lot that was significantly smaller than the minimum lot size in that zone. He said it was a pre-existing nonconformance as to setbacks all over the place, but the lot was also very small. He referred to his earlier comments and said granting the variances would not be contrary to the public interest nor to the spirit of the ordinance and that the essential residential character of the neighborhood wouldn't be altered in any material way. He said there were already two dwelling units on the lot and that there would still be two dwelling units, so the residential density would not change. He said there would be some significant additional massing but that the Board had heard no opposition from the neighborhood and that he couldn't imagine that there would be opposition. He said the Board often granted vertical expansions of pre-existing nonconforming structures in terms of setbacks and didn't think it was that unusual, especially for a small lot. He said it would do substantial justice because the Board had to balance the loss to the applicant if they were to require strict compliance with the ordinance, which was impossible given the nonconformities, so the balance tipped in the applicant's favor. He said granting the variances would not diminish the values of surrounding properties because the existing garage at the rear of the property was substandard and what was proposed would be a welcome addition to the neighborhood. He said he understood Chairman Rheume's concern about the massing of the improvements on the left side yard setback, but to balance that, the left side yard setback was improved to some extent because the existing setback was 2'4", so values wouldn't be diminished. He said literal enforcement of the ordinance would result in unnecessary hardship due to the unique conditions of the property

that distinguished it from others in the neighborhood, which were the very small lot of 5,000 square feet where 7,500 square feet was required, so it was already a lot that would be subject to relief under the zoning ordinance for any improvements made. He said it was nonconforming as to setbacks already and unique because it had frontage on two separate public ways, so it was appropriate to site one of the dwelling units over the garage. He said there was no fair and substantial relationship between the purpose of the ordinance's provisions and their application to the property and that the proposal met all the requirements and should be approved.

Mr. Parrott concurred. He said it was a rare through-lot so it deserved special consideration. He said he also was concerned about the mass but not enough to say that it shouldn't be built. He said the overall height was an allowed 35 feet and the proposed structure was well below that, and more than one unit was allowed by zoning as a matter of right. Chairman Rheaume said he wouldn't support it because of the massing on the left-hand side of the structure.

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

**B. Request of C. P. Schoff & T. C. Revocable Trust, (Owner),** for the property located at **134 Fairview Avenue** whereas relief was needed from the Zoning Ordinance to demolish existing dwelling and construct a new single-family dwelling which requires the following: 1) Variances from Section 10.521 to allow a) a lot area of 14,226 square feet where 15,000 is required; and b) a lot area per dwelling unit of 14,226 square feet where 15,000 is required. Said property is shown on Assessor Map 220 Lot 63 and lies within the Single Residence B (SRB) District. (LU-21-185)

Ms. Eldridge returned to alternate status, and Alternate Mr. Hagaman took a voting seat.

### **SPEAKING TO THE PETITION**

The applicant Tara Schoff was present and said they wanted to demolish the existing home and foundation and remove the in-ground pool to build a classic New Englander single-family residence and attached garage. She reviewed the criteria and said the neighbors were in favor.

Chairman Rheaume noted that a draft ADU plan for the top of the garage was included in the packet and asked if that would be built. Ms. Schoff said it wouldn't but that it made sense to design a future ADU if they needed to increase the garage's size.

Chairman Rheaume opened the public hearing.

### **SPEAKING IN FAVOR OF THE PETITION**

Jack McGee of 303 O'Leary Place said he was a direct abutter and was in favor of the project. He said it wouldn't adversely affect him and that no other neighbors were opposed.

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

No one else spoke, and Chairman Rheaume closed the public hearing.

**DECISION OF THE BOARD**

*Mr. Parrott moved to **grant** the variance for the petition as presented, and Mr. Hagaman seconded.*

Mr. Parrott said it was a modest and straightforward request. He said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance, pose no threat to the public's health, welfare, or safety, or otherwise injure any public rights. He said substantial justice would be done because the benefit to the applicant would be very significant, and he couldn't see any advantage to the public in denying the request. He said granting the variance would not diminish the values of surrounding properties because replacing a nice house with an up-to-date modern design would be nothing but a plus for the whole neighborhood, and it was sited on the lot such so as not to impinge on anyone's rights. He said the lot was unusually shaped and positioned in the logical location and he could see no relationship between the public purposes of the ordinance and their application in this case that would lead to a denial. He said the proposal was more than reasonable and easily passed all the tests and should be approved.

Mr. Hagaman concurred and said it was always nice to have a new home on a lot that didn't really require much. He said the lot size itself was near the size it needed to be anyway.

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

**C. Request of Malloy Revocable Trust, (Owner), for the property located at 52 Prospect Street** whereas relief was needed from the Zoning Ordinance to demolish existing rear addition and construct a 2-story rear addition which requires the following: 1) Variances from Section 10.521 to allow a) a 1.5' left side yard where 10' is required; and b) 30.5% building coverage where 25% is the maximum allowed. 2) A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is show on Assessor Map 141 Lot 13 and lies within the General Residence A (GRA) and Historic Districts. (LU-21-188)

Mr. Hagaman returned to alternate status and Ms. Eldridge took a voting seat.

**SPEAKING TO THE PETITION**

The applicants Tim Malloy and Sue Malloy and their designer Hubert Krah were present to speak to the petition. Mr. Malloy said they wanted to replace the porch/sunroom in the back of the house with a two-story addition. He said the neighbors they spoke with were in favor and that

the Historic District Commission (HDC) approved the project contingent on the variances being granted. He referred to the criteria addressed in the packet.

Ms. Margeson noted that part of the deck and steps were on the neighbor's property and that the addition was a substantial increase. Mr. Malloy said the steps did go over a bit. Mr. Krah said the existing sunroom was 8'x10' and the addition was 10' deep by 22' wide, which was where the substantial increase came from, and that they had to create some additional living space there. He said they were only encroaching on the neighbor's property by a total of 30 square feet.

Chairman Rheume said the applicant was asking for 1-1/2 feet of relief on the left side yard, and he asked if it had been surveyed. Mr. Krah said the property had not been surveyed and that he had used MapGeo. Chairman Rheume said at some point there would need to be a survey of that line. Mr. Stith said it was up to the building inspector. It was further discussed. Ms. Margeson asked if the City's building department would require a survey before pulling a permit. Mr. Stith explained that when a structure was built with a foundation and went through a land use approval process, an as-built survey was done. He said he would confirm it with the Inspection Department.

Chairman Rheume opened the public hearing.

#### **SPEAKING IN FAVOR OF THE PETITION**

Jim Strack of 49 Prospect Street said he was a direct abutter and supported the petition. He said part of the existing steps appeared to be on the neighbor's property line and that the project would eliminate that. He said the project would benefit the neighborhood.

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

No one else spoke, and Chairman Rheume closed the public hearing.

#### **DECISION OF THE BOARD**

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

Vice-Chair McDonell said the request was for the left yard setback and some increased building coverage, which were both reasonable. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance, would not alter the essential character of the neighborhood, and would not threaten the public's health, safety, or welfare. He said the neighbor noted that the work was tucked away in the back and not even visible from the street. He said substantial justice would be done because it was an obvious benefit to the applicant and there was no harm that would be done to the public or neighbors. He said granting the variances would not diminish the values of surrounding properties because the project would

improve the house's value and would not likely diminish the values of houses in the area. He said literal enforcement of the ordinance would result in an unnecessary hardship due to the special conditions of the shape and size of the lot and the location of the existing structure that drove the nature of the relief requested. He said the side yard setback requested would be improved upon and would be a reduced nonconformity, and the building coverage would increase but only minimally, especially given the lot's size, so there was no fair and substantial relationship between the purpose of the ordinance's provisions and their application to the property. He said the proposed use was reasonable and the variances should be approved.

Ms. Eldridge concurred and had nothing to add.

Ms. Margeson said she walked the eclectic neighborhood and was at first concerned with the movement of light and air and egress and ingress for emergency vehicles but would vote for it because clearing the path between the two houses allayed a lot of her concerns about public health and safety. Chairman Rheame said he would also support the petition because the request was modest in terms of a new structure. He said the two stories would be in the back of the house and wouldn't be really be visible to the neighborhood. In terms of light and air impact on the neighboring property he said that, due to the unique nature of the neighborhood, the main structure was set all the way over to one side, and there was an ell shape to the property that made the back area unlikely to have something built on it. Due to those unique aspects of the property, he said he was in favor of the petition.

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

**D. Request of Dagny Taggart, LLC, (Owner), for the property located at 93 Pleasant Street** whereas relief was needed from the Zoning Ordinance for the redevelopment of an existing 4-story structure and construction of new structure totaling 52 living units which requires the following: 1) Variances from Section 10.5A41.10C to allow a) a finished floor surface of the ground floor to be 60" where 36" is the maximum allowed; b) a ground story height of 10'8" where 12' is the minimum required; and c) to allow entrance spacing greater than 50' where 50' is the maximum. 2) A Variance from Section 10.5A41.10C & 10.642 (1) to allow residential uses on the ground floor where it is prohibited in the Downtown Overlay District. 3) A Variance from Section 10.5A44.35 to allow an above-ground portion of a parking structure without a liner building. Said property is show on Assessor Map 107 Lot 74 and lies within the Character District 4 (CD4), Historic and Downtown Overlay Districts. (LU-21-183)

Mr. Mulligan was recused, and both Alternates took voting seats.

Mr. Stith stated that Variance 3 wasn't needed because the entrance location had been revised and there were one or two parking spaces in question. He said the grading was such that they were more than six feet below the finished grade, so it was considered to be in the basement and didn't violate that section of the code.

**SPEAKING TO THE PETITION**

Attorney F. X. Bruton was present on behalf of the applicant and asked for an additional ten minutes for his presentation.

*It was moved, seconded, and passed to allow the additional time by a vote of 6-1, with Mr. Hagaman voting in opposition.*

Attorney Bruton introduced the project engineer John Chagnon, project architect Tracy Kozak, traffic engineer Rebecca Brown, and landscape architect Terence Parker. Attorney Bruton reviewed the petition and said they were asking relief that related to micro-units, which was a new alternate form of housing that Portsmouth created. He said the project was in the CD4 zone that consisted of medium-to-high densities with resident, retail, and commercial uses and was also in the Downtown Overlay District. He said the Treadwell Mansion would have office space in the basement and first floor, and the rest of it and the addition would have all micro-units. He said the addition would be consistent with the zone and neighborhood context. He said the HDC required them to retain the historic wall as much as possible, which they did by moving the parking entrance away from the Temple's property. He said they would go for site plan review and ask for a Conditional Use Permit (CUP) due to parking issues, which he thought the Planning Board would look at in the context of micro-units. He said the tenants would have different expectations for parking because the apartments were not typical one- or two-bedroom apartments. He said they would not be short-term rentals. He explained that the lot was unique because of the historic Treadwell Mansion on it and the lot was a significant size on a corner lot surrounded by a mix of commercial and residential. He pointed out that the Overlay District required that the first floor have commercial uses, but the applicant wanted to keep it consistent with the neighborhood mix of residential and commercial. He emphasized that there was so sidewalk access into any commercial use in the addition, so commercial use seemed inappropriate, and they also wanted to retain the wall. He said the second variance request was for the two feet needed above the finished surface of the ground floor that was 36 inches above grade and because the sidewalk sloped down. He said the third relief needed was because the ground story height had to be a minimum of twelve feet and they needed an additional eight inches that related to the use of the first floor for residential. He said the HDC requested that the addition be shorter than the Treadwell Mansion, so they needed a shorter first floor, and relief was also needed because the ordinance required an entrance facing every 50 feet. He reviewed the criteria and said the location was the right spot to put micro-units because it was residential and he didn't think the requirements to put commercial space on the first floor needed to be imposed to maintain the intent of the ordinance.

Mr. Hagaman verified that the HDC approved the proposal. Attorney Bruton said the approval also included the design change reflected at the entrance. Mr. Hagaman asked if a lift structure was considered for parking. Attorney Bruton said it wasn't because the parking was all underground. Mr. Hagaman asked if the applicant considered still maintaining a commercial use on the first floor but having a few points of entry and internal entrances. Attorney Bruton said it would limit the applicant to be stuck with the commercial. He said it was a reasonable use and that it wasn't a legal requirement to come up with a program in that regard. Mr. Hagaman said



there were a lot of mixed-use developments for shopping and eating as well. Attorney Bruton said the Treadwell Mansion and the wall were very historic and a commercial component would affect them, so they wanted to keep it more residential and that it would be less of an impact to the abutters not to have commercial uses. He said construction could occur without impacting the wall and they would only remove ten percent of what they originally were going to remove.

Ms. Margeson said a lot of the variance relief was driven by the HDC considerations, but she thought the most problematic aspect was not having commercial use on the ground floor. She said the zoning ordinance was very clear that the Downtown Overlay District needed to have commercial uses and they saw fit to include in the CD4 zone that residential wasn't allowed on the first floor. She said that although no parking was allowed on Court Street, the purpose was to have pedestrian-oriented businesses, and she didn't know why that couldn't be achieved in the addition. Attorney Bruton said the Treadwell Mansion would be a mixed-use building and the portion that they wanted residential was on Court Street. He said that saying the ordinance didn't allow it wasn't a defensible way of denying a variance and that the restriction didn't need to be imposed in this case. He said Court Street was very residential and the test was whether residential with no commercial made sense and was reasonable. Ms. Margeson said the issue was whether the applicant could demonstrate hardship. Attorney Bruton said there was a relationship between the general intent of the ordinance and the need to impose that restriction, it was a reasonable use, and there were special characteristics. He said the elevation was five feet above pedestrian walking and that it wasn't reasonable for pedestrians to have to go up that high to do their shopping. It was further discussed. Ms. Margeson said there were no other medium-to-high density buildings in the area except for the new public housing on the other side of Pleasant Street. Attorney Bruton said the Treadwell Mansion was a building of consequence but that they met the 200-ft massing requirement and just wanted to put non-retail at the bottom of the addition and that they had the special conditions of the sidewalk and the wall as well.

Mr. Parrott asked how deep the parking lot would be dug into to put the basement in. Attorney Bruton said it would be seventeen feet from grade level. Mr. Parrott asked how much investigation had been done as to what was under the gravel. Ms. Kozak said the HDC stipulated that an archaeological investigation would be done and that there had been GeoTech research in the meantime. Mr. Chagnon said there was a ledge that would be dug out, which would allow a more direct and vertical cut for the lower-level parking. He said there probably wouldn't be any blasting due to all the buildings in the general area and that the excavation would be done safely.

Chairman Rheame asked if the second and third floors were identical to the first floor. Ms. Kozak agreed and said what was different was that the building's middle section was only two stories with an attic with dormers and there were no third-level apartments there, just lofts. She said the building on the right was two stories with a short third, so that same pattern would carry up on all floors on that side. She said the back of the property was a full third story and the front was lowered in the middle. Mr. Hagaman said the micro-units weren't being pitched as workforce or affordable housing, so there was no percentage being set aside. Attorney Bruton said the micro-units would be at market rate but at the market rate of a micro-unit vs. a normal one-bedroom or two-bedroom apartment.

Chairman Rheume opened the public hearing.

### **SPEAKING IN FAVOR OF THE PETITION**

No one was present to speak.

### **SPEAKING IN OPPOSITION TO THE PETITION**

Attorney Jack McGee was present on behalf of Peter and Janet Dinan of 278 Court Street, who were opposed to the project. He said the Dinans believed that their property value would decrease because the building's height facing them would overpower their house. He said the micro-units should not be built at the expense of the zoning ordinance and that the project didn't meet the five criteria. He said the City carefully adopted an ordinance that didn't allow residences on the first floor in that particular zone. He said there was no hardship because one had to first determine whether there was some reasonable nexus between the purpose of the ordinance and the relief requested, and the applicant didn't have any nexus – they simply said they wanted micro-units. He said the tenants themselves could rent out their units. He said Attorney Bruton said the tenants wouldn't want parking because they wouldn't have cars, but Attorney McGee said he didn't know anyone who didn't have a car and that people needed cars to go food shopping and so on. He said the idea of a special type of customer for micro apartments wasn't legitimate.

Attorney Derek Durbin said he represented Michelle and Mitchell Sevigny of 300 Court Street, Unit 1, Richard and Mary Dumler at 300 Court Street, Unit 2, and the Finnian Company at 314 Court Street, who were all opposed. He said the relief requested didn't relate to the applicant's desire to create a second building on the property to maximize residential density because it was more than three times the size of the mansion. He said it just related to the applicant's desire to place 15 residential units on the ground floor, which wasn't permitted in the DOD Overlay District and had rarely been approved by the Board. He cited the purpose of the DOD ordinance in Section 10.641.20 and said it was to promote the economic vitality of the downtown by ensuring the continuity of pedestrian-oriented business uses along the streets. He said they were dealing with 15 residential units in a brand new building on Court Street, and the hardship that the applicant claimed was the property's location and physical characteristics, i.e. the slope and size of the lots. He said he didn't believe those things had any real bearing on whether there was a fair and substantial relationship between the general purposes of the ordinance provisions and their application to the project. He said the only hardship was a self-created one because the applicant could redesign the new building to accommodate less residential units that would integrate well with the neighborhood, or they could just do a commercial use like they previously stated in another meeting. He said there were all types of commercial uses in the CD4 District and that the applicant bought the property with full knowledge of the zoning. He said the applicant could propose a combination of uses in accordance with the ordinance. He said the only hardship was that the applicant wasn't making enough money by doing other things. He said there was a need for micro housing in the city but it was a card being played before the City Staff and the land use boards and was the wrong location for micro-units.

Elizabeth Bratter of 159 McDonough Street said the proposed addition of 15 residential units and one parking space on the ground floor was not allowed in the Overlay District. She said the DOD had two parts, the liner buildings and the parking reduction, and they directly impacted one another. She said allowing the residential would create another problem because the building had 37 units they didn't show the Board on the second and third level, and the provided parking was 18 spaces. She asked that the variance to Ordinance 10.642 not be granted until the development made an effort to provide the minimum requirements for the regulating ordinance of the Downtown Overlay District for the allowance of 37 units on the second and third levels. She said allowing the variance for more residential units on the ground floor would cause a three-fold increase in the amount of parking the applicant was not providing. She said offices in that space would not change the character of the neighborhood and would not require additional parking.

Stan Boduch of 34 Hunking Street said he drove down Hancock Street and Washington Street and counted 25 and 10 cars respectively, and all the spots were taken. He said there would be 18 parking spaces for 52 units, and if just 20 percent didn't have cars, that would leave 42 people with cars and 25 people with no place to park.

Janet and Peter Dinan of 278 Court Street said the project would seriously diminish the value of their historic property. They said the size and height would overwhelm their house as well as the buildings around it and the buildings on the State Street side. She asked that the City not make that section of Portsmouth undergo the same fate as the homes between Hanover and Deer Streets that were overshadowed by large structures. She said the buildings on Court Street were at street level and the proposed building was closer to four stories high from street level. She said they would be looking at the first floor of the building from their second floor. She said the underground parking of 18 spaces was inadequate. Mr. Dinan then read a quote from Mr. McNabb in which Mr. McNabb claimed that he was an office developer and owned 50 percent of the office market downtown, and that he had a commercial tenant but wanted to build micro-units instead for his workers who couldn't afford to live in Portsmouth. Mr. Dinan said Mr. McNabb was claiming a hardship even though he could do something else.

Bill Downey of 67 Bow Street phoned into the meeting and said he had lived downtown for three decades. He said a Public Relations firm claimed that the local residents would ride bikes or go to nearby parking facilities, but he thought that wasn't true. He noted that public parking was costly at \$400-500 a month. He said Mr. McNabb did quality work but that the additional residents would distress the neighborhood. He said the hardship was a reduction of profitability for the applicant and that the City supported developers at the expense of the citizens. He said the hardship was man-made and there was ample opportunity to make a good return on the investment without building micro-units at the expense of the community and the neighborhood.

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

Attorney Jack McGee said it was a self-created hardship. He referenced Mr. White's letter that said another proposed developer for the property might not design it in a manner consistent with the look of a classic downtown building. Attorney McGee said the HDC would make sure that didn't happen. He noted that Mr. White said anyone who would buy the Dinan house would see

that the lot across the street was ripe for development. Attorney McGee said the buyer should be able to take into consideration that any project would be built in conformance with the zoning ordinance, which the applicant's building was not. He said there were commercial uses that could be done and a tenant who was willing to do that, so there was no hardship.

Attorney Bruton said the HDC did approve the design the previous week. Regarding massing, he said the project met the massing requirement and were just asking that the first floor of the building be allowed micro-unit residential use.

No one else spoke, and Chairman Rheame closed the public hearing.

*At this point, Mr. Hagaman moved to **postpone** Petition C for 45 Miller Avenue and Petition D for 437 Lafayette Road to the December 21 meeting due to the late hour and the complexity of the current petition. Ms. Margeson seconded. The motion **passed** unanimously, 7-0.*

## **DISCUSSION OF THE BOARD**

Chairman Rheame noted that the CUP wasn't an issue for the Board, nor was Variance 3 for the underground parking.

Ms. Margeson said the fact that it was in CD4, which allowed for medium-to-high density but where the buildings were really very low density, gave her concerns about the high density of the residential units in that space. She said it could cause health, safety, and welfare issues, especially off Court Street. She said her other concern was the commercial use on the ground floor, and she wasn't sure that the applicant's attorney really addressed the hardship of that. She said she probably would not be in favor for those reasons. Mr. Hagaman said he could support Variance 1 but not Variance 2 because he didn't think that allowing residential uses on the ground floor when prohibited in the Overlay District met all the necessary criteria. He said he didn't have the same concerns about the height and density of the building because that fell within the nature of downtown, but he thought there were alternate reasonable uses where the commercial use could be used on the property in conjunction with the ordinance and the Overlay District. He said he was in support of Variance 1 because it was in line with the HDC's concerns about having the new building be the same height as, or slightly lower than, the existing historic structure, but he couldn't get behind the lack of commercial use on the first floor.

Vice-Chair McDonell said he would be supportive of all the variance requests. He said the ground story height was closely related to the request for residential use, and the finished floor above the sidewalk tied into the reason the residential use on the first floor was requested, which was due to the slope on the lot and the retaining wall. He said the applicant made a convincing enough argument that was the reason why their commercial space in the portion of the first floor of the structure was reasonable. He said the entrance spacing requirement reasonably followed from that and that it would be incongruous with the space to require an entrance in the middle of that wall area. He also thought that an entrance every fifty feet was a reasonable thing because the pedestrian would be walking down the street, not along a wall. He said the wall according to

the ordinance was a wall of a building with no entrance, and here it was a literal wall, and the lack of an entryway into the building was fine. He said some people brought up the point that the applicant was making a self-created hardship, but he thought the better point was what Attorney Bruton articulated. He said no one disagreed that the first floor could be used for uses other than residential uses, but it was a reasonable use and there were special conditions of the property. He said there were big concerns about parking and that some tenants would be looking for parking spaces. He didn't believe that because they were micro-units meant that tenants wouldn't have cars, but he didn't think it was enough of a hurdle to prevent the Board from getting past it.

Mr. Parrott said he could not support Variance 2 asking for residential uses on the ground floor because the ordinance was carefully written to address the fact that commercial uses were desirable on the ground floor, and the applicant didn't have sufficient reasons for countering that. He said he had 18 years of experience as a residential landlord and owned buildings very close to the edge of downtown, several of which were micro-units, and the people had cars just like the people who lived in the larger units. He said based on that, the justification that those units would be aimed at people who wouldn't have cars was false. He said a landlord couldn't control who would want to rent the place, so even if it was targeted toward someone, it probably wouldn't happen. For those reasons, he thought the reasoning was faulty and couldn't support that variance. He also said the zoning was carefully considered by the Planning Department and approved by the City Council, and the use was very significant, long-term and permanent.

Chairman Rheame said the Board heard great information from the public and heard that it was going to be a very tall building, but the height was allowed by the zoning ordinance and the massing was the HDC's concern and was approved. He said the Board was looking at the sloping nature of the property. He said when the character districts were created, the intent was to provide more refinement about what the properties were expected to look like, and that was a great effort but also created subtle nuances. He said the zoning ordinance, by being more specific, also created new issues. He said the substantial slope was driving the need to violate the found floor height. He said the first floor height of 12 feet was synonymous with the idea that it would be a commercial space, and the need to request 10.6 inches was tied to the desire to have first-floor residential. He said the spacing between the doors was intended to be for the pedestrian experience, but there was a hardship due to the wall that affected the applicant's ability to do any development that would comply with those aspects of it. He said it was really the variance about commercial vs. residential uses on the first floor. He cited a similar example, the historic Connie Bean building redevelopment that was all residential because the applicant had said it didn't make sense to put commercial on the first floor in a predominantly residential area. He said the Board considered that and had thought it made sense. He said there was a whole series of character districts involved, like CD4, civic spaces, and CD4-L1, and the context was that the parcel was a unique zone parcel. He said the applicant said they were right on the edge of the Downtown Overlay District, and the Board recognized that properties on the edge of districts have an opportunity for more of a blending so that there was no sharp cutoff. He said he thought it was a hardship because of the nature of things surrounding the lot. He said it wouldn't bring the usual kind of foot traffic and office traffic because of the wall and slope. He cited another

example on Bridge Street where the property was built 3-4 years ago in full compliance with residential on the upper floors and commercial on the first, but there had not been a commercial tenant to this day, and it was right on the edge of downtown. He said there were good arguments from the applicant that, because of where they were located and due to the wall, the commercial use really didn't apply very well. He said the applicant could have built luxury condos but chose to build micro-units, and there were plusses and minuses to that. He said the residential use made more sense to him than commercial. He said the parking issue was a major hurdle but was one that the Planning Board would tackle. Ms. Eldridge said the Connie Bean example was almost convincing but it didn't change the scale of the neighborhood by being residential. She said that little block of Court Street was like nothing else downtown and the building starting that high up would change the feeling of the neighborhood, whether it was allowed or not. She said there would be 52 new neighbors that would affect the public interest of the people who live on Court Street, which was why she couldn't support the residential use. Chairman Rheame said there were no variances requested for that, and it was further discussed.

Ms. Margeson suggested voting on the variances separately. She said the first variance was driven by design considerations by the HDC and the property, and she didn't think the applicant had a compelling case about the ground floor. She said the density needed to be more toward the medium range for the scale of the CD4 District.

*Mr. Hagaman moved to **deny** Variance 2, Section 10.5A41.10C and 10.642 to allow residential uses on the ground floor where it's prohibited in the Downtown Overlay District. Ms. Margeson seconded.*

Mr. Hagaman said he had concerns with the request and how it pertained to the criteria the Board measured it against. He said it failed on the first, second, and fifth criteria. He said it would alter the essential characteristics of the neighborhood, even though it was on the edge of the Overlay District, because it would still be connected to a few blocks of mixed use, including the first floor commercial and residential above it. He said if the Board allowed it to be entirely residential, it would alter the character of the neighborhood and go against the spirit of the ordinance. He said it failed Criterion 5 because there was a substantial relationship between the purpose of the ordinance and how it's applied in this case, in part tying it to what the design of the Overlay District and Character Districts were intended to accomplish in those areas. He said he respected Chairman Rheame's remarks of being on the fringe of where you might get foot traffic but that he disagreed because there was a lot of food traffic there. He said a persuasive case was not made as to how the slope and historic wall would hinder the ability to develop a commercial space there. He said the proposed use was potentially a reasonable one and didn't think it would overcome what he thought was a fair and substantial relationship between the intent of the ordinance and applying it here.

Ms. Margeson concurred and had nothing to add.

*The motion **passed** by a vote of 4-3, with Vice-Chair McDonell, Mr. MacDonald, and Chairman Rheaume voting in opposition.*

*Vice-Chair McDonell moved to **grant** Variance 1, and Mr. Hagaman seconded. Vice-Chair McDonell recognized that Variance 3 was not in play.*

Vice-Chair McDonell stated that the Board was approving the finished floor above the sidewalk, the ground story height, and the entry spacing. He said all three requests were driven by the site, the slope, and the wall, with the exception of the ground story height, which was driven by the request to make residential uses on the first floor, but he thought that, given the HDC's request on the height of that floor of the building, that it was also a reasonable request. He said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said allowing those requests would not conflict with the purposes of the ordinance as had been articulated. He said the reasoning for those three requests was driven by the wall and the slope and that it would not alter the essential character of the neighborhood or threaten the public's health, safety, or welfare. He said substantial justice would be done because the benefit to the applicant was obvious in being able to keep the integrity of the site while still constructing a building there and was not outweighed by any harm to the public or others. He said granting the variance would not diminish the values of surrounding properties because it was clear that those values would not be diminished. He said the hardship was due to the special conditions of the property, the wall and the slope of the site, and those conditions distinguished the property such that there was no fair and substantial relationship between the purpose of the ordinance as it related to those provisions and their applications to the property. He said the proposed use, whether it was residential on the first and upper floors or exclusively commercial on the first floor, and then a mix on the upper floors or exclusively residential on the upper floors, would be a reasonable one. For those reasons, he said the variance should be granted.

Mr. Hagaman concurred and said he supported it because it more directly applied to the physical issues with the property and the needs related to it, not necessarily whether it was a commercial or residential use. He said the spacing and height requests could relate to either use.

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

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

### **III. PUBLIC HEARINGS – NEW BUSINESS**

- A) Request of Richard E. Tully Revocable Trust and Madeline F. Tully Revocable Trust, (Owners), for the property located at 194 Madison Street** whereas relief was needed from the Zoning Ordinance to convert a single family dwelling into a two-family dwelling which requires the following: 1) A Variance from Section 10.521 to allow a lot area per dwelling

unit of 1,219 square feet where 3,500 is required. Said property is shown on Assessor Map 146 Lot 17 and lies within the General Residence C (GRC) District. (LU-21-191)

The applicant wasn't present.

### **DECISION OF THE BOARD**

*Mr. Hagaman moved to **postpone** the petition to the December 21 meeting, and Mr. Parrott seconded.*

Mr. Hagaman said the applicant wasn't present so the petition should be postponed. Mr. Parrott concurred.

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

**B) Request of Cyrus B. and Robin B. Noble, (Owners), for the property located at 15 Mount Vernon Street** whereas relief was needed from the Zoning Ordinance for an addition over existing garage which requires the following: 1) Variances from Section 10.521 to allow a) a 2.5' front yard where 5' is required; b) an 8.5' right side yard where 10' is required; and c) a 20' rear yard where 25' 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 located on Assessor Map 111 Lot 33 and is located in the General Residence B (GRB) and Historic districts. (LU-19-126)

Mr. Mulligan resumed his voting seat and Ms. Eldridge returned to alternate status. Mr. Hagaman took a voting seat.

### **SPEAKING TO THE PETITION**

The applicant Cyrus Noble was present. He explained that the variances were previously approved for the owner of the house then, but when he applied for the building permit, he found that the zoning approval had expired. He said there would be no changes to the project at all.

The Board had no questions. Chairman Rheume opened the public hearing.

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

No one spoke, and Chairman Rheume closed the public hearing.

### **DECISION OF THE BOARD**

Chairman Rheume said it was an unusual situation and asked if the HDC's approval was still valid. Mr. Noble said he went before the HDC and the petition was approved.



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

Mr. Mulligan said the Board had seen the petition before and had unanimously approved it, and nothing material had changed in the neighborhood that would affect the project or change his mind. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said the essential character of the neighborhood as a residential one would not be changed in any way. He said it was a vertical expansion over an existing nonconformity and it wouldn't affect the public's health, safety or welfare in any significant way. He said substantial justice would be done because the benefit to the applicant if the Board granted the variances would far outweigh any loss to the public if the Board were to require strict compliance. He said a pre-existing nonconformity already existed on the property and the project simply expanded the nonconformity vertically but didn't materially change any of the nonconformity. He said granting the variances would not diminish the values of surrounding properties and would most likely increase them because it would be a significant investment and upgrade to the property. He said literal enforcement of the ordinance would result in an unnecessary hardship because the property had the present nonconformity and a false façade on the front of the garage. He said the relief was also granted very recently, which was another special condition, so those were all special conditions of the property that distinguished it from others in the neighborhood such that there was no fair and substantial relationship between the strict application of the setback requirements and their application to the property. He said it was a reasonable residential use in a residential neighborhood and should be granted.

Mr. Parrott concurred and had nothing to add. Mr. MacDonald said he would support the petition because the Board voted on it not that long ago and the approval expired and didn't get reviewed, but nothing else changed. Chairman Rheume agreed. He said it was a new owner and a unique set of circumstances and that sometimes things got lost in translation.

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

**C) Request of Monarch Family Trust of 2018, (Owner), for the property located at 45 Miller Avenue** whereas relief is needed from the Zoning Ordinance for an addition of a covered front porch and conversion of existing balcony into enclosed bathroom which requires the following: 1) Variances from Section 10.521 to allow a) an 8' left side yard where 10' is required; and b) 28% building coverage where 25% is the maximum allowed. 2) A Variance from Section 10.321 to allow a nonconforming building or structure to be expanded, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on assessor Map 129 Lot 21 and lies within the General Residence A (GRA) district. (LU-21-195)

## **DECISION OF THE BOARD**

*Mr. Hagaman moved to **postpone** the petition to the December 21 meeting, and Ms. Margeson seconded.*

**D)** 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. Said property is shown on Assessor Map 229 Lot 1 and lies within the Single Residence B (SRB) District. (LU-21-196)

#### **DECISION OF THE BOARD**

*Mr. Hagaman moved to **postpone** the petition to the December 21 meeting, and Ms. Margeson seconded.*

#### **IV. OTHER BUSINESS**

There was no other business.

#### **V. ADJOURNMENT**

The meeting was adjourned at 10:55 p.m.

Respectfully submitted,

Joann Breault  
BOA Recording Secretary