

TO: Zoning Board of Adjustment  
FROM: Peter Stith, AICP, Planning Department  
DATE: January 13, 2022  
RE: Zoning Board of Adjustment January 18, 2022

### **OLD BUSINESS**

1. Request for Extension – 132-133 Middle Street
2. Motion for Reconsideration of Rehearing – 53 Green Street
2. Rehearing – 53 Green Street – Request to Postpone

### **NEW BUSINESS**

1. 232 Wibird Street
2. 0 Woodbury Avenue
3. 389 Lincoln Avenue – Request to Postpone



## OLD BUSINESS

1.

Request of 132 Middle Street LLC and 134 Middle Street LLC for property located at **132 Middle Street and 134 Middle Street** wherein relief is needed from the Zoning Ordinance for the renovation and reconfiguration of existing units including the conversion of one unit from office to residential which will result in 21 dwelling units between the two properties and requires the following: 1) A Variance from Sections 10.331 & 10.333 to allow a nonconforming use to be extended, enlarged or changed without conforming to the requirements of the Ordinance and to allow the use to be extended throughout other parts of the building or structure. 2) a Variance from Section 10.5A41.10A to allow a lot area per dwelling unit of 590 square feet where 3,000 square feet per dwelling unit is required (134 Middle Street). 3) A Variance from Section 10.5A41.10A to allow a lot area per dwelling unit of 499 square feet where 3,000 square feet is required per dwelling unit (132 Middle Street) Said properties are shown on Assessor Plan 127, Lot 12 and Assessor Plan 127, Lot 11 and lie within Character District 4-L1 (CD4-L1).

The above referenced variances were granted on February 19, 2020 and a building permit has not been issued for the project. The applicant has submitted a request for an extension which the Ordinance allows for a one-time, one-year extension if the request is acted on prior to the expiration date.



**2 & 3.** A request to reconsider the granting of the rehearing for 53 Green Street was submitted by the developer for the Board to reconsider the granting of a rehearing at the December 21, 2021 meeting. After consultation with the Legal department, the Board should consider the merits of this request first and postpone the rehearing to the next meeting, depending on the outcome of the consideration of the request to reconsider. The other documents submitted by Attorney Ramsdell and Attorney MacCallum pertain to this memo. In one of Attorney MacCallum's memos, he requests the rehearing to be heard at the next meeting, either on January 25<sup>th</sup> (if one was scheduled) or at the February regular meeting.

Rehearing of the Appeal of **Duncan MacCallum, (Attorney for the Appellants)**, of the July 15, 2021 decision of the Planning Board for property located at **53 Green Street** which granted the following: a) a wetlands conditional use permit under Section 10.1017 of the Zoning Ordinance; b) preliminary and final subdivision approval; and c) site plan review approval. Said property is shown on Assessor Map 119 Lot 2 and lies within the Character District 5 (CD5) and Character District 4 (CD4).

The Board voted to grant the rehearing at the December 21, 2021 meeting, which resulted in a 3-3 vote. Per the Rules & Regulations, a motion to grant a rehearing requires the majority of the members present or in the case of a tie vote, 3 votes are necessary.

As of the writing of this report, no documents have been submitted by either party for the rehearing. Memos from both parties have been submitted with regard to the request to reconsider the action to grant the rehearing from the December meeting.

Prior BOA history:

**June 15, 2021** – Relief is needed from the Zoning Ordinance for the demolition of an existing building and construction of a 5-story mixed-use building which requires the following: 1) A Variance from Section 10.5A41.10D to allow 42.89% front lot line buildout where 80% is required. Said property is shown on Assessor Map 119 Lot 2 and lies within the Character District 5 (CD5) District.

The Board **approved** the request, however with a vote of 3-2, the motion did not have the four positive votes required for granting a variance, therefore the **application was denied**.

**September 28, 2021** – Said property is shown on Assessor Map 119 Lot 2 and lies within the Character District 5 (CD5) and Character District 4 (CD4).

On the matter of standing, the Board voted that the appellants **do have standing to bring the appeal forward**. On the matter of whether the Board has jurisdiction to hear the appeal of the granting of a wetland Conditional Use Permit, the Board voted that it **does not have jurisdiction to hear the appeal of the granting of a wetland Conditional Use Permit** pursuant to RSA 676:5, III, which delegates the administration including the granting of conditional or special uses to the Planning Board, and provides that decisions made

pursuant to that delegation cannot be appealed to the BOA but may be appealed to the Superior Court. The Board voted to continue to the remaining items of the appeal to the October 19, 2021 meeting.

**October 19, 2021** – The Board voted that the request be **denied**. A motion to grant the appeal resulted in a 3-3 tie and did not receive 4 affirmative votes.

**December 21, 2021** – The Board voted that the request be **granted**. A motion to grant the appeal resulted in a 3-3 tie, therefore the request for the rehearing was granted.

**NEW BUSINESS**

1.

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

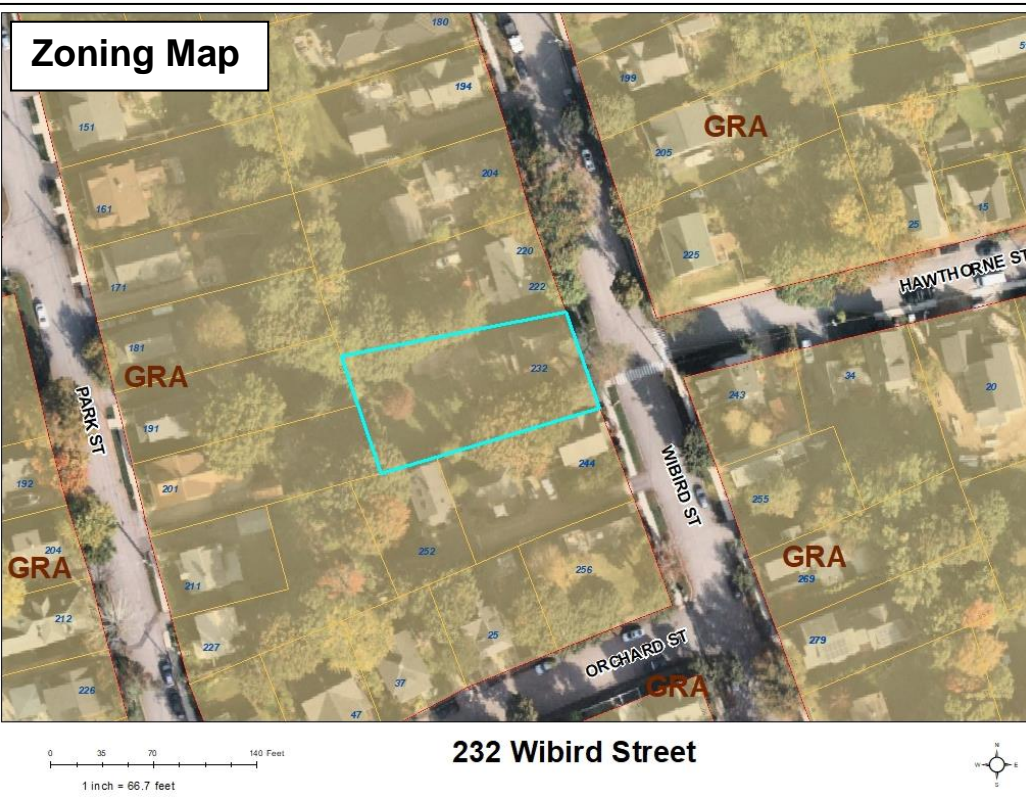
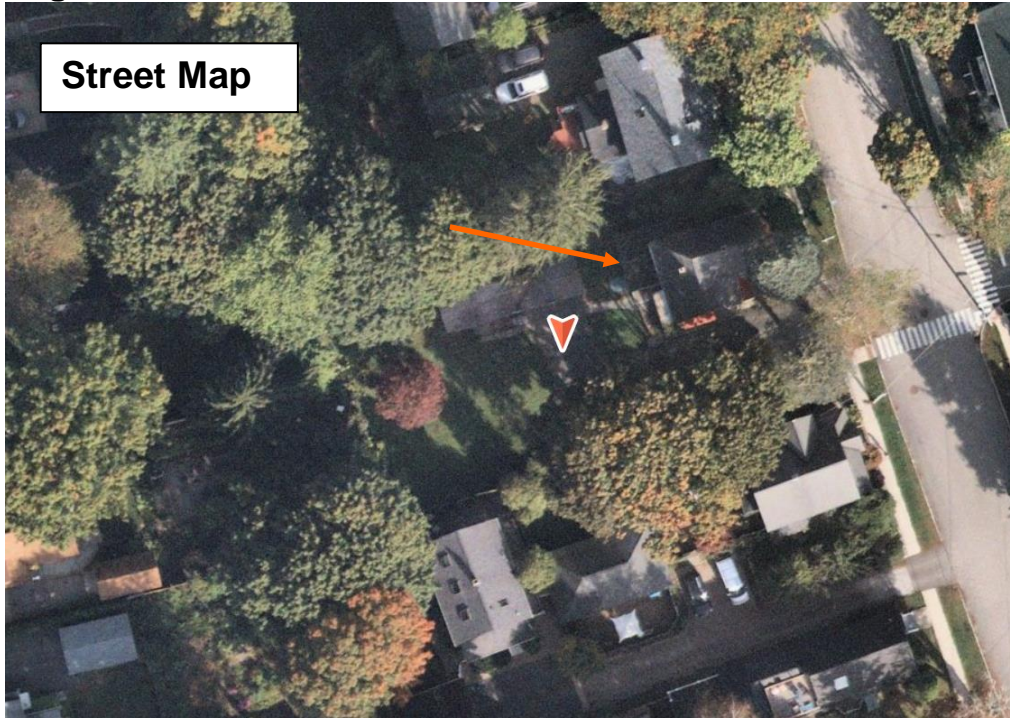
**Existing & Proposed Conditions**

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Single-family	two-story rear addition w/ garage	Primarily residential
<u>Lot area (sq. ft.):</u>	11,785	11,785	7,500 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>		11,785	7,500 min.
<u>Lot depth (ft.):</u>	65	65	100 min.
<u>Street Frontage (ft.):</u>	156	156	70 min.
<u>Primary Front Yard (ft.):</u>	3	3	15 min.
<u>Right Yard (ft.):</u>	1	<b>6</b>	10 min.
<u>Left Yard (ft.):</u>	30	10	10
<u>Rear Yard (ft.):</u>	96	50	20 min.
<u>Height (ft.):</u>			35 max.
<u>Building Coverage (%):</u>	9	18	25 max.
<u>Open Space Coverage (%):</u>	64	68	30 min.
<u>Parking:</u>	2	2	2
<u>Estimated Age of Structure:</u>	1915	<b>Variance request(s) shown in red.</b>	

**Other Permits/Approvals Required**

None.

### Neighborhood Context





## Previous Board of Adjustment Actions

No prior BOA history found.

## Planning Department Comments

The applicant is proposing to demolish the existing garage and construct a two-story addition with a new attached garage. The existing dwelling is nonconforming to the right side yard as well as the existing garage. The new addition will be 6 feet from the right side yard where 1 foot exists with the garage. The project will conform to all other dimensional requirements for the district.

## Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The "unnecessary hardship" test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*

**AND**

- (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

**OR**

*Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*



2.

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

### Existing & Proposed Conditions

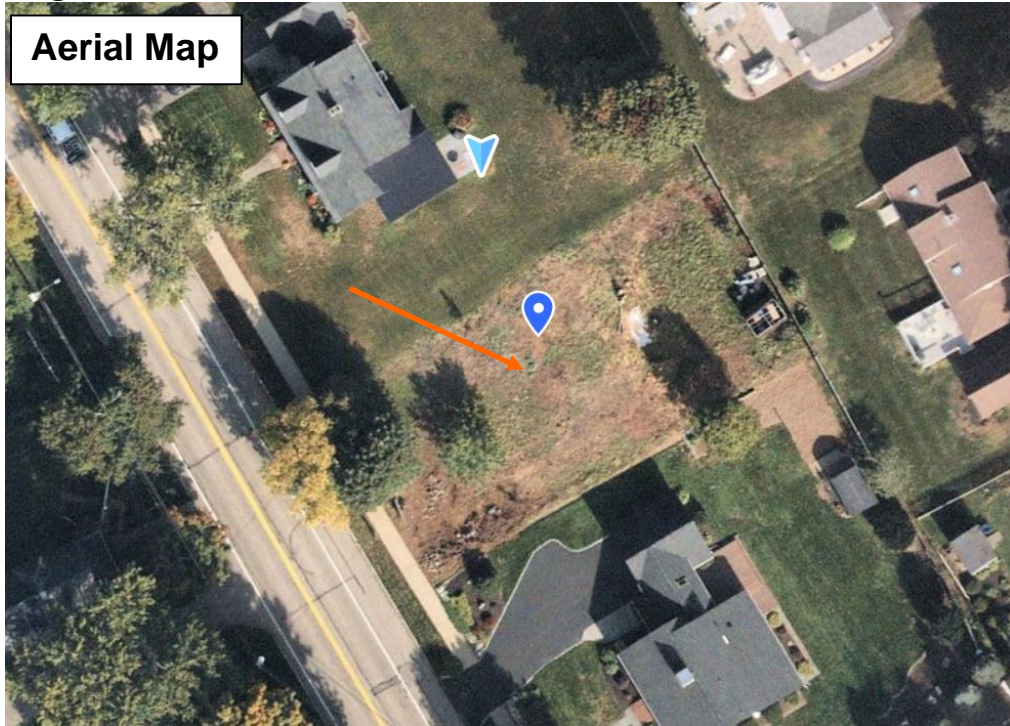
	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Vacant	Construct single-family	Primarily single-family residential
<u>Lot area (sq. ft.):</u>	7,436	<b>7,436</b>	15,000 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	7,436	<b>7,436</b>	15,000 min.
<u>Lot depth (ft.):</u>	124.5	124.5	100 min.
<u>Street Frontage (ft.):</u>	60	<b>60</b>	100 min.
<u>Primary Front Yard (ft.):</u>	NA	30	30 min.
<u>Right Yard (ft.):</u>	NA	16	30 min.
<u>Left Yard (ft.):</u>	NA	10	10
<u>Rear Yard (ft.):</u>	NA	>30	30 min.
<u>Height (ft.):</u>	NA	<35	35 max.
<u>Building Coverage (%):</u>	1	19	20 max.
<u>Open Space Coverage (%):</u>	99	69	40 min.
<u>Parking:</u>	NA	2	2
<u>Estimated Age of Structure:</u>	NA	<b>Variance request(s) shown in red.</b>	

### Other Permits/Approvals Required

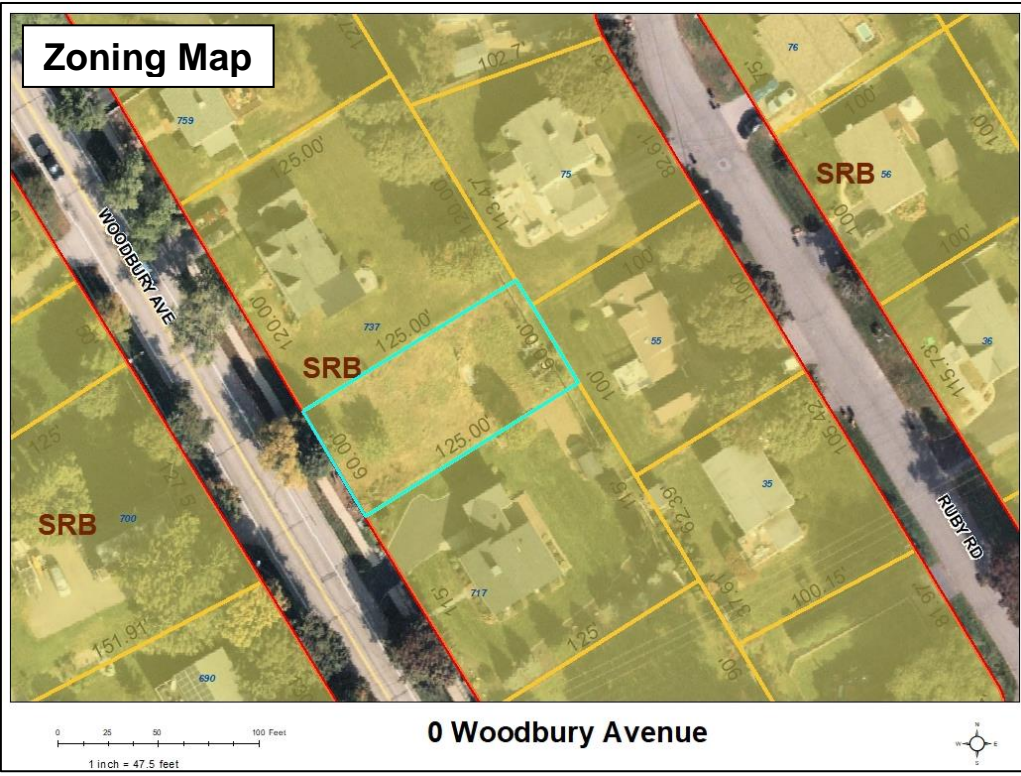
None.

### Neighborhood Context

**Aerial Map**



**Zoning Map**



## Previous Board of Adjustment Actions

No prior BOA history found.

## Planning Department Comments

The applicant is seeking variance to make the lot conforming in order to construct a new single-family dwelling. The lot was recently unmerged and is nonconforming to frontage, lot area and lot area per dwelling. The proposed structure will conform to all dimensional requirements in the SRB District. The existing nonconforming shed will be removed from the property as part of this project.

## Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The "unnecessary hardship" test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*

**AND**

- (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

**OR**

*Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*



3.

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

### Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Single-family	Tree house	Primarily residential
<u>Lot area (sq. ft.):</u>	8,712	8,712	7,500 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	8,712	8,712	7,500 min.
<u>Lot depth (ft.):</u>	84.5	84.5	70 min.
<u>Street Frontage (ft.):</u>	100	100	100 min.
<u>Primary Front Yard (ft.):</u>	0.5'	0.5'	15 min.
<u>Right Yard (ft.):</u>	1	1	10 min.
<u>Left Yard (ft.):</u>	72 (house)	<b>5 (tree house)</b>	8 (tree house)
<u>Rear Yard (ft.):</u>	0 (deck)	<b>0 (tree house)</b>	8 (tree house) min.
<u>Height (ft.):</u>	<35	8'	35 max.
<u>Building Coverage (%):</u>	21	23	25 max.
<u>Open Space Coverage (%):</u>	>30	>30	30 min.
<u>Parking:</u>	2	2	2
<u>Estimated Age of Structure:</u>	1900	<b>Equitable Waiver or Variance request(s) shown in red.</b>	

### Other Permits/Approvals Required

None.



### Neighborhood Context

**Aerial Map**



**Zoning Map**





## **Previous Board of Adjustment Actions**

**April 20, 1993** – The Board **granted** a Special Exception to allow the conversion of a 21' x 24' garage to an office / drafting area for a home occupation designing handbags to be produced off-site.

Said property is shown on Assessor Plan U-34 as Lot 017 and lies within the General Residential district.

**September 20, 2016** – The Board **granted** a Variance to allow the replacement and expansion of rear deck Required relief from the Zoning Ordinance, including the following:

- 1) A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed, enlarged or structurally altered except in conformity with the Ordinance.
- 2) A Variance from Section 10.521 to allow 32.3%± building coverage wither 25% is the maximum allowed.

## **Planning Department Comments**

The applicant is seeking an equitable waiver or variance for an existing tree house structure that was recently constructed. If the Board determines a waiver is not applicable, the applicant is requesting a variance to allow the structure to be located within the setbacks as advertised. As of the writing of this report, the applicant's representative has not addressed the equitable waiver criteria or the variance criteria for their case. A request to postpone from the applicant's representative is anticipated in advance of the meeting.

### **674:33-a Equitable Waiver of Dimensional Requirement.**

I. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:

- (a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;
- (b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;
- (c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and

(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

### **Review Criteria**

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The “unnecessary hardship” test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*

**AND**

  - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

**OR**

*Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*