

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

7:00 P.M.

August 16, 2022

MEMBERS PRESENT: Arthur Parrott, Chair; Jim Lee, Vice Chair; Beth Margeson; Paul Mannle; Phyllis Eldridge; David MacDonald

MEMBERS EXCUSED: Thomas Rossi

ALSO PRESENT: Peter Stith, Planning Department

Chairman Parrott called the meeting to order at 7:00 p.m.

I. APPROVAL OF MINUTES

A) Approval of the minutes of the meeting of July 19, 2022.

The following amendments to the minutes were requested by Ms. Margeson:

On page 2, first paragraph: "Ms. Margeson said the abutter Pike Industries submitted an option for rehearing that was very comprehensive." The word 'option' was changed to 'motion'. On page 4, first paragraph after Discussion of the Board: "She said the fact that the building was in the District was an extra purpose when the board entertained a variance." The word District was changed to Historic District, and the phrase 'when the board entertained a variance' was changed to 'that the board needed to consider when it entertained a variance.'

Mr. MacDonald moved to **approve** the minutes as amended, and Vice-Chair Lee seconded. The motion **passed** by unanimous vote, 5-0.

II. OLD BUSINESS

A. POSTPONED TO SEPTEMBER 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. (LU-22-89) **POSTPONED TO SEPTEMBER**

DECISION OF THE BOARD

Mr. Mannle moved to **postpone** the petition to the September meeting, seconded by Vice-Chair Lee. The motion **passed** by unanimous vote, 5-0.

Mr. Mannle said postponement of a petition was a common request and he had no problem postponing it to the September meeting. Vice-Chair Lee concurred.

Mr. MacDonald recused himself from the following petition. The applicant said he would proceed even though there were only five voting board members.

- B.** The request of **Jeffrey M. and Melissa Foy (Owners)**, for property located at **67 Ridges Court** whereas relief is needed to construct a 718 square foot garage addition with living space and deck above which requires the following: 1) A Variance from Section 10.521 to allow a 15.5' front yard where 30' 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 207 Lot 59 and is located within the single residence B (SRB) District. (LU-22-139)

SPEAKING TO THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant and introduced his team, project engineer John Chagnon, realtor Robin Valeri, owners Melissa and Jeff Foss, and property appraiser Peter Stanhope (via Zoom). He reviewed the proposal and the criteria in detail. In response to Ms. Margeson's questions, Attorney Phoenix said 100 percent of the project was within the tidal buffer zone and a very small corner of the house was also in the buffer zone.

Realtor Robin Valeri noted that one of the opposing neighbors said their property would lose over a million dollars in value but said she did an amortization calculation that disproved it. She said just because neighbors could see a property owner's water view didn't mean they had a right to that property view. She said the applicant paid \$26,000 in yearly taxes whereas the neighbor paid \$11,000. She said there was no market evidence to suggest that a partial loss of water view would result in a huge diminution of value. She noted that the neighbors could walk to the beach.

Ms. Margeson asked if the dock was part of the beach. Mr. Chagnon agreed, noting that it was a public beach. Vice-Chair Lee said there was a similar situation involving a view a few years ago, and he had contacted an appraisal expert who opined that the value of a view was between 5-30 percent of the property's value. Ms. Valeri said it would just be a partial loss of view. Ms. Margeson said the subject lot had a water view and was taxed for it, and she asked about Lots 62 and 63 across the street. Ms. Valeri said their property taxes were about \$11,000 but didn't know

if those taxes included a water view, and that neither lot could be marketed with water view easements although they could be taxed with water views.

Peter Stanhope (via Zoom) said he was a certified general appraiser in New Hampshire. He explained that the views extended all the way to the end of Ridge Court, so the project would only result in a partial loss of view. He said he interviewed several realtors, appraisers, and municipal assessors about whether an unowned, uneased view contributed value to a property and was told that it was between 1-30 percent. He explained the definition of market value and reviewed different types of views that included partial, panoramic, and territorial views. He said the issue was a territorial view and the project would remove a very modest part of that greater view. He concluded that there would be no diminution of value in surrounding properties if the variances were granted since there would be no loss of view. He said he found no evidence that the neighbor's 2.3 million-dollar property would have a probability of a million dollar loss and assumed that the realtor wasn't aware that there was a view preserved.

Property owner Jeff Foy said he researched assessed land values in the neighborhood as to whether the current tax assessment was reflective of the view. He said the neighbor Cathy Thomson's assessment for her land was the lowest assessment on a square-footage basis for land for any property on Ridges Court. He said there were much smaller lots on the street and there wasn't a current view assessment going on. Ms. Margeson asked if there was an actual verification of a water view tax assessment on those two properties, and Mr. Foy said he didn't see one. Mr. Mannle asked if Mr. Foy went online or spoke to the city's tax assessor. Mr. Foy said he looked at the figures online and that they were not reflective of anything substantial.

Mr. Parrott opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Darcy Peyser said she was present on behalf of Kathleen Thomson of 56 Ridges Court, who objected to the project because it failed most of the criteria, especially the hardship one. She said the structure would have a huge detrimental effect on Ms. Thomson's property and that it could be moved back so that it complied with the 30 percent buffer setback. Vice- Chair Lee asked if there would be a different view if one walked ten feet down the street. Attorney Peyser agreed there would be more of the view of Little Harbor.

Robin Hackett of 46 Ridges Court said she lived across the street from the applicant. She read the letter she submitted to the board saying how the addition would negatively impact the neighbors' enjoyment of their properties and water views. She said there wasn't a hardship for adding another porch and living space on top of the garage. She said the property couldn't support that and also maintain environmentally protected setbacks. She said the addition would increase neighboring properties for sale purposes and property taxes would rise.

Mark Hepp of 28 Ridges Court said the variance request would place a 30' high, 3-story building right in the middle of the setback and would not only affect the water view but also the birds and nature. He said the applicant could find another creative way to build an addition without encroaching on the setback. He distributed a drawing that was submitted by the applicant that he marked up to show how it would look if the setbacks were complied with.

Kathleen Thomson of 56 Ridges Court said the project would adversely affect her property value and water views as well as those of nearby property owners. She said it would cause a hardship and significant changes to the neighborhood's quality of life.

Marta Rubinek of 40 Ridges Court said the project would detract from the most-affected neighbors' beautiful views and quality of life and hoped their little corner would be protected.

Nancy Andrews of 161 Sagamore Avenue said that, as a member of the general public, she was harmed when a south end property in a quaint community was having huge pieces of buildings added very close to the street so that the street would soon look like the downtown hotel area.

Warren Wilson of 40 Ridges Court said the addition would be out of scale for the area.

Mike Rainboth said he lived at the end of Ridges Court and had enjoyed the views from Mr. Thomson's deck many nights. He said the addition would block that view.

Dylan Hackett of 46 Ridges Court said the view was a nice one to have.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Owner Jeff Foy stated that a few inaccurate things were said by some of the opposition. He said the addition would return the structure to a garage and would not block 100 percent of anyone's view. He said he actually scaled down his original larger plan to fit entirely on the existing asphalt area. He said the 30' setback was on his lawn and not on the side of the road, and he had worked with that as much as he could. He said the addition would be back from the current house and further from the street than any of the homes that were supposedly impacted.

Attorney Phoenix said the marked-up plan handed in by Mr. Hepp was originally prepared by Ambit engineer John Chagnon and that it was improper for Mr. Hepp to mark up the plan and use it without Ambit's permission, so he asked that it not be taken into evidence. He said the front yard setback purposes did not intend to protect someone's views past their properties but intended to protect air and light. He said some of the existing views would be limited by the project but there would still be views. He said Mr. Stanhope said there would be no diminution of property values and that the concerns about environmental impacts were not within the board's purview. He said the applicant met all the requirements for the variance request and there was no demonstration that there would be any loss of value for surrounding neighbors.

Evan Mullen of 82 Austin Street said he was a building designer and the code of ethics for architects indicated that they had an obligation to the public and environment. He asked that the applicant come up with better alternatives.

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

DISCUSSION OF THE BOARD

Ms. Eldridge said she could not support the variance request because she didn't see a hardship. She said the addition could be built anywhere on the property. Mr. Mannle said the addition was proposed to be fully in the wetlands buffer and if the setback were complied with, it wouldn't need a variance. He said if the Conservation Commission granted approval for a difference of another 10 or 15 feet, he didn't see how it would make a difference because the project was fully in the wetlands buffer. Vice-Chair Lee said back in the 1960s when he was stationed in the Air Force in Florida, one could drive along the miles of dunes and the views of the Gulf of Mexico were the territorial views, but now there were 10-story condos which were the new territorial view. Ms. Margeson said the board did not have any jurisdiction over the views and were tasked with the applicant's request for a front yard setback. She said she shared everyone's concern about building within the wetland buffer and that it was clearly delineated in the ordinance under the environmental protection standards, but the board could not take that into consideration. She said if the tidal buffer zone were pushing the project closer to the main building, she'd have a different view of it, but anything built on the property had to be built within the tidal buffer zone, so she couldn't say it was really a hardship.

DECISION OF THE BOARD

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

Ms. Eldridge said the hardship just wasn't there. She said the applicant stated that they needed to avoid the buffer zone but were not avoiding it, and they were within the setback where they could be anywhere else within the buffer zone. Mr. Mannle concurred. He said the property was problematic as far as the wetland buffer and the applicant knew the hardship going in yet was asking the board to grant something that was fully in the buffer when it could be moved back and eliminate all the emotional responses from the neighbors.

Chairman Parrott said he wrestled with the hardship aspect, especially the conditions of the property that distinguished it from others in the area, because there were other properties in the area that were similarly situated. He said the structure was already in the setback so it wasn't a unique feature, and there were opportunities to deal with the neighbors' concerns.

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

III. NEW BUSINESS

- A. REQUEST TO POSTPONE** The request of **Jeffrey C. Christensen (Attorney for the Appellants)**, for property located at **225 Banfield Road** for a rehearing of the May 24, 2022 decision of the Zoning Board of Adjustment's granting of a request for variances to

demolish the existing building and constructing a new 5 unit commercial building and 60 unit residential building with underground parking which requires the following: 1) A Variance from Section 10.440 to allow a 60 unit residential building where residential uses are not permitted in the Industrial district. Said property is located on Assessor Map 254 Lot 1 and Map 266 Lot 1 and lies within the Industrial (I) District. (LU-22-91)

REQUEST TO POSTPONE

DECISION OF THE BOARD

Mr. Mannle moved to **postpone** the petition to the September meeting, seconded by Vice-Chair Lee.

- B.** The request of **Lonza Biologics (Owner)**, for property located at **101 International Drive** whereas relief is needed for the addition of a 372 square foot wall sign which will result in 487.5 square feet of total sign area which requires the following: 1) A Variance from Section 306.01(d) to allow 487.5 square feet of total sign area where 200 square feet is the maximum allowed per lot. Said property is located on Assessor Map 305 Lot 6 and is located in the Airport Business Commercial (ABC) District. (LU-22-136)

SPEAKING TO THE PETITION

Brandon Currier of Barlow Signs was present on behalf of the applicant via Zoom, and Kady Harnedy of Barlow Signs was also present. Mr. Currier reviewed the petition, noting that the sign would attract new customers and aid current customers in locating the building. He said they had met with the Pease Development Authority (PDA), who supported the change with the exception that the existing sign be removed. He reviewed the criteria. In response to Chairman Parrott's questions, Mr. Currier said the proposed sign would replace the existing one and that it would be lit internally.

Chairman Parrott opened the public hearing.

SPEAKING IN FAVOR OF OR IN OPPOSITION TO OR 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 **recommend** approval to the PDA, seconded by Ms. Eldridge.

Vice-Chair Lee referred to the PDA's criteria and said granting the variance would cause no adverse effect or diminish surrounding properties, would benefit the public interest and do substantial justice, and a denial would result in unnecessary hardship to the person seeking the variance. He added that the sign was pretty big but felt that the building's scale justified a sign of

that magnitude. Mr. Mannle concurred and said he saw no reason not to make the sign bigger, especially considering how much Lona had done for the PDA.

The vote to recommend approval to the PDA as presented **passed** by unanimous vote, 6-0.

- C. The request of **Richard P. Fusegni (Owner)**, for property located at **201 Kearsarge Way** whereas relief is needed to subdivide one lot into three lots which requires the following: 1) A Variance from Section 10.521 to allow 82.5 feet of street frontage where 100 feet is required for proposed Lot 3. Said property is located on Assessor Map 218 Lot 5 and lies within the Single Residence B (SRB) District. (LU-22-150)

SPEAKING TO THE PETITION

Attorney Chris Mulligan was present on behalf of the applicant and noted that the same relief requested was received in 2019 but the owner decided back then to preserve all the mature trees on the property that would have had to be removed to accommodate drainage improvements, so the project design was changed to the current one. He reviewed the criteria.

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

SPEAKING IN FAVOR OF OR IN OPPOSITION TO OR 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 variance for the petition as presented and advertised, seconded by Mr. Mannle.

Vice-Chair Lee said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance, and would not conflict with the implicit and explicit purposes of the ordinance nor alter the essential character of the neighborhood nor injure public rights. 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 granting the variance would not diminish the values of surrounding properties but would likely enhance them. Relating to the hardship, he cited a case where the Supreme Court redefined the definition of a hardship by stating that a hardship exists when special conditions of the land render the use for which the variance is sought to be reasonable. He said he felt that the request was very reasonable and was also a reasonable use of the land, and for those reasons, he moved to grant the variance.

Mr. Mannle concurred but said he didn't agree with the case cited regarding the hardship and thought it was ironic that Lot 3 met the variance and was the biggest lot. Ms. Eldridge said it was admirable that the applicant returned to save the trees. Mr. Margeson said she had struggled with the hardship but would support the application.

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

- D.** The request of **Marcio Goldani Von Muhlen (Owner)**, for property located at **303 Thaxter Road** whereas relief is needed to replace existing entryway with 2-story addition including front landing and steps which requires the following: 1) A Variance from Section 10.521 to allow a 14.5' front yard where 30' is required. Said property is located on Assessor Map 152 Lot 37 and lies within the single residence B (SRB) district. (LU-22-155)

SPEAKING TO THE PETITION

Land surveyor Scott Boudreau was present on behalf of the applicant. He said there were revised plans, which he distributed to the board. He explained that the applicant wanted a 4-ft landing area outside of the addition and the steps would go to the side, so the request was for an 18.5' front yard instead of a 14.5' one. He reviewed the criteria and said they would be met.

There were no questions from the board, and Chairman Parrott opened the public hearing.

SPEAKING IN FAVOR OF OR IN OPPOSITION TO OR 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 variance for the petition as presented, seconded by Ms. Eldridge.

Mr. Mannle said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said substantial justice would be done and the values of surrounding properties would not be diminished and would most likely increase. He said literal enforcement of the ordinance would result in unnecessary hardship because the applicant was only asking for a 1.5' variance off the existing and using the front yard averaging, so it would become slightly less nonconforming. Ms. Eldridge concurred and had nothing to add.

Mr. Stith said that 14.5' was advertised and recommended stipulating that the front yard setback shall be 18.5 feet per the plan submitted that evening. Mr. Mannle and Ms. Eldridge agreed.

Mr. Mannle **amended** his motion as follows:

Mr. Mannle moved to **grant** the variance for the petition as presented, seconded by Ms. Eldridge, with the following **stipulation**:

1. The front yard shall be 18.5' as shown on the revised plans submitted at the meeting.

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

- E.** The request of **John A Signorello (Owner)**, for property located at **22 Maple Street** whereas relief is needed to subdivide one lot into two lots and construct new dwelling which requires the following: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling unit of 8,530 and 10,400 where 15,000 is required for each; b) a lot depth of 85' where 100' is required; c) 98' of continuous street frontage where 100' is required; d) an 18' front yard where 30' is required; and e) a 19' rear yard where 30' is required. Said property is located on Assessor Map 237 Lot 1 and lies within the single residence B (SRB) district. (LU-22-156)

SPEAKING TO THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant and said the variance was necessary to meet the requirement for a certain amount of frontage. He reviewed the petition and explained why the lot should be subdivided into two. He reviewed the criteria.

There were no questions from the board, and Chairman Parrott opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING IN OPPOSITION TO THE PETITION

Fred McMullen of 1000 Woodbury Avenue said the south side of his lot bordered the applicant's property. He said changing one conforming lot to two nonconforming lots didn't make sense and would crowd the neighborhood. He said the existing trees protected the wetland from erosion and helped the ecology and were a natural barrier for the noise from the turnpike and Pease AFB, and losing them would be a hardship for the entire neighborhood.

Sandra Pantelakos of 5 Meadow Road said her driveway was very close to the applicant's property and she had concerns about intrusiveness and sewage.

James Pantelakos of 5 Meadow Road said the lot was being subdivided for capital gains and that the resulting two smaller lots would be much smaller than the surrounding ones, which would make the neighborhood look bad. He said there was no hardship

Tyler Bradbury of 91 Woodlawn Circle said the petition fell short of all five criteria and would affect the privacy of the neighbors and make the neighborhood congested.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Phoenix said the owner did speak with a few of the neighbors and was willing to offer Mr. McMullen a fence along the common property line. He cited Section 516.40 of the ordinance stating that in the SRA and SRB zones, terraces, decks, steps and stoops that are uncovered and unenclosed and are less than 3' in height and less than 100 square feet in area only require a 5' front and rear setback. He said the house was 27.6 feet in the front but the rear met the setback. Mr. Stith noted that those were projections into the front yard, so instead of a 30' setback it could be 25 feet. Attorney Phoenix said part of it could still apply. He said it was a good project and thought the people against it just didn't like it but their reasoning did not overcome the property owner's rights. He said the development was in keeping with the neighborhood's characteristics.

Fred McMullen said the applicant didn't quite know what they wanted to do, but the lot and the house were not right and a house on each lot would be crammed together.

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

DISCUSSION OF THE BOARD

Vice-Chair Lee said he had concerns about the application because the conforming lot would be subdivided into two nonconforming lots and most of the house would be in the wetland's buffer zone. He said those two reasons were sufficient enough for him to not support the application. Ms. Margeson said she would support it because she thought there were a lot of things that met zoning in terms of open space and building coverage. She said the applicant had persuaded her that there were a lot of nonconforming lots in the area and she didn't find that the applicant's lot was a new kind of configuration for that neighborhood. Ms. Eldridge said she also would support the application. She said the lot on the tax map looked like many of the other lots in the neighborhood, and in terms of lot coverage, there would be the required amount of open area around the homes. She said the proposal didn't seem intrusive and seemed more like the neighborhood than the current enormous lot. Mr. MacDonald said people who buy a property are entitled to the use and enjoyment of it within the limits of the ordinances but that he could not see any unnecessary hardship on the lot that would entitle the owner to go outside of the ordinances in order to maximize the return on their investment. Vice-Chair Lee said there were similar lots in the neighborhood, and even if every lot in the neighborhood was nonconforming, they were not valid reasons to inject two more nonconforming lots in the neighborhood. Mr. Mannle said 90 percent of Portsmouth lots were nonconforming and it wasn't the board's job to create more nonconforming lots. He said he couldn't see turning an existing conforming lot into two nonconforming lots.

DECISION OF THE BOARD

Vice-Chair Lee moved to **deny** the variance, seconded by Mr. MacDonald.

Vice-Chair Lee stated that just because other lots in the neighborhood were nonconforming was not a reason to inject two more nonconforming lots into the area. He said the petition only had to fail one criteria. Mr. MacDonald concurred, noting that if the board kept granting variances to the ordinances, there would be more properties in Portsmouth that would fail to comply than

those that did comply. He said the board's mission was to evaluate land and building use in Portsmouth to ensure that it was appropriate to the city's vision of where it wanted to go. Vice-Chair Lee said the variance was contrary to the public interest, and the benefit to the applicant was outweighed by harm to the general public, so it failed those two criteria.

Chairman Parrott said he struggled to find a hardship on the lot but couldn't find one because even though the lot was somewhat oversized, it was a perfectly good lot dimensionally and served a public purpose with its drainage area and large trees. Ms. Margeson said the application referred to a hardship that may be found where similar nonconforming uses exist in the neighborhood, and the proposed use would have no adverse effect on the neighborhood. She said that was very different from the traditional analysis of hardship in that the neighborhood had a lot of existing nonconforming lot sizes. Therefore, she felt the applicant met the hardship criteria. She said she found the use reasonable because it was in the SRB zone and she didn't find that anything that would be put into that lot would be any different than what was there now.

The motion to deny **passed** by a vote of 4-2, with Ms. Margeson and Ms. Eldridge voting in opposition to the motion.

2. OTHER BUSINESS

A. Potential Dates for Workshop with NH Municipal Association

Mr. Stith said the City was working with the NH Municipal Association to provide some training with the board, noting that new legislation was forthcoming about how to make motions and how to add more detail to findings of fact and so on. He said he hoped to set up an informal work session at the end of September or early October and would send out a poll to the board members asking which selected dates would be feasible for them.

V. ADJOURNMENT

The meeting was adjourned at 10:15 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary