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

7:00 P.M. **January 17, 2023**

MEMBERS PRESENT: Phyllis Eldridge, Chair; Beth Margeson, Vice Chair; Paul Mannle, Thomas Rossi, David MacDonald, David Rheaume, Alternate Jeffrey Mattson

MEMBERS EXCUSED: None.

ALSO PRESENT: Stefanie Casella, Planning Department

Chair Eldridge called the meeting to order at 7:00 P.M. She asked that New Business Items E through I on the agenda be postponed due to the large volume of agenda items scheduled for that evening's meeting and that they would be heard at the January 24 meeting.

*Mr. Mannle moved to **postpone** New Business Items E through I to the January 24 meeting, seconded by Mr. MacDonald. The motion **passed** by unanimous vote, 7-0.*

She said the applicant for Old Business, Item C, 635 Sagamore Avenue requested to postpone to the March 21 meeting and asked that it be taken out of order to vote on.

*Mr. Rheaume moved to take the item out of order, seconded by Vice-Chair Margeson. The motion **passed** by unanimous vote, 7-0.*

*Mr. Mannle moved to **grant** the request to postpone 635 Sagamore Avenue to the March 21 meeting, seconded by Mr. MacDonald. (Mr. Rossi and Mr. Rheaume recused).*

Mr. Mannle said the board got requests to postpone all the time and they were routinely granted because it was the applicant's request and it was up to the applicant if they weren't ready to have the hearing and needed to delay it. Mr. MacDonald concurred.

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

I. APPROVAL OF MINUTES

A. Approval of the December 20, 2022 minutes.

*The minutes were **approved** as amended by unanimous vote, 7-0.*

The amendments were as follows:

Page 1: The sentence 'Former Chairman Jim Lee left the board' was changed to 'Former Chairman Jim Lee was not reappointed'.

Page 2: The vote on the postponement of 635 Sagamore Avenue was changed from 6-0 to 5-0 because Mr. Rossi abstained from the vote.

Page 7: The following phrase in the second paragraph was changed to replace the phrase 'it went back to the ordinance' with 'it went through the City Council and the Planning Board'.

Page 14: In the first paragraph under the section Discussion and Decision of the Board, the word 'board' was changed to 'ordinance' so that the sentence now reads: 'Mr. Rheaume said there used to be nothing in the zoning ordinance about fence heights.'

II. OLD BUSINESS

A. Cherie Holmes and Yvonne Goldsberry - **45 Richmond Street** request a **1-year extension** to the variances granted on January 19, 2021. (LU-20-249)

DECISION OF THE BOARD

*Mr. Rossi moved to **grant** the 1-year extension request, seconded by Mr. Mattson.*

Mr. Rossi said they were routine requests the board received when people had difficulties securing a contractor or completing the work and the applicant was within their rights to get an extension because it was a timely submission within the one year of the original approval and they were entitled to a one-year extension. He said the board should approve the request. Mr. Mattson concurred. Mr. Rheaume said he would support the motion but cautioned the board, noting that there used to be a one-year timeframe after approval from the board where the applicant was required to get a building permit, but that was extended by NH State Law to be two years with a potential one-year extension. He said he wouldn't call the extension automatic and thought it was something the board should consider carefully before allowing additional time. He said he understood the effects of Covid and thought 2020 was still a timeframe for those concerns, so he thought it was fair of the board to grant the extension for the 45 Richmond Street applicant, but he still advised caution because the applicant had been given an extra year by law, and giving the third year was to him a little bit more extraordinary. Chair Eldridge agreed, noting that neighbors and other things change, especially in two years as opposed to just one.

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

B. 67 Ridges Court - Request for Rehearing (LU-22-199)

DISCUSSION OF THE BOARD

Mr. Rossi said he voted to proceed with the hearing when it came before the board the first time and that he didn't believe at that time that it represented a Fisher v. Dover problem. He said he still didn't believe so. He said he thought it was an unfortunate by-product of the City Council's lack of appointing additional board members, resulting in the board ending up in situations where they have a 2-3 split, so it wasn't a clear and decisive answer one way or another. He said he didn't think the applicant should suffer for that and that it put applicants at a disadvantage. He said he hoped that the City Council corrected it and appointed additional board members, but in the meantime he was inclined to support the request for rehearing. Mr. Rheaume said he reviewed the tape of the first and second times the applicant came before the board and thought there were a few irregularities to caution the board about. He said the reason for granting the applicant's request was that the motion was not to invoke Fisher v. Dover, which was unusual because the assumption was that Fisher v. Dover would only be invoked by a motion of the board. As a result, he said some of the discussion got skewed in the opposite direction in terms of why Fisher v. Dover should not be invoked and to why it should be invoked. He said comments by Mr. Lee and Mr. Mannle were somewhat limited and the deciding vote by the acting chair at the time was really no explanation as to why the feeling of the board was that Fisher v. Dover should be invoked by the acting chair. He said if it were to go to a court decision, the board could be vulnerable by not having a lot of detailed information as to some of the thoughts behind the Fisher v. Dover invocation. To prevent that, he thought the easiest way was for the board to grant the request for rehearing, and that rehearing could have a more detailed discussion about Fisher v. Dover or decide that it didn't apply, but it wouldn't mean that the applicant's new design still wouldn't fail. He said it would give the applicant a fuller understanding of the board's concerns. He summarized that the prior decision had a five-member board and there was limited participation, so he thought it was in the board's best interest from a legal standpoint to reconsider the application at the next meeting.

Mr. Mannle said he originally stated that, even though the size of the project has reduced, none of the objections that the board found with the original denial were changed but were all still in place. He said his objection had been about surrounding property values, and another board member's objection was to hardship, and another member said the entire project was within the wetlands boundary. He said none of those objections had changed with the new project, and that was the reason he voted the way he did. Vice-Chair Margeson said she thought the standard for a motion for a rehearing was whether or not the board would like to correct their own error of if there had been a mistake of law. She said she wasn't at that hearing but watched the tape, and she believed that the board came to the right decision. She said it was barred by Fisher v Dover, so she would not support a rehearing. Mr. Rheaume said it was mentioned late by the applicant's attorney that the criteria had changed from the original application, where there was 30 feet required, and the applicant's representative indicated that through the averaging method, the actual requirement was 19 feet. He said that wasn't technically a change in the ordinance but it was a substantial change in the applicant's recognition of the relief necessary to be granted by the board. He said the applicant

changed his design and had a different standard or requirement for the actual relief that was necessary. He said the board could simply decide that Fisher v. Dover was applicable, but he thought they would be better served to rehear it and if necessary re-decide whether or not Fisher v. Dover applied. Mr. Mattson said his position had not changed and that he would vote in favor of the rehearing. Chair Eldridge said her position had not changed either because she did not believe the board erred last time, so she would not vote for a rehearing.

DECISION OF THE BOARD

*Mr. Mannle moved to **deny** the request for rehearing, seconded by Vice-Chair Margeson.*

Mr. Mannle said he did not believe that the material changes would have altered the Board's original decision or the second decision because all the objections that the Board found in the application were still in play. Vice-Chair Margeson said she did not believe that the Board erred in reaching its decision.

*The motion to deny **passed** by a vote of 4-3, with Mr. Rheaume, Mr. Rossi, and Mr. Mattson voting in opposition.*

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

DECISION OF THE BOARD

*The petition was **postponed** to the March 21, 2023 meeting by unanimous vote, 5-0.*

Mr. Rossi recused himself from the following petition.

D. The request of **Nissley LLC (Owner),** for property located at **915 Sagamore Avenue** whereas relief is needed to demolish the existing building and construct new mixed-use building which requires the following: 1) A Variance from Section 10.440 to allow a mixed-use building where residential and office uses are not permitted. 2) A Variance from Section 10.1113.20 to allow parking to be located in the front yard and in front of the principal building. 3) A Variance from Section 10.1114.31 to allow 2 driveways on a lot where only one is allowed. Said property is located on Assessor Map 223 Lot 31 and lies within the Waterfront Business (WB) District. (LU-22-229)

SPEAKING TO THE PETITION

Attorney Derek Durbin was present on behalf of the applicant, with project engineer Corey Caldwell. Attorney Durbin reviewed the petition. He said the property was unique because it was situated in a mixture of different zoning and that it was an inlet off Sagamore Creek that made it a waterfront property. Mr. Caldwell said the site contained a lot of wetlands. He discussed what the uses could be, noting that two of them were not feasible and others required access to the water, which the property did not provide. Attorney Durbin said they proposed a 3-story mixed-use building with office space and 12 residential units, and off-street parking spaces. He said the combination of residential and office space would lend itself to a future live/work environment. He reviewed the criteria. (See recording time stamp 23.37 for full presentation).

Mr. Rheaume said Attorney Durbin included a tax map and that he indicated that the property was unfairly burdened by being in the Waterfront Business District because its waterfront was not useful. He named other properties that were truly landlocked that had no access to the waterfront at all yet were considered part of the Waterfront Business District. He said if those properties were considered by the City Council to be appropriate for the Waterfront District, then why did the applicant's representative feel that his property was still wrongly included in the Waterfront Business District. Attorney Durbin said most of the surrounding properties identified were used for residential purposes, especially the landlocked properties referred to, in addition to at least one or two other properties that had direct access on the Sagamore Creek. He said he wasn't sure that some of the other uses were identified with three of the eight properties, but he thought the applicant's proposal did fit with a few properties. He said there was a Supreme Court case where the city has an obligation to have the zoning reflect the prevailing character of the area. In this case, he said five out of eight properties zoned Waterfront Business were used for residential purposes, and that didn't identify what the other three properties were utilized for. He said the prevailing character was something other than waterfront businesses. Mr. Rheaume asked if the client was the property owner. Attorney Durbin said the application was submitted on behalf of the property owner and his client was someone interested in purchasing the property.

Mr. Rheaume said Attorney Durbin said he hoped that the building could be a work/live or office/residential combination. He asked what the client was doing to promote that vision of a work/live complex and if there were plans for workforce housing. Attorney Durbin said there was no plan to create workforce housing and noted that the plan was still conceptual as to how the residential units and future office space would interact. He said it would depend on the market over the next year or so. He said the units would be small and would fall into a lower rent price bracket. Mr. Rheaume said the conceptual building plans could be for a building anywhere in the city, and he asked what attempts were made to honor the waterfront business area by creating something in the industrial spaces that could tie it into the waterfront business. He also noted that it was a unique property and the applicant was asking for exceptional relief from the ordinance. Attorney Durbin said he didn't believe there was a uniform design or appearance that they would identify with the waterfront businesses due to the nature of them. He said the property didn't have the ability to have traditional marine uses and that the project was designed to be in keeping with the surrounding properties but not designed to cater to a fish market or retail type of business on the ground.

Chair Eldridge opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DISCUSSION OF THE BOARD

Vice-Chair Margeson said it was a use variance, so it was a hard bar. She said in that area, there were already areas zoned mixed residential/office and mixed residential/business. She said she wasn't in favor of the petition because she didn't find the arguments that compelling for such a substantial change in use variance. She said it was a property that did have access to the creek, much more so than other landlocked property lots that Mr. Rheaume pointed out. She said the City Council was the board that should really be looking at whether it should be waterfront business, but given that it did have access to water, they were the uses that could be made with this. She said the City Council was intentional about how they zoned the area and there were waterfront businesses and mixed residential/office and mixed residential/businesses across the creek. Mr. Mattson said he agreed in terms of how not useful this would be as a waterfront business, and the potential alternative of mixed use residential/office was feasible and desirable, but he struggled with the fact that the variance request was for a use and there was no lot-area-per-dwelling for waterfront business. He said if there was, it would be quite an aggressive ask for that density due to the three stories from the Sagamore side and the four stories on the other side. He said all that combined would potentially put it out of character with the neighborhood. Mr. Mannle said the board granted variances to the property behind the applicant's in June since it was a residence, even though it was in the Waterfront District. It was further discussed.

Mr. Rheaume said he had concerns about the application, including the density and the fact that the applicant was proposing a substantial footprint structure. He said the Waterfront Business District was created by many forums and one of the common things heard was a desire for the City to maintain its waterfront business presence because it added a character to the City that was highly identifiable to what the City wanted to be for the future. He said the board needed to tread carefully. It was further discussed. Chair Eldridge said she was also torn. She said having residences in that location and office space was more appropriate for the neighborhood than anything else because it reflected what was across the street and around it, but she was concerned about the number of units. She said she'd have a hard time supporting it. She said the board could ask the applicant to work on the design and return. Vice-Chair Margeson said it was a use variance, and design was not within the purview of the board, so she said the board had to vote it up or down. Mr. Rheaume disagreed, saying that it could give the applicant an opportunity to consider the board's comments about the project's intensity and perhaps tie it to waterfront businesses.

DECISION OF THE BOARD

*Mr. Rheaume moved to **table** the application to the February 22 meeting to give the applicant time to take the board's comments under consideration. Mr. Mattson **seconded** the motion.*

Mr. Rheaume said his motion wasn't something the board would normally do but he believed that it was an unusual set of circumstances. He said if the board denied it, the applicant could potentially come back, but he also thought there was an opportunity for the applicant to better understand the board's concerns. He said it was a use variance and denying it would set the applicant up for a high bar for Fisher v. Dover. He said there was a potential for compromise and it was the applicant's choice, but he was willing to give the applicant that opportunity.

Attorney Durbin said the option to table would give them the opportunity to reconsider and potential withdraw. It was further discussed. Vice-Chair Margeson said the motion was inappropriate because it would give the applicant a benefit that wasn't given to other applicants, whereby the applicant got to take the temperature of the board and decided to fashion an application that would be acceptable.

*The motion **passed** by a vote of 4-2, with Mr. Mannle and Vice-Chair Margeson voting in opposition.*

III. NEW BUSINESS

Mr. Rossi resumed his voting seat.

A. The request of **Sarah M Gardent Revocable Trust (Owner)**, for property located at **47 Howard Street** whereas relief is needed for the installation of a mechanical heat pump which requires the following 1) Variance from section 10.515.14 to allow an 8 foot setback where 10 feet is required. Said property is located on Assessor Map 103 Lot 84 and lies within the General Residence B (GRB) and Historic District. (LU-22-242)

SPEAKING TO THE PETITION

Justin Zeimetz was present on behalf of his wife the applicant. He reviewed the petition, noting that he submitted an addendum. He explained why the chosen location for the heat pump was the best and most appropriate one and said he had 19 signatures of neighbors and abutters.

Mr. Rheaume said the photo showed a larger heating unit than the board normally saw. The applicant said it was 41-1/2 inches tall, 38-1/2 inches wide, and 27 inches deep. Mr. MacDonald asked what the uses would be. Mr. Zeimetz said it would be primarily for cooling but could provide heating. In response to further questions from Mr. MacDonald, Mr. Zeimetz said he currently had a hot water heater and the mechanical heat pump would be more efficient than that.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

Barba Sobol of 58 Manning Street said she was in favor and didn't think the pump would affect her, even though there was an 8-ft setback. She said they had a fence and wouldn't see the unit.

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

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

DECISION OF THE BOARD

*Mr. Rossi moved to **grant** the variance for the application as submitted, seconded by Mr. Rheaume.*

Mr. Rossi said granting the variance would observe the spirit of the ordinance. He said the board had come across those variances often in the Historic District and he didn't believe that the ordinance was designed to prevent the upgrade and modernization of HVAC units within the Historic District, and to do so required a variance, so he did believe that the application was consistent with the spirit of the ordinance. He said substantial justice would be achieved because there would be no loss to the public that would outweigh the benefit to the applicant. He said granting the variance would not diminish the values of the surrounding properties, which was supported by the advocacy of the abutters and in particular Ms. Sobol, who was the most directly affected abutter. He saw her support of the project as solid evidence that there would be no negative impact on her property values. In terms of hardship of the property, he said it was a very densely packed-in location and thought the applicant did a good job of reviewing all the alternatives. He said when he looked at the site plan, he had thought there was a potential for Site D along the driveway to locate the condenser, but upon visual inspection he found that it would be detrimental to the neighborhood in terms of the overall appearance of that historic area. He said he believed that it was a special condition that mitigated toward locating the unit within eight feet of the property line as proposed. Mr. Rheaume concurred and said it would observe the spirit of the ordinance. He said the setback was a recognition of the tight neighborhoods in Portsmouth, and the potential noise from that type of condenser was minimal, noting that he had one and he could barely hear it running. He said eight feet vs. 10 feet, with how quiet the unit was, would not make a difference in terms of what the ordinance was trying to do. In regard to special conditions of the property, he said the existing house had exit ways through large sliding doors to the backyard and multiple locations that made it such that there was no other feasible location to put the unit and not have it be visible to the public. He said he supported approving it. Mr. MacDonald said he would support it, noting that it was the best example he had seen for an unnecessary hardship that was avoidable. He said if the board denied the variance request, the applicant would end up with an old, ineffective system that would place an unnecessary hardship on him.

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

B. The request of **Antonio Salema**, Trustee of Salema Realty Trust (Owner), for property located at **199 Constitution Avenue** whereas relief is needed to build a climbing, yoga, and general and specialty fitness studio in an existing building which requires the following 1) Special Exception from Section 10.440 Use #4.42 to allow a health club, yoga studio,

martial arts school, or similar use that is greater than 2,000 GFA. Said property is located on Assessor Map 285 Lot 16-301 and lies within the Industrial District. (LU-22-249)

SPEAKING TO THE PETITION

Taki Miyamoto, Owner of Portsmouth LLC was present to speak to the petition. He said he was the tenant. He reviewed the special exception criteria and said they would be met.

In response to Mr. Rheaume's questions, Mr. Miyamoto explained the building orientation and said customers would most likely enter the building from Constitution Avenue. He said the current building had two handicap spots and curb cuts to get into the building. As designed, their primary entry would be where the bulk of the parking was but would also have two entries on the south side. Mr. Rheaume said his concern was from a customer confusion perspective and asked if there would be signage pointing the way into the business. Mr. Miyamoto said he hoped so. Mr. Rheaume noted that most of the parking spots were on the back side of the building and asked if there was an alternative entrance on the back side. Mr. Miyamoto said there would also be entrances on that side. Mr. Rheaume asked about the truck turnaround and backup shown on the diagram. Mr. Miyamoto said there was a truck loading zone there and although he wanted as many parking spaces in the back as possible, he wanted to be sure the trucks could back out without a problem. Mr. Rheaume noted that 58 parking spaces were required by the ordinance and asked the applicant if he thought he would have that many customers. Mr. Miyamoto said he hoped so. Mr. Rheaume asked if any analysis was done on trips per hours that were related to traffic criteria. Mr. Miyamoto said he had not. Mr. Rheaume asked how long the applicant anticipated customers being in the building. Mr. Miyamoto said generally an hour and a half, but youth and adult programs would run 45 minutes.

Chair Eldridge opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

*Vice-Chair Margeson moved to **grant** the special exception for the application as presented and advertised, seconded by Mr. Rossi.*

Vice-Chair Margeson said if an applicant demonstrated that they met all the special exceptions, the board was compelled to grant them. She said the standards as provided for the particular use was permitted by special exception and that the zoning ordinance allows for a business like this to be located in an industrial zone. She said the special exception is to allow a health club, yoga studio, martial arts studio, or similar use that is greater than 2,000 square feet, so the applicant's use is permitted by special exception in that zone and it meets the criteria. She said the second section, Section 10.233.22 stated that there be no hazard to the public or adjacent properties on account of potential fire, explosion, or release of toxic materials. She said it was a yoga and general/specialty fitness studio and a climbing wall, so none of those conditions would be present. She said Section

10.233.23 stated that there would be no detriment to property values in the vicinity or change in the essential characteristics of any area, including residential neighborhoods, business or industrial districts on account of the location or scale of the buildings or other structures, parking areas, accessway, odor, smoke, gas, dust or other pollutants, noise, glare, heat, vibration, unsightly outside storage of equipment, vehicles or other materials. She said the applicant met these criteria because his business would be in an industrial area, and the climbing, yoga, general and special fitness studios would not have any outdoor odor, gas, dust, or other pollutant, noise, heat, vibration, unsightly storage of equipment or vehicles. She referred to Section 10.233.24, no creation of a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity, and said the applicant took into account all the turning radius and ways to avoid having any kind of safety hazard. She also noted that the applicant didn't have to go to the Technical Advisory Committee (TAC), where such issues would be dealt with. Relating to Section 10.233.25, no excessive demand on municipal services including but not limited to water, sewer, waste disposal, police and fire protection, and schools, she said a facility that had climbing, yoga, and general/special fitness would not create excessive demand on any of those city services. Referring to Section 10.233.26, no significant increase in stormwater runoff onto adjacent properties or street, she said the applicant's type of use would not create any kind of increase in stormwater runoff. For those reasons, she said she moved to grant the special exception. Mr. Rossi concurred. He noted that, relating to Section 10.233.24 for traffic congestion, Constitution Avenue was a very broad throughway and hoped the applicant's business was successful enough to create a traffic jam on that avenue. He said it would never happen because the avenue was too wide. He said he saw no problem with the special use.

Mr. Rheaume said he was torn because the entryway was proposed to be on Constitution Avenue and people cutting through the Walmart's parking lot could create a headache in that area. He said it could be stipulated that the Parking, Traffic, and Safety Committee take a look at the application but that he could probably live with the idea that the applicant's business would not negatively affect the area, although he wasn't convinced it was cut and dry.

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

C. The request of **Jesse M Lynch and Sarah L Lynch (Owners)**, for property located at **19 Sunset Road** whereas relief is needed to construct a connector structure from primary structure to the garage which requires the following: 1) Variance from Section 10.521 to allow a) 27 foot setback where 30 feet is required; and b) 22 % building coverage where 20% is required. 2) 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 153 Lot 19 and lies within the Single Residence B (SRB) District. (LU-22-250)

SPEAKING TO THE PETITION

Architect Arelda Dench was present on behalf of the applicants, along with the owner Sarah Lynch. She said that all the neighbors were in favor of the proposal. She said the applicant wanted to

connect the garage to the house. She reviewed the petition and reviewed the criteria and said it would be met.

Mr. Rheaume said a connection between the main house and an outbuilding in New England was a common occurrence and made sense, but his concern was that years ago the client came before the board for relief to reconstruct the garage, and he asked why the connection wasn't included in the application then. Ms. Lynch explained that a flat roof that was falling in was involved before as well as three retaining walls and that they didn't have the finances to do the connection then. Mr. Rheaume said a ¾ bath in the ell was in an odd spot because it was backed up to a half-bath, and he asked what if the plan was for a future bedroom or an ADU. Ms. Dench said it would not be an ADU. She said the storage space might be used as a bedroom for a short time. She said the house only had one bathroom and three girls and another bath with a shower was needed, and there was no other place to put it. She said the storage place might be used for a few years as a master bedroom until the girls went to college. Mr. Rheaume said it would potentially be another bedroom for the house, and Ms. Dench agreed.

Chair Eldridge opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

Mr. Rossi said he would support the variance request because it would be in keeping with the character of the neighborhood. Chair Eldridge agreed.

*Mr. Rheaume moved to **grant** the variances for the project as presented and advertised, seconded by Mr. Mattson.*

Mr. Rheaume said the applicant satisfactorily answered his questions about the intended use and thought the applicant was allowed to use a space as a bedroom. He said granting the variances would not be contrary to the public interest because a slight increase in the overall footprint of the property was being asked for and was extremely minimal. He said the intent was not to create overcrowding and to fill in space between two structures. He said it wouldn't be impactful to the abutters and neighbors or the public. He said granting the variances would observe the spirit of the ordinance because minimal impact was being requested by keeping light and air between buildings, keeping open spaces, and infilling between two buildings. He said it was a very minor increase in overall density on the property, and no one would really notice the slight impact to the setback requirement. He noted that there were already other portions of the building that were far closer to the edges of the lot. He said substantial justice would be done because it was a balancing test between what the applicant was trying to do and what the public interest was. He said the applicant won that balancing test because they were asking for very minimal relief that provided a lot of benefit to them in terms to connecting this odd garage with their main house, securing it for the

winter, and creating an extra bathroom in a small home. He said the public had no outweighing concerns that what the applicant was looking for was unjust. He said granting the variances would not diminish the values of surrounding properties because it would be a minor change that would not affect the character of the neighborhood. As far as unnecessary hardship, he said the applicant made a good argument for relief, noting that the unique topography of their lot where a garage had been built many years before and the fact that they were able to remedy that situation and recreate the garage and were now doing a logical connection between the two structures that they couldn't do before because it was a financial hardship at the time. He said he recommended approval for all those reasons. Mr. Mattson concurred and said granting the variances would not be contrary to the public interest and that it was a good-faith measure to address stormwater management as well.

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

D. The request of **Patrick and Nicole Mullaly (Owners)**, for property located at **36 Hunters Hill Avenue** whereas relief is needed to construct an addition with a second living unit which requires the following: 1) Variance from Section 10.440 Use #1.30 to allow a two-family dwelling unit is the Business District. 2) Variance from Section 10.531 to allow a 5 foot setback where 10 feet is required. Said property is located on Assessor Map 160 Lot 38 and lies within the Business (B) District. (LU-22-243)

SPEAKING TO THE PETITION

The owner/applicant Patrick Mullaly was present and said he wanted the unit as an apartment for his mother to live in and that he wouldn't rent it out. He noted that the surrounding properties were mixed use. He reviewed the criteria and said they would be met.

Mr. Rheaume asked if the current garage would be torn down. Mr. Mullaly agreed and said the main house would not be affected but the roofs on the back had to be changed. He said the addition would have a garage underneath and a living space above it. Mr. Rheaume noted that the advertised relief read into the record was a 5-ft setback where 10 feet was required but was actually 15 feet per the zoning ordinance. He said his concern was with the advertisement and the verbiage not being correct, and he asked if the board had to decide if it was an error or a de minimis error. Ms. Casella said it was 15 feet and that she believed it was okay to move forward as long as it was stated and there was a stipulation noting that it was 5 feet where fifteen feet is required, otherwise the alternative would be to readvertise.

Mr. Rossi asked if the addition was being considered as an attached accessory dwelling unit. Mr. Mullaly said it was not. Ms. Casella said neither an ADU nor a two-unit was allowed in that district. The said the City Staff's reasoning was that more than two units was allowed, so having it be two units would be in more in conformance with what was allowed in that district. It was further discussed. Vice-Chair Margeson said the Staff Memo stated that two-family units were not permitted but higher density residential uses including 3-4 family units were permitted by right. Ms. Casella said 3 or 4 was under the residential section but was commercial use in other respects. The

board discussed whether the Planning Staff would also allow an ADU by right in the future. Ms. Casella said she didn't believe so but that it had not been fully vetted.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR

John Hallowell of 361 Dennett Street said he was an abutter and was in approval of the project.

Tony Coviello of 341 Dennett Street said he was also an abutter and supported the project but had concerns about the zoning currently allowed on the property. He said it would be inappropriate for the property to have a 4-unit apartment because the street was ten feet higher than Route One at the end and there was no way to get access to Route One. He said the area was zoned improperly and feared that someone would try to do something with those properties.

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

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

DECISION OF THE BOARD

Mr. Rossi clarified that he was merely trying to understand what the zoning ordinance as written allowed and did not allow and that he was not suggesting that someone build it out to the maximum.

*Mr. Rheaume moved to **grant** the variances for the project as presented and advertised, with the following **stipulation**:*

1. *The board recognizes the de minimis error in the advertisement for the application as 10 feet versus 15 feet.*

Mr. Mattson seconded the motion.

Mr. Rheaume said the application had a lot of little quirks to it. He said the Route 1 Bypass created a lot of disruption to a lot of the streets when it was constructed, and the fact that the area was zoned business was unusual. He said there were substantial elevation differences between the applicant's property and the one across the street from it and it probably wasn't realistic that they would be turned into businesses. (See recording time stamp 2:31 for more explanation).Mr. Rheaume said granting the variances would not be contrary to the public interest. He said the public interest here was the zoning connection that should not negatively affect the ability of this residential use that was already an existing nonconformity in the Business District from being slightly expanded from one dwelling unit to another. He said it was in the public interest for the property to remain in the hands of the current owners and not be transferred to some other owner who could take advantage of the allowances in the Business District and provide something that would be negative to the public interest. He said granting the variances would observe the spirit of the ordinance because a small amount of relief was asked for and the property was up against the bypass and wouldn't affect

the light and air of abutting properties. He said the elevation difference between the property and the bypass further negated that concern. He said granting the variances would do substantial justice because the public's interest in not only allowing the applicant to do what he requested but in keeping it from being rebuilt in some other fashion tipped the balance scale in favor of the applicant. He said granting the variances would not diminish the values of surrounding properties because he did not believe that the businesses in the lower elevation would be negatively impacted and there would be no impact on neighboring properties because the applicant's property was on the opposite side of the residential properties that could be negatively impacted. He said the hardship was that the current situation was set up by something that was imposed on the property circa 1940 when a public roadway was built and the property was reorientated and elements on it were moved around. He said the applicant wasn't creating any worse of an encroachment than what was currently there. He said the property was somewhat more elevated in height but not so much that it would be detrimental to becoming a reasonable use of the property. He said the elevation change between it and the bypass created a situation such that a more normal business use of the property was unlikely and not logical for the way the property was accessed through Hunter Hill Avenue. With those hardships, he said he believed that it was a reasonable use and recommended approval.

Mr. Mattson concurred and said it was interesting that instead of the lot being an unusual shape, it's an unusual zoning situation that led to the hardship. Vice-Chair Margeson said normally the number of dwellings on a lot was something she took seriously. She said the City was usually very intentional about that, but in this instance it was hard to square because the zoning seemed a bit off, and if the zoning was a bit off, she generally gave the benefit to the applicant. It was further discussed.

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

IV. OTHER BUSINESS

There was no other business.

V. ADJOURNMENT

The meeting adjourned at 9:42 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary