

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

7:00 P.M.

June 22, 2022

MEMBERS PRESENT: Arthur Parrott, Chair; Jim Lee, Vice Chair; David MacDonald; Beth Margeson; Thomas Rossi; and Paul Mannle.

MEMBERS EXCUSED: Phyllis Eldridge

ALSO PRESENT: Peter Stith, Planning Department

Chairman Parrott called the meeting to order at 7:00 p.m. He stated that Old Business Items A and B for One Congress Street and Item C, 108 Burkett Street, were requested to postpone to the July 19 meeting. He said Item D, 635 Sagamore Street, was withdrawn by the applicant.

I. APPROVAL OF MINUTES

A) Approval of the minutes of the meetings of April 26, 2022; May 17, 2022 & May 24, 2022.

Mr. Rossi moved to **approve** the April 26 minutes as submitted, seconded by Mr. Mannle. Mr. Rossi said the minutes were an accurate reflection of the Board's discussion.

Ms. Margeson moved to **approve** the May 17 minutes as **amended**, noting that the sentence on page 7 should read that 'it was clear that the ordinance didn't want the building to go past 40 feet'. Mr. MacDonald seconded and concurred.

Ms. Margeson moved to **approve** the May 24 minutes as **amended**. She said the term 'community campus' should be capitalized, and she clarified that the sentence on page 3 saying 'the Community Campus wasn't part of the applicant's property' should be deleted. Mr. MacDonald seconded. Both agreed that the minutes should be approved as amended.

*The three sets of minutes were **approved** by unanimous vote, 6-0.*

Mr. Mannle requested that New Business Item J, 1 Walton Alley, and Item K, 111 State Street, be taken out of order and voted upon.

Chairman Parrott read Item J, 1 Walton Alley, into the record. *Mr. Mannle moved to **postpone** the item to a time determined by the applicant, seconded by Vice-Chair Lee.* Mr. Mannle said the applicant would return when they were ready, and Vice-Chair Lee concurred.

*The motion **passed** by unanimous vote, 6-0.*

Chairman Parrott read Item K, 111 State Street, into the record. He said it was withdrawn by the applicant and that the process would start anew if the applicant so desired.

II. OLD BUSINESS

- A. POSTPONED TO JULY** The request of **Francis X. Bruton, (Attorney for Appellants)**, for Appeal of Administrative decision that the merged lot at **1 Congress** is not subject to the height allowances (2 stories, 4th short, 45 feet in height) pursuant to Map 10.5A21B and as permitted pursuant to Section 10.5A21.22(a) & (c) of the Zoning Ordinance. Said property is shown on Assessor Map 117 Lot 14 and lies within Character District 4 (CD-4), Character District 5 (CD-5) and the Historic District. **POSTPONED TO JULY (LU-22-12)**

DECISION OF THE BOARD

The petition was **postponed** to the July 19 meeting.

- B. POSTPONED TO JULY** The request of **One Market Square LLC (Owner)**, for the property located at **1 Congress Street** whereas relief is needed to construct a 3 story addition with a short 4th story and building height of 44'-11" which requires the following: 1) A Variance from Section 10.5A.43.31 and Map 10.5A21B to allow a 3-story addition with a short 4th and building height of 44'-11" where 2 stories (short 3rd) and 40' is the maximum allowed. Said property is shown on Assessor Map 117 Lot 14 and lies within Character District 4 (CD-4), Character District 5 (CD-5) and the Historic District. **POSTPONED TO JULY (LU-22-12)**

DECISION OF THE BOARD

The petition was **postponed** to the July 19 meeting.

- C. POSTPONED TO JULY** The request of **Joel St. Jean and Mariele Chambers (Owners)**, for property located at **108 Burkitt Street** whereas relief is needed to demolish existing garage and construct new 13' x 30' garage which requires the following: 1) A Variance from Section 10.573.20 to allow a 1 foot left side yard where 10 feet is required. 2) A Variance from Section 10.321 to allow a nonconforming structure or building to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 159 Lot 30 and lies within the General Residence A (GRA) District. **POSTPONED TO JULY (LU-22-89)**

DECISION OF THE BOARD

The petition was **postponed** to the July 19 meeting.

D. WITHDRAWN The request of **635 Sagamore Development LLC (Owner)**, for property located at **635 Sagamore Avenue** whereas relief is needed to remove existing commercial structure and construct 5 new single-family dwellings which requires the following: 1) A Variance from Section 10.513 to allow 5 principal structures on a lot where only 1 is permitted. 2) A Variance from Section 10.521 to allow a lot area per dwelling unit of 22,389 square feet where 1 acre per dwelling is required. Said property is shown on Assessor Map 222 Lot 19 and lies within the Single Residence A (SRA) District. **WITHDRAWN** (LU-22-57)

The petition was **withdrawn** by the applicant.

III. NEW BUSINESS

A. The request of **Michael Lucas (Owner)**, for property located at **45 Coffins Court** whereas relief is needed for renovation of the existing structure including new dormers, second story bathroom over an existing one story addition, and a new second story open porch which requires the following: 1) Variances from Section 10.521 to allow a) a 1' rear yard where 20' is required; b) a 0' right side yard where 10' is required; c) an 8' left side yard where 10' is required; d) a 3' front yard where 5' is required; and e) 57% building coverage where 35% 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 located on Assessor Map 135 Lot 55 and lies within the General Residence C (GRC) District. (LU-22-94)

SPEAKING TO THE PETITION

Herb Lloyd of 5 Ruth Street was present on behalf of the applicant Michael Lucas. He said he was the applicant's friend and had done a lot of work on the project. He noted that Mr. Lucas received a survey after the application was submitted determining that there's a 2' setback on the right side yard and that the left side yard has a 6' setback instead of an 8' setback. He reviewed the petition in detail. He reviewed the criteria and said they would be met. He said the applicant would live in one of the duplex units and rent the other one out, and that the adjacent neighbors were in support of the project and their approvals were included in the packet.

Mr. Rossi asked why the 2-ft roof ridge height increase required a variance. Mr. Stith said it was because it was within the setback. The Board had no other questions.

Chairman Parrott opened the public hearing.

SPEAKING IN FAVOR OF OR IN OPPOSITION TO THE PETITION

No one spoke.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Lisa McMahon via Zoom said she owned the 179 Union Street property. She asked the Board to comment on the encroachment on the left side of her property, noting that the area was the border between her property and the encroachment area was the stairway at 45 Coffins Court. She said the existing stairs were not addressed and that she was concerned about the porch.

Mr. Lloyd said the existing stairs would be removed and the new stairs would go from the door out to the street. Ms. Margeson verified that Mr. Lloyd had stated that the new structure would be 6 feet from the left side yard. Mr. Lloyd agreed and said the bumpout on the left side of the building would be removed. Ms. Margeson asked if the survey showed that there was any encroachment on the neighbor's yard. Mr. Lloyd said he wasn't that familiar with the survey but knew that the stairs would be removed.

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

DECISION OF THE BOARD

*Ms. Margeson moved to **grant** the variances for the petition, seconded by Mr. Mannle, with the following **stipulation**:*

- 1. The right side yard shall be two feet and the left side yard shall be six feet.*

Ms. Margeson explained that there was a modification to the variance request and that it would therefore be stipulated that the right side yard is two feet and the left side yard is six feet. She said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance as to setbacks. She said the side setbacks are for the circulation of light and air and for emergency egress to yards, and although they were less than what is required, they are within the existing footprint. She said the building coverage is larger but the lot area of the house is smaller than minimally required. She said substantial justice would be done because the benefit to the applicant would not be outweighed by any harm to the public. She said granting the variances would not diminish the values of surrounding properties because their values would be increased by the upgrade and the condition of the duplex house. She said the hardship test was that the applicant has to prove there are special conditions that distinguish the property from others 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's provisions and their specific application to the property. She noted that the property was much smaller than its abutting properties and had a smaller lot area, so it had special conditions that differed from the abutting properties, and there was no fair and substantial relationship between the side yard setbacks, given how tight the lot was and the purposes of the zoning. She said the proposed use is a reasonable one because the applicant is seeking to expand an existing structure and retain it as a duplex structure, and this use is allowed by right in the General residence C zone. Mr. Mannle concurred and had nothing to add.

*The motion **passed** by unanimous vote, 6-0.*

- B.** The request of **Portsmouth Savings Bank/Bank of NH (Owner)**, for property located at **333 State Street** whereas relief is needed to alter existing internally illuminated wall signs which require the following: 1) A Variance from Section 10.11261.30 to allow signs in the Historic District to be internally illuminated where only external illumination is allowed. 2) A Variance from Section 10.1144.63 to allow luminaires used for sign illumination to be higher than 25 feet where 25 feet is the maximum allowed. 3) A Variance from Section 10.1281 to allow a nonconforming sign to be altered, reconstructed, replaced or relocated without conforming to the Ordinance. Said property is located on Assessor Map 116 Lot 5 and lies within the Character District 4 (CD4), Historic and Downtown Overlay Districts (LU-22-73)

SPEAKING TO THE PETITION

Brandon Currier of Barlow Signs was present on behalf of the applicant. He reviewed the petition, noting that TD Bank's brand update had specific guidelines to ensure consistency among the national brand. He said they proposed to replace the two internally-illuminated sign cabinets on the drive-thru building in kind. He said the cabinets would be slightly larger to eliminate ghosting and existing damage from the mounting. He said the current neighbors were all businesses, so there would be no issues with light pollution into homes. He said it would be detrimental if the two signs were removed and relocated lower to fit into the 25-ft height restriction because the shadow and holes would be seen by the public. He said they would replace the wall sign on the main building in kind, replace the awnings, and repair and paint the green band that wrapped around the building. He reviewed the criteria in full.

Ms. Margeson said the Historic District Commission was stricter with signs in the Historic District and did not allow for illumination, and she asked what the hardship to the property was that required illuminated signs when the abutters did not have any. Mr. Currier said they wanted to be consistent and keep the wayfinding ability to attract new customers. He said the lighting would also help separate the drive-thru area from the main offices. Ms. Margeson said the bank wasn't open at night, however, and that internally-illuminated light created more light pollution than externally. She said the Historic District was stricter in order to eliminate that light. Mr. Currier said he felt that there would be more light pollution on the building itself than having just a smaller portion on the sign projecting a low luminance of light through that TD section.

Mr. MacDonald asked why the applicant was before the BOA, which heard appeals, and whether the applicant had been denied by another board or commission. Mr. Currier said his program manager said they would have to come before the BOA due to the height restriction and the illumination and that he had not been before any other boards.

Chairman Parrott opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DISCUSSION OF THE BOARD

Mr. Rossi referred to Ms. Margeson's comments and said he didn't see how the application met the unnecessary hardship test. He said it was a corporate mandate from some other location far distant from Portsmouth that had no bearing on the Historic District or the character of the area, and he didn't see that it was an unnecessary hardship to prioritize the needs of Portsmouth over that. Vice-Chair Lee agreed. He said the ordinance was black and white about allowing only external illumination. Chairman Parrott noted that there were residential properties pretty close to the bank, which wasn't the case with most commercial properties.

DECISION OF THE BOARD

*Mr. Rossi moved to **deny** the request for variances, seconded by Mr. Mannle.*

Mr. Rossi said the request did not meet the unnecessary hardship test for the reasons discussed. Mr. Mannle concurred and said he didn't see the hardship of the bank needing more illuminated signs. He said it wasn't like anyone in town didn't know where the bank was, and the sign didn't need to be lit at night when the bank was closed. Chairman Parrott said he had the same concern and felt that there wasn't any hardship. He said it was a corporate dictate but it didn't mean that it fit in well in that particular location downtown. He said it wasn't on a highway where the branding had to catch people's eyes.

*The motion **passed** by unanimous vote, 6-0.*

Mr. Mannle **recused** himself from the following petition. Chairman Parrott stated that there would only be five members voting and that four positive votes were needed to approve the application. He asked the applicant if he wished to postpone, but the applicant declined.

- C. The request of **Michael J. Fregeau (Owner)**, for property located at **1474 Islington Street** whereas relief is needed to construct an 8' x 12' shed which requires the following: 1) Variance from Section 10.573.10 to allow a) A 2' left side yard where 5' is required; and b) a 2' rear yard where 5' is required. 2) A Variance from Section 10.521 to allow 22% building coverage where 20% is the maximum allowed. Said property is located on Assessor Map 233 Lot 107 and lies within the Single Residence B (SRB) District. (LU-22-109)

SPEAKING TO THE PETITION

The applicant Michael Fregeau was present and said he wanted to site the proposed 8'x12'shed in the back rear corner of the lot. He said the shed was 7 feet high and 9 feet to the peak and that it needed a variance because it exceeded the lot coverage limit. He said it would be installed within the 5-ft setbacks. He reviewed the criteria, noting that the shed would not encroach on or impact the three abutters' properties and that they had verbally approved the shed plan. He said the hardship was due to the property's small lot and that the setback requirement would place the

shed almost directly behind the house and in the middle of the yard. He noted that he purchased a used shed and that it would be difficult to alter it.

Ms. Margeson said the property was fairly large and that, for only another three feet, the shed would be in the left and rear yard setbacks. She asked why the applicant couldn't meet that requirement. Mr. Fregeau said he would lose five feet on the side yard and five feet on the rear and there would be a lot of space behind the shed and between the fence and the shed and the fence in the rear yard. He said he had a nice rectangular yard and if he were to move the shed out, it would take up a lot of property and would be in square view looking out the bedroom window, whereas it could be tucked into the corner instead. Ms. Margeson said that's what rear yard setbacks are, and she asked what the hardship was in not being able to get outside of the 5-ft yard setback. Mr. Fregeau said he just thought it was a reasonable use of the space.

Mr. MacDonald said there was two feet of clearance setback on two of the lot's boundaries, and one of the reasons for the setback requirements was emergency access. He asked what would be stored in the shed and whether it would be propane or such. Mr. Fregeau said he would store yard equipment and nothing hazardous. He said there was a fence along both sides of the shed as well. Mr. MacDonald asked if the applicant got input from the Fire Department before doing the application, and Mr. Fregeau said he didn't think it was an issue. Mr. MacDonald said he could stipulate that the application would be approved only if the Fire Department were asked for an opinion on the shed's installation and that their decision had to be followed.

Chairman Parrott opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

Mr. Rossi said he was concerned about the setback and suggested granting the variances for the lot coverage and setback separately. He said none of the adjacent properties had anything encroaching on the setback, so it would set a new precedent if approved.

*Mr. Rossi moved to **grant** the variance for the lot coverage, seconded by Vice-Chair Lee.*

Mr. Rossi said it was a minor variance and very close to within the limits and that granting it would not be contrary to the public interest and would observe the spirit of the ordinance because the shed would not overcrowd the property. He said it would do substantial justice and would not diminish the values of surrounding properties. He said the special condition was that the shed was already built, so it was reasonable to utilize what was available and it would be an unnecessary hardship to require the applicant to build a new shed just because of a percentage or so of lot coverage. Vice-Chair Lee concurred and had nothing to add.

*The motion **passed** by unanimous vote, 5-0.*

Chairman Parrott asked about the motion for the setback. Vice-Chair Lee commented that the Board had approved several variances for sheds, garages, decks, and so on that had even smaller setbacks than two feet. He said the objective of having a setback was to be able to access the property around the shed, and from looking at the photos of the shed and its location, it made common sense to locate the shed in that tucked-away position to enjoy the remainder of the yard.

*Vice-Chair Lee moved to **grant** the variance as presented with a 2-ft setback. No one seconded. The motion **failed**.*

*Mr. MacDonald moved to **grant** the variance for the setbacks as presented, with the following stipulation:*

- 1. The applicant shall seek and abide by the Fire Department's referral regarding public safety and the shed's location specifically set back from the property line of the shed.*

Vice-Chair Lee seconded.

Mr. MacDonald said the shed could be moved if the Fire Department found the location not suitable for public safety access reasons. He said it might spoil the backyard but that the yard would be worse if the shed caught on fire. He said it was hard to see a hardship in a structure that didn't presently exist in that proposed location. He said granting the variance would be a bit contrary to the public interest and would depend on whether the Fire Department told the applicant to change the location or not. He said the ordinance was intended to promote public safety, and the shed's proposed location didn't observe the spirit of the ordinance based on what the Board knew. As far as substantial justice being done, he said there was no challenge to right or wrong or justice or anything else, so it was hard to see how substantial justice is done. He said the proposed shed would not diminish the values of surrounding properties, but it would if it caught fire. He said the use was a reasonable one because a lot of people had sheds in their backyards, but the applicant's shed just needed to have a few of its physical attributes tuned up to allow public safety officials responsible for putting out fires to approve it. He said if all those conditions were met, then the project could be approved.

Vice-Chair Lee noted that the Board recently approved a variance for a house with a 2-ft setback, so it seemed inconsistent to deny this 2-ft setback on a shed, but he said he would support the motion. Chairman Parrott said the fact that the shed was proposed to be put in a corner where there were two substantial board fences was significant and he felt that it would not cause anyone any hardship if the shed were to be placed in the proposed location. He said he would support the motion. Mr. Stith said the Fire Department would typically not review any sort of permit such as this because it was an uninhabited structure and they probably would not have any issue with its location. He said the Fire Department didn't review permits for sheds or things of that nature, but if the stipulation was included, he was sure the Fire Department would not have an issue with it. He said they couldn't overturn the Board's decision anyway. Chairman Parrott agreed that it shouldn't be presented to the Fire Department as a review of the permit. Ms. Margeson said she would not support the motion as stated for the same reasons Mr. Stith brought up, noting that the BOA could not defer to the Fire Department when making a decision.

She said she would also not support it as a variance application because there was no hardship. She said the lot was fairly substantial and it was another three feet to take the shed out of the side yard and rear and left yard setbacks.

*The motion technically passed by a vote of 3-2, with Mr. Rossi, Ms. Margeson voting in opposition, but it **failed** because the required positive vote of 4 out of 5 was not achieved.*

Mr. Mannle resumed his voting seat for the following petition and Mr. Rossi recused himself. Chairman Parrott told the applicant's representative that there were only five voting members, but the applicant's representative said she would proceed.

D. The request of **Karen Butz Webb Revocable Living Trust (Owner)**, for property located at **910 Sagamore Avenue** whereas relief is needed to remove an existing 150 s.f. addition and construct a new 512 s.f. addition with deck and stairs which requires the following: 1) A Variance from Section 10.531 to allow a 20.5' side yard where 30' is required. 2) A Variance from Section 10.331 to allow a nonconforming use to be expanded. 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 located on Assessor Map 223 Lot 26A and lies within the Waterfront Business (WB) District. (LU-22-114)

SPEAKING TO THE PETITION

Attorney Monica Kaiser was present on behalf of the applicant, along with the project engineer Alex Ross. Attorney Kaiser said the project received approvals from the Planning Board and the Conservation Commission as well as New Hampshire DES approval. She reviewed the petition and said the proposed expansion was approved by people in the neighborhood and the hardship was due to the special conditions of the small lot burdened by two fronts and subject to buffers and the fact that the existing home was located off-kilter on the lot. She said the addition would not encroach on the side setback in any way to undermine the abutters' access to air, light and separation, and the stormwater would be managed. Mr. Ross said they spent a lot of time with the Conservation Commission, Planning Board, and the State Shoreland Wetland Permitting and that the proposed addition would be further from the side line setback than the house.

Ms. Margeson said the home has been there since 1978 and is in the Waterfront Business District, which means that the intention of the zoning ordinance is that as uses retire, you want the use of the way it's zoned now to take its place. She said she didn't see that happening here. She said there were some businesses and three other homes besides the applicant's, and the intention was for residential uses within the Waterfront Business District to more or less expire on their own. Attorney Kaiser said in the number of years that she had lived in Portsmouth, there had been substantial improvements to some of the waterfront properties in the same zone on that side of Sagamore Avenue that were redeveloped into more expansive, fancy residential homes. She said she didn't know how long it had been zoned Waterfront Business District but thought it was strange because as Portsmouth had become more developed, that particular real estate had

been prime for residential use. She said it was residential across the street and behind the property. She referred to a case where there was an area that already had nonconforming uses and the ordinance looked at that in the context of hardship and said other nonconforming uses in the area could almost be a hardship and that it would support a request for expanding. She said the applicant needed the variance because it was an expansion of a nonconforming use, and she thought it was reasonable in that context. She said the expansion would not adversely impact the few businesses that were there and said the abutters didn't have concerns it.

Chairman Parrott opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

Vice-Chair Lee said he would support the motion. He said he lived across the hill from the area and that it was a unique enclave of small to very large homes, and he thought the project would be an improvement to that area. Ms. Margeson said she would also support the project.

*Vice-Chair Lee moved to **grant** the variances as requested, seconded by Mr. Mannle.*

Vice-Chair Lee said the applicants had been through a lot of bureaucracy to get where they were. He said granting the variances would not be contrary to the public interest in any way and the spirit of the ordinance would be observed. He said substantial justice would be done because the benefit to the applicant would not be outweighed by any harm to the public. He said an improvement like that would not diminish the values of surrounding properties and that the special conditions of the property that distinguished it from others was the area. He said the proposed use was reasonable. Mr. Mannle concurred and noted that many parcels in Portsmouth were nonconforming and the project would make that property less nonconforming.

*The motion **passed** by unanimous vote, 5-0.*

Mr. Rossi resumed his voting seat.

- E.** The request of **Blus O'Leary Family Living Trust (Owner)**, for property located at **225 Wibird Street** whereas relief is needed to construct a detached accessory dwelling unit which requires the following: 1) A Variance from Section 10.521 to allow a lot area per dwelling unit of 6,412 where 7,500 square feet is required for each dwelling. Said property is located on Assessor Map 133 Lot 54 and lies within the General Residence A (GRA) District. (LU-22-116)

SPEAKING TO THE PETITION

Arilda Dench was present on behalf of the applicant. She reviewed the petition and said the property was larger than others in the area and fronted on two streets. She said the ADU was proposed to be located in the most out-of-the-way place to keep the backyard as open as possible for the neighborhood and would not impose on any setback lines. She noted that the back neighbor was concerned about the two trees along the fence but that the contractor wouldn't dig there. She said the addition would be used as a home for the owner's mother, with handicap access. She reviewed the criteria and said they would be met.

Mr. Rossi said it looked like there was less space between the property line where it met Wibird Street and Hawthorne Street versus the sidewalk and Hawthorne Street. He said that looking at the site, one would think the property line went along the edge of the sidewalk but it didn't, and that was kind of a special condition of the lot that made it technically measure out smaller than what it really looked like. Ms. Margeson said the applicant wasn't asking for a variance for the ADU because it was a Conditional Use Permit (CUP). Ms. Dench agreed and said it was for the lot area requiring the 7500 square feet per dwelling unit, and they would have two units, so they were a little under that total. Ms. Margeson thought that should be made clear because Ms. Dench was mixing up the ADU with the lot area in reviewing the criteria. She clarified that the detached ADU was outside of the Board's purview.

Chairman Parrott opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING IN OPPOSITION TO THE PETITION

Mike Anderson and Robin Silva of 25 Hawthorne Street said they were direct abutters and thought the lot was too small and the proposed structure was too big. Mr. Anderson said the building was excessive and was compounded by the size of the proposed ADU, which was a 750-sf two-bedroom house and more than half the size of his own house in square footage. He said there wasn't sufficient hardship to justify a variance of that magnitude. He said he was worried that the ADU would eventually become a rental property. He said the scale of the house combined with the impact of a future rental with such close proximity to his property would negatively impact his property's value.

Leslie Brenner of 34 Hawthorne Street said her house faced the property. She said the applicant told her at first that he had a plan for a small structure for his elderly mother. When she saw the plans later on, she said she was stunned by how tall and large the structure was and how out of line it was compared to traditional ADUs. She said it seemed that the house would eventually become a rental property or even a short-term rental. She also lamented the loss of greenspace, which was part of the neighborhood's charm. She said there wasn't sufficient hardship.

Juliet Grant of 243 Wibird Street said he lived across from the applicant but his driveway was on Hawthorne Street. He agreed with Ms. Brenner that there would be very little open space left and

the loss of the backyard would have a huge impact on other neighbors. He said he didn't see the benefit of adding a new separate structure to a house that was already fairly large and could be modified to have the mother reside there. He said it was a lot of construction, investment, time, and change that could be dealt with in a different way.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DISCUSSION OF THE BOARD

Mr. Mannle asked Mr. Stith if the applicant would need a variance if the ADU was attached, and Mr. Stith said they would not. Ms. Margeson said it was a difficult petition to analyze and noted that there was a prohibition in the zoning ordinance stating that one couldn't have two dwelling units per lot. She said she realized the proposal was for a detached ADU but wondered how it wasn't another dwelling unit. Mr. Stith said there were specific requirements for ADUs and they had to comply with the ordinance, including that they couldn't be separate ownership and had to live in one of the units. Vice-Chair Lee asked what would happen if the ADU were built and the owner moved out and the new owner didn't live in one of the units. Mr. Stith said if both units were rented, it would nullify the CUP and the owner would be in violation and would have to return for a variance request for a second dwelling or do something else to make it a legal situation. He said short-term rentals were also not permitted, so the ADU could not be used as an Airbnb. Vice-Chair Lee said the only variance the applicant was asking for was the lot area per dwelling, which was modest at less than 1,000 square feet, and that the Board had approved that in the past. Ms. Margeson said it was confusing to her that the zoning ordinance would allow a detached ADU in an area of low-to-moderate densities in the GRA District, but the ordinance had stated that it could be done with a CUP, so the applicant had to demonstrate a hardship that they have a smaller lot than what is required by the zoning ordinance. Mr. Stith said that section of the ordinance stated that, for detached ADUs, the applicant must comply with the lot area per dwelling unit in the GRA District. It was further discussed. Mr. Rossi said the lot had an oddly shaped property line that didn't follow the contours of the sidewalk. Vice-Chair Lee said the only variance requested was for the lot area. He said a 750-sf structure wasn't large, so he didn't think the applicant was basically plopping another house down on the lot but was looking for a variance on the lot area by a little more than 1,000 feet. He said it was a large lot on two streets, so he thought it was a reasonable request. Ms. Margeson said it was allowed in the GRA zone as long as there was sufficient lot area, and it didn't have that by 1,100 feet. She said it was a small neighborhood and the applicant's lot was larger than the other lots but it may not be quite enough, given the surrounding context. Chairman Parrott said the additional unit would look very much like another house. He said the lot wasn't much bigger than his own lot and he had trouble picturing the structure in his backyard. Mr. Stith said the proposed house was 16 feet to the midpoint. Chairman Parrott said it would be the size of a traditional Cape Cod and that it would look like the lot had two houses, with one in the backyard of the other house, and that it wasn't replicated anywhere else in the area. It was further discussed.

DECISION OF THE BOARD

*Ms. Margeson moved to **deny** the request for variances, seconded by Vice-Chair Lee.*

Ms. Margeson said she moved to deny on the first two criteria, that granting the variances would be contrary to the public interest and would not observe the spirit of the ordinance. She said it was clear that the City Council, when amending the ordinance, meant for detached ADUs to be allowed by a CUP in the GRA District, but the lot size was a minimum of 7500 square feet. She said the fact that the applicant proposed having two structures on the lot, neither one of which would meet the minimal lot area, was against the spirit and intent of the ordinance. She also said there would be a benefit to the public by not granting the variance because there was a character to the neighborhood that the proposed detached ADU may change.

Vice-Chair Lee concurred and said that even though the Board denied the variance, there was still a path for the applicant to make it happen. Chairman Parrott agreed. He said he had a problem with Criteria 1 and 2, particularly with the character of the neighborhood, which was a well-established and well-loved one. He said the project could be a major change and believed that the lot would look overburdened because the structure was too ambitious for it. He said there were alternatives that would be more compatible with the area and the neighbors, and he thought the neighbors had rights to expect that anything done would be consistent with the rest of the well-established neighborhood. He said he didn't see any hardship.

*The motion **passed** by unanimous vote, 6-0.*

- F. The request of WSS Lafayette Properties LLC (Owner), for property located at 1900 Lafayette Rd** whereas relief is needed for an Ambulatory Surgical Center use which requires the following: 1) A Special Exception from Section 10.440, Use #6.40 to allow an Ambulatory Surgical Center where the use is permitted by Special Exception. Said property is located on Assessor Map 267 Lot 8 and lies within the Office Research (OR) District. (LU-22-117)

SPEAKING TO THE PETITION

Attorney Tom Hildreth as present on behalf of the applicant and suggested that the Board make a decision that no special exception was required because in the OR zone, medical office buildings were permitted by right, as were outpatient clinics. He said the ordinance had a use category named 'ambulatory surgical center' that would require a special exception, although it had no definition, but he said the definition supplied by the Ambulatory Surgical Center stated that Ambulatory Surgical Centers (ASCs) are modern health care facilities focused on providing same-day surgical care, including diagnostics and preventive procedures. He said the definition almost matched the ordinance's definition of outpatient clinic. He said they got site plan approval in 2019 but they now wanted to clarify the use issue because a prospective buyer wanted to purchase the real estate and was aware that the ordinance called it out.

Ms. Margeson said the Board should deal with the special exception for purposes of clarity and simplicity, and Chairman Parrott agreed. Attorney Hildreth referred to his special exception criteria review that he submitted earlier to the Board, and he briefly reviewed them.

The Board had no questions, and Chairman Parrott opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

*Vice-Chair Lee moved to **grant** the special exception as requested, and Mr. Rossi seconded.*

Vice-Chair Lee said the standards for a special exception were that there could be no hazard to the public or adjacent properties on account of potential fire, explosion, or release of toxic materials; no detriment to property values in the vicinity or change to the essential character of the area including residential neighbors, businesses, industrial districts on account of the location or scale of buildings and other structures, parking areas, accessways, smoke, gas, dust and other pollutants, noise, glare, and unsightly outdoor storage of vehicles; no creation of a traffic safety hazard or potential increase in the level of traffic; no excessive demand on municipal services; and no significant increase of stormwater runoff onto adjacent properties. He said the surgery center had been employed in this use for several months and that it probably didn't even need a special exception but thought the Board should make an effort to grant one to make sure all the I's were dotted. Mr. Rossi concurred and had nothing to add.

The vote ***passed*** by unanimous vote, 6-0.

G. The request of **Peter V. Ward (Owner)**, for property located at **15 Central Avenue** whereas relief is needed for vertical expansion of existing dwelling and garage which requires the following: 1) Variances from Section 10.521 to allow a) a 6' front yard where 30' is required; and b) a 4' side yard where 10' is required. 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 located on Assessor Map 209 Lot 4 and is located within the Single Residence B (SRB) District. (LU-22-123)

SPEAKING TO THE PETITION

Attorney Derek Durbin was present on behalf of the applicant. He reviewed the petition, noting that the property was unique in that it was large but bound to the north by a paper street presumably owned by the City and bound on the other side by land that the applicant also owned. He said the land shown as the paper street had been fenced in for many years and incorporated as the owner's right side yard. He said the interest that the City had in the paper street was released after a period of 20 years if it wasn't used, but there was no deed or City Council vote releasing

the City's rights. He said he was calculating a right side yard setback as if the applicant didn't own it. He said the owner proposed to vertically expand the home and garage, and he explained why the variances were needed. He reviewed the criteria and said they would be met. He said the garage would be turned into an ADU that would comply with all requirements.

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

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

*Mr. Mannle moved to **grant** the variances as presented, seconded by Mr. Rossi.*

Mr. Mannle agreed that the lot was unique and said the variance requests were minimal and would not be contrary to the public interest or to the spirit of the ordinance. He said granting the variances would do substantial justice and that the values of surrounding properties would not be diminished and would in fact be enhanced. He said literal enforcement of the ordinance would result in an unnecessary hardship. Mr. Rossi concurred and had nothing to add.

*The motion **passed** by unanimous vote, 6-0.*

H. The request of English and Hopkins LLC (Owner), for property located at 57 Sherburne Avenue whereas relief is needed to construct a new single-family dwelling which requires the following: 1) Variances from Section 10.521 to allow a) 34% building coverage where 25% is the maximum allowed; b) a 16' rear yard where 20' is required; and c) a 5.5' front yard where 15' is required. Said property is located on Assessor Map 113 Lot 22-1 and lies within the General Residence A (GRA) District. (LU-22-122)

SPEAKING TO THE PETITION

Attorney Derek Durbin was present on behalf of the applicant. He reviewed the petition, noting that it was another unique property. He said the property was reviewed and granted several variances in 2019 to allow for the creation of the lot, which was undersized within the GRA zoning district and was part of 60 Elwyn Avenue that abutted it to the rear. He said that, following the approval, the subdivision approval was received, creating the 2,943-s.f. lot. He said what made the property unique was that the 2019 plans showed a 917-s.f. building envelope for a single-family home. He said a notation on that plan indicated 31.2 percent was approved for the proposed building coverage, but no building coverage was applied for. He said he thought it was because the design hadn't been finalized. He said the same building footprint was proposed except for the added staircase, which drove the need for a 4-ft variance in the rear yard setback. He said the property was then sold to his client. He said there was also a garden shed proposed that wasn't in the 2019 plan. He said he didn't believe a front yard setback variance was needed

due to the average alignment. He said the lot was so tight that there was no reasonable way to build a single-family home without a variance. He reviewed the criteria in detail.

There were no questions from the Board. Chairman Parrott opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

*Mr. Rossi moved to **grant** the variances as presented, seconded by Mr. Mannle.*

Mr. Rossi said the project would be consistent with the public interest. He said an increase in housing stock was needed in Portsmouth and that the applicant's project would help satisfy that need, keeping it in the spirit of the ordinance in terms of the density of that zoning district. He said substantial justice would be done because there would be no harm to the public that would outweigh the benefit to the property owner. He said granting the variances would not diminish the values of surrounding properties, given the character of the neighborhood and nearby homes. He said the hardship was that the new owners purchased the property with the reasonable expectation that minor adjustments to the square footage of the planned structure would not be an encumbrance to the development that was already set in motion by previous actions. Mr. Mannle concurred and noted that 30 percent building coverage had already been granted in the past, so the extra four percent for the stairs was minor.

*The motion **passed** by unanimous vote, 6-0.*

- I.** The request of **Randi and Jeff Collins (Owners)**, for property located at **77 Meredith Way** whereas relief is needed to subdivide one lot into two lots which requires the following: 1) A Variance from Section 10.521 to allow 73 feet of frontage for Lot A and 31 feet of frontage for Lot B where 100 feet is required for both. Said property is located on Assessor Map 162 Lot 16 and lies within the General Residence A (GRA) District. (LU-22-61)

SPEAKING TO THE PETITION

Attorney Chris Mulligan was present on behalf of the applicant. He said the variances were needed to build a single-family dwelling on the GRA District lot. He said the owners bought the property in March and determined that the existing dwelling was substandard and could not be renovated, so they wanted to replace it with a more modern and amenable one. He said they also wanted to subdivide the property to add a single-family home on a new lot. He said the parcel was unusually large and almost three times the required lot area for the GRA District and was at the end of a dead-end street. He explained that the street ended about 31 feet into the Collins' property and a paper street extended all the way back to Stark Street and abutted a partially built paper street, and there was a public park across from the paper street. He said the City's position on a partially-built paper street was that the unbuilt portion didn't count as street frontage, but

the existing lot was shown on a plan that predated 1966, so the lot was deemed compliant with the frontage requirements. He said the applicant could build a two-family dwelling with up to 15 percent building coverage by right but felt that it would be less in character with the neighborhood than subdividing the lot and complying with all the dimensional requirements other than continual street frontage. He said they proposed to extend Meredith Way from its current terminus to have 73 feet of frontage on the first lot and 31 feet of frontage on the second lot. He said the applicant had a Technical Advisory Committee (TAC) work session and would require further approval from the Planning Board. He said the Staff Report proposed a stipulation acknowledging that the final design may change as the applicant moved through the TAC process but the amount of street frontage and lot coverage proposed would not exceed what was proposed in the plans. He said the subdivision plans dated back well before 1966, and Meredith Way was not fully built as originally laid out because a proposed bridge was never built, which was a special condition of the property. He reviewed the criteria and said the Board received letters from abutters who were concerned with stormwater and drainage, but he emphasized that the relief requested was for frontage relief and not lot coverage or setback to build closer to the affected properties that had drainage concerns. He said mitigation effects were proposed at the TAC work session and rain gardens were proposed for the rear of the second lot and toward the front of the second lot, which were the low points. He said the map indicated that the water runoff should run toward Meredith Way and not toward the rear of the property. He said the special conditions that prevented property enjoyment were that the property was at the end of a dead-end street and partially on the unbuilt paper street and abutted the undevelopable park land. He said two lots with a single-family home on each would be more appropriate than a duplex that accomplished the same amount of density.

Mr. Mannle confirmed that Meredith Way ended 31 feet into the applicant's property. He said on paper, it went for another 100 feet on the applicant's property and another 100 feet on the property behind the applicant. He asked how the property shown in the picture accessed their property. Attorney Mulligan said that was the subject of relief before the Board ten years ago. He said it had a driveway off of Pine Street and the neighbor went across the paper street and park to get to Pine Street. In response to further questions from Mr. Mannle, Attorney Mulligan said the people who sent in a letter stating that they didn't want the extension of Meredith Way lived on the other side. He said the variances would still be requested in spite of Meredith Way because they still wouldn't have 100 feet of continuous street frontage for each lot. Ms. Margeson said street frontage provided uniformity, which was the reason the City required it. She said it was hard to see how that applied to the area, given how irregular Meredith Way was. Attorney Mulligan said there were only two properties that actually accessed Meredith Way, and the drive would only be the third active driveway if it was approved.

Chairman Parrott opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

David Chapnick of 97 Meredith Way said he was in support but had a few concerns. He requested that a stipulation be added on the deed that there would not be separate pairs of multi-family homes or additional in-law apartments in the future so that the consistent residential

density on Meredith Way was maintained. He said he also noticed in the application that two different home sizes were requested, 1500 square feet and 2400 square feet, and he wanted the 1500 s.f. one to be granted. He said he didn't support extending Meredith Way because it would remove a lot of trees and vegetation. He asked that the driveway be created with Meredith Way in place. He also noted that there were significant water issues on Meredith way and hoped the project wouldn't create additional impervious surface. Ms. Margeson said those issues were Planning Board ones and that the Board could not put stipulations on deeds. She said the variance request was limited and was for less street frontage than was required by zoning, and that was what the Board was asked to consider. She asked if the large structure shown in the photo to the right of the existing building was a single-family one. Attorney Mulligan agreed and said it was a photo of 55 Pine Street. Ms. Margeson concluded that it wasn't like there weren't any other large structures in the area.

Donna Splaine of 299 Bartlett Street phoned in via Zoom and said she was an abutter. She said she parked on Meredith Way and thought it used to be a dirt road that went onto Pine Street but wasn't maintained by the City. She said she didn't know where Attorney Mulligan got the diagram showing a paper street in the back of the Collins' property. She said the Collins bought the property in back of 77 Meredith Way and tore down the house and built a large house, and she didn't want that to happen on Meredith Way again. She said conditions could be put on a property that would be accessed as a driveway, and she asked that the Board grant the variance for the new driveway so that the property could be subdivided but that they put a condition in writing that the approved variances would be based on the existing driveway only to serve the existing single-family home. She asked that it also state that each driveway would service only one single-family home and no mother-in-law apartments. Chairman Parrott said many of Ms. Splaine's requests were beyond the scope of the Board and that they only dealt with issues defined on the agenda, like the frontage on Lots A and B.

Aaron Long of 255 Thornton Street said he had lived in his house for only a few months before he learned about the water issues, and he thought if Meredith Way was extended, it would allow more water that wouldn't soak into the ground.

SPEAKING IN OPPOSITION TO THE PETITION

No one spoke.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Mulligan said most of the concerns stated were Planning Board issues. Regarding the extension of Meredith Way impacting runoff to the rear of a speaker's property, he said Meredith Way was at the low point of the property and that it would not run off on Thornton Avenue, so the extension of the road itself would have no impact. He said they were proposing some mitigation and the Planning Board would review the proposed rain gardens and determine what had to be done to keep the runoff on the applicant's property. He said they weren't asking for relief from lot coverage and that they would not build any closer to the other properties.

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

DECISION OF THE BOARD

*Vice-Chair Lee moved to **grant** the variances as requested, seconded by Mr. Rossi.*

Vice-Chair Lee said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said the purpose of frontage was to influence the density of neighborhoods, and he thought the property's location at a dead-end street with a park across it was sort of an irrelevant factor in this case. He said substantial justice would be done because the benefit to the applicant would not be outweighed by any harm to the general public. He said the surrounding properties would not be diminished by the addition of two new code-compliant homes, and literal enforcement of the ordinance would result in unnecessary hardship. He said the applicant's representative established that the property was burdened by a zoning restriction that was distinct from other similarly situated properties.

Mr. Stith reminded Vice-Chair Lee of the request for a stipulation in the Staff Memo. Vice-Chair Lee **amended** his motion as follows:

*Vice-Chair Lee moved to **grant** the variances as requested, seconded by Mr. Rossi, with the following **stipulation**:*

- 1. The proposed house plans are conceptual and may change from what was presented to the Board as long as they conform to the requirements of the zoning ordinance.*

Mr. Rossi concurred and had nothing to add. Ms. Margeson said the street frontage was really for uniformity and not to control density, and she thought it was less applicable in this situation.

*The motion **passed** by unanimous vote, 6-0.*

- J. REQUEST TO POSTPONE** The request of **James William Woods and Anna Roeline Meinardi (Owners)**, for property located at **1 Walton Alley** whereas relief is needed to construct a 1 story, 12' x 18' detached garage which requires the following: 1) Variances from Section 10.573.20 to allow a) a 1.5' side yard where 10' is required; and b) a 5' rear yard where 13'10" is required. Said property is located on Assessor Map 103 Lot 27 and lies within the General Residence B (GRB) and Historic Districts. **REQUEST TO POSTPONE** (LU-22-124)

DECISION OF THE BOARD

The petition was **postponed** to a future meeting.

- K. WITHDRAWN** The request of **Coventry Realty LLC (Owner)**, for property located at **111 State Street** requesting an appeal of the administrative decision that variances are required from Section 10.521 for the proposed additions to provide code compliant egress or Variances from Section 10.521 to allow a) 93% building coverage where 90% is the

maximum allowed; and b) 3.5% open space where 10% is the minimum 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 107 Lot 50 and lies within the Character District 4 (CD4), and the Historic and Downtown Overlay Districts. **WITHDRAWN** (LU-22-125)

The petition was **withdrawn** by the applicant.

IV. OTHER BUSINESS

There was no other business.

V. ADJOURNMENT

The meeting was adjourned at 11:00 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary