

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

**7:00 P.M.**

**December 19, 2023**

**MEMBERS PRESENT:** Phyllis Eldridge, Chair; Beth Margeson, Vice Chair; David Rheume, Thomas Rossi, Paul Mannle, Jeffrey Mattson, and Alternate ML Geffert

**MEMBERS EXCUSED:** Alternate Jody Record

**ALSO PRESENT:** Stefanie Casella, Planning Department

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Chair Eldridge called the meeting to order at 7:00 p.m. She noted that the petition for New Business Item D, 111 Gates Street was withdrawn by the applicant and that Alternate ML Geffert would take a voting seat on all petitions.

**I. APPROVAL OF MINUTES**

**A.** Approval of the November 21, 2023 minutes.

*Mr. Mattson moved to **approve** the November 21 minutes as submitted, seconded by Mr. Mannle. The motion **passed** by a unanimous vote of 4-3, with Mr. Rossi, Mr. Rheume, and Ms. Geffert abstaining from the vote because they weren't present at the November 21 meeting.*

**II. OLD BUSINESS**

**A. 9 Kent Street** - Request for rehearing (LU-23-176)

Vice-Chair Margeson said she was in favor of rehearing the petition on the grounds that the backyard, spa, patio, and walls were considered a structure and that she had not considered that the first time the Board heard the petition. She said there was a good argument to be made that additional zoning relief was required for lot coverage because of the patio connected to the spa and connected to the masonry walls as well as the corner lot obstruction, so she wanted to rehear it but did not want to move to rehear the rest of the application.

*Vice-Chair Margeson moved to rehear that portion but not the rest of the application.*

Mr. Rossi asked if it was in the Board's jurisdiction to look at the submitted plan and determine whether all the variances required were requested, noting that the Planning Board normally did that. Ms. Casella said whatever the applicant got for approval was what they were stuck with and if they didn't get approval for something involved with a building permit process, they were still required to comply with the zoning ordinance. It was further discussed. [Timestamp 12:00]

*Mr. Mannle seconded the motion.*

Mr. Rheume asked what the applicant could get in terms of an appeal of a decision by a code official, and what relief the applicant would get from a legal standpoint. Ms. Casella said if the code official determined that a variance wasn't needed and the affected party felt that an error was made, they could appeal the building permit. Mr. Mattson said the code official appeal could come up when the building permit application occurred in the future, but the Board did not approve allowing the applicant to go over the lot coverage, so the applicant wouldn't be able to apply for a building permit that was over the granted building coverage unless they came back to the Board for a variance. Mr. Rossi said there was a misrepresentation made by the applicant's attorney during the prior discussion. He said the question of the spa was raised with regard to the lot coverage and the answer given by the applicant's team was that it was a structure and was included in the lot coverage calculation, which swayed his thinking regarding the outcome, and he felt that he made a decision based on inaccurate information presented to the Board. He said the applicant's new position was that it was not a structure and that seemed to merit its own separate consideration. He said the Board did not approve the plan for the building but only approved the 5,000 sf lot with a 5,000 sf per dwelling unit. Vice-Chair Margeson said that could be inaccurate because everything the applicant submitted was considered conditions for approval and they included site plans.

Mr. Rossi asked if the applicant could come back for additional relief if the motion was not supported, and asked if a building permit could be issued and how the appellants would know a building permit was issued. It was further discussed. Vice-Chair Margeson said the Board may have approved more than what was noticed to the public, so there could also be a legal issue. Mr. Rheume said the appellants believed that the Planning Department did not do an accurate job in preparing the Board to make decisions about the property, which he further explained [timestamp 23:28]. He said the applicant corrected the information and was going forward. He said the Board made a decision based on the information given to them from the Planning Department and wondered whether the Board should rehear the decision that they made or if there was the other issue of whether the Planning Department was in error. Mr. Rossi said since the purpose of a rehearing was to give the Board an opportunity to correct errors without having to escalate an issue to Superior Court or elsewhere, and since there was a question about the facts and what was required, he thought it would be beneficial to the appellant and the applicant if the Board waited for the building permit decision and the Planning Department's decision. Vice-Chair Margeson said the issue was the corner lot, the patio, the walls, and the spa, and the Board didn't have renderings of the back of the building or a cross-section of the site plan but could ask the applicant to submit that information. Mr. Rheume thought the City Attorney could weigh in on it. Vice-Chair Margeson said she disagreed because there was a presumption of reasonableness and lawfulness and should have four ZBA actions.

Vice-Chair Margeson **clarified** her motion.

*Vice-Chair Margeson moved to rehear the application, specifically on whether additional variances were required, whether the combination of the spa, walls, and patio constitute a structure and therefore require additional lot coverage from the Board, and whether the corner lot needs a variance.*

Ms. Casella said the Board should not to parse out pieces and instead should rehear everything.

*Vice-Chair Margeson **withdrew** her original motion. She **moved to rehear the application**. Mr. Mannle seconded. The motion **failed** by a vote of 5-2, with Ms. Geffert, Mr. Rossi, Mr. Mattson, Mr. Rheume, and Chair Eldridge voting in opposition.*

*Mr. Rheume then moved to **deny** the appellant's request for a rehearing, seconded by Mr. Mattson.*

Mr. Rheume said he made the motion to deny the original application and then had moved to grant the revised application. He said the project had pushed some limits and what came before the Board was interpreted by the Planning Department staff, who he had faith in to review the information and present the necessary relief the applicant needed to receive to move forward.

He said based on that, it came down to whether it was a buildable lot. He said the Board discussed it and he believed that the applicant was making sure they were fully compliant with the zoning ordinance requirements as seen through the lens of the Planning Department. He said the Board considered all the information and made a decision based on that criteria with regard to the specific relief that was being asked for. Mr. Mattson said he didn't think the Board made an error in approving that a dwelling be allowed to be built on a 5,000 sf lot where 7,500 sf was allowed. Regarding the error on lot coverage, he said the Board did not approve that, so the property owner wasn't allowed to go over the lot coverage. Vice-Chair Margeson said she would not support the motion because it was much more than whether the lot was buildable. She said the application was complicated and not well presented, which harmed the Board's deliberations, and the issue was whether there was something that required the Board to rehear it. Mr. Rossi said he would support the motion to deny because there was still a process about whether the applicant would have an alternative means to zero in on the issues that Vice-Chair Margeson pointed out and that he presumed that it would come back before the Board.

*The motion to deny the rehearing **passed** by a vote of 5-2, with Mr. Mannle and Vice-Chair Margeson voting in opposition.*

#### **B. 550 Sagamore Avenue – Request for Rehearing (LU-23-164)**

Mr. Rossi and Mr. Mannle recused themselves from the request for rehearing.

Mr. Rheume said the previous meeting had absent members and the Board decided that they wanted a fuller board to hear the application and he noted that there were only five members present

now. Vice-Chair Margeson said she was comfortable voting with five members because the application was more straightforward. Mr. Mattson said he was comfortable either way but noted that the fundamental issue was that, even though the lot area per dwelling was reasonable, it was a conforming use for a single-family home and the applicant was proposing a nonconforming use, which was the main reason for opposing it the first time. Mr. Rheume said the Board's vote was originally unanimous because they felt that the application did not meet all the criteria, but he thought there was some dissension as to exactly what criteria it failed on because the Board only focused on two of the criteria. He said the only reason he would consider rehearing the application was to firm up the Board's overall thinking but that he would be fine with denying the rehearing as well because he thought the Board was right in recognizing that not all the criteria were met.

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

Mr. Mattson said he did not think the Board made any errors in their judgement and decision making during the original hearing, so there was no reason to correct anything. Vice-Chair Margeson concurred and had nothing to add.

*The motion to deny **passed** by a unanimous vote of 5-0, with Mr. Rossi and Mr. Mannle recused.*

- C. The request of **Jeff and Rhonda Caron (Owners)**, for property located at **1 Garden Street** whereas relief is needed to construct an addition to the existing detached garage and create a second living unit on the property which requires the following: 1) Variance from Section 10.516.10 to allow a two (2) foot front yard where five and a half (5.5) feet is required; 2) Variance from Section 10.513 to allow two (2) free standing dwelling units where one (1) is allowed; and 3) 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 174 Lot 11 and lies within the General Residence A (GRA) District. (LU-23-139)

## **SPEAKING TO THE PETITION**

The project designer Arilda Dench was present on behalf of the applicants. She said the owners wanted to create an apartment above the garage to house a relative, and another relative would live in the main house. She said the owners would not live in the house, so it could not be made into an ADU. She said the neighbors were in support. She reviewed the criteria. [Timestamp 47:16]

Mr. Rheume asked if the applicant considered connecting the main house and garage to be one structure, which would require no relief for two separate units. Ms. Dench said they did but felt that it would be an unnecessary expense and would bulk up the property. Vice-Chair Margeson said the zoning ordinance was clear that there not be more than one dwelling unit per lot. She said the Board was tasked with what characteristics of the property created a hardship to allow for more than one dwelling unit per lot. Ms. Dench said no one would be disturbed by having the structure as two

separate buildings. She said it was an unnecessary expense and hardship to require the applicant to build extra just for the sake of joining the buildings.

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. Rheume moved to **grant** the variances for the application as presented and advertised, with the following **condition**:*

- 1. The existing shed shall be relocated onto the property in conformance with the zoning ordinance or removed in its entirety.*

*Mr. Mattson seconded the motion.*

Mr. Rheume said the only sticking point of the application was two separate dwelling structures that would each have a dwelling unit, and there was also the relief needed for the added dormering to the garage structure. He said it was a modest home and he was comfortable with the dormer in the front because there was no house across the street that would be affected by the added windows. He said he understood some of the concerns about the two separate structures but that the Board had been careful about authorizing that. He said there were some hardship characteristics due to the property's unique location surrounded by commercial and municipal properties, empty lots, a multi-building housing project, etc., and having two separate structures each housing a dwelling unit would not be out of character for the neighborhood. He reviewed the criteria and said granting the variances would not be contrary to the public interest or the spirit of the ordinance. He said there were characteristics in the neighborhood pointing to that, and both structures were relatively modest and wouldn't look unusual for the neighborhood. He said substantial justice would be done because it would allow the applicant to make full use of the house and allow him to have his relatives live there. He said he did not think the public would have a detriment that would outweigh the benefit to the applicant. He said granting the variances would not diminish the values of surrounding properties because most of those properties had various uses and the neighboring property was in support. He said the hardship was the unique location relative to the other properties, but the nearby properties that had multiple dwelling units on them that would lessen the impact. He said the request was reasonable and was just adding some additional dormering to an existing structure. Mr. Mattson concurred and said the purpose of the ordinance's provision of not allowing two freestanding dwellings on one lot was to prevent overcrowding, which wasn't an issue with the application because two structures already existed and the property was unique.

Vice-Chair Margeson said she would not support the motion because the zoning ordinance was clear that there should be more than one dwelling unit per lot. She noted that the 1995 special

exception had an added condition that there would not be a second dwelling on the applicant's lot, and she didn't think the applicant had been able to demonstrate hardship.

*The motion **passed** by a vote of 5-2, with Vice-Chair Margeson and Mr. Rossi voting in opposition.*

### **III. NEW BUSINESS**

- A.** The request of **Anne Sullivan and Kathleen Sullivan (Owners)**, for property located at **166 Martha Terrace** whereas relief is needed to replace the existing shed with a new shed which requires the following: 1) Variance from Section 10.521 to allow 21% building coverage where 10% is the maximum allowed. Said property is located on Assessor Map 283 Lot 23 and lies within the Single Residence A (SRA) District. (LU-23-186)

### **SPEAKING TO THE PETITION**

The applicant Kathleen Sullivan was present and said she wanted to replace the shed that was removed in July with a new one and needed the variance because it would take up more space than the new zoning allowed. She also referred to a letter of support from her neighbor.

Ms. Geffert asked the applicant why she thought granting the variance would not be contrary to the public interest. Ms. Sullivan said the shed was set back and in the original spot. In response to why she thought the project met the other criteria, Ms. Sullivan said it would be consistent with the surrounding zoning and would do substantial justice because she had to remove the original shed due to an insurance company that went out of business. She said the hardship was that the new insurance company said she would lose her home ownership insurance due to the part of the building that had come off. Mr. Rheume noted that the previous BOA actions in 1999 granted a building coverage of 17.5 percent and the shed was about one percent of the total property but the packet said it was 21 percent. Ms. Casella said she used the information on the City's tax site. Mr. Mattson asked if the definition of building coverage could have changed since then, and Ms. Casella agreed. Mr. Rheume concluded that the Board was convinced that 21 percent was the correct coverage with the rounding up for the requested shed and the fact that it was torn down and was being replaced required the applicant to come before the Board. Ms. Casella said whenever a nonconformity was removed, it also removed any existing rights.

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. Mannle moved to **grant** the variance for the petition as presented, seconded by Ms. Geffert.*

Mr. Mannle said the property had a hardship, along with practically every other property on Martha Terrace, because the area was zoned incorrectly. He said the area had 16 properties and it was all zoned SRA, which had a minimum lot of one acre. He said only one house lot had the size of one acre out of the 16, and the remaining 15 lots had less than a half-acre. He said the SRB zone had a minimum lot size of a half-acre. He said Martha Terrace should be zoned GRA, which would make the application moot. He said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance, except that the ordinance applied to the property was at fault. He said it would do substantial justice because the property wasn't zoned properly, and it would not diminish the values of surrounding properties because the properties were all in the same situation. He said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship owing to the property's special conditions, which included the ordinance being incorrect as it applied to the property. Ms. Geffert concurred and had nothing to add.

*The motion **passed** by a unanimous vote of 7-0.*

- B.** The request of **Go-Lo Inc. and James A. Labrie Revocable Trust of 1991 (Owners)**, for property located at **2059 Lafayette Road** whereas relief is needed to demolish the existing structure and construct an eight (8) living unit building which requires the following: 1) Variance from Section 10.1113.20 to allow parking located closer to the street than the principal building in the secondary front yard; and 2) Variance from Section 10.521 to allow 3,430 square feet of lot area per dwelling unit where 7,500 square feet are required. Said property is located on Assessor Map 268 Lot 13 and lies within the Mixed Residential Business (MRB) District. (LU-23-191)

## **SPEAKING TO THE PETITION**

Attorney Derek Durbin was present on behalf of the applicant, along with project engineer Eric Weinrieb. He asked if the Board had an issue with Fisher v. Dover. Mr. Rossi asked what had changed in the application and noted that several variance requests seemed to disappear. Attorney Durbin said the prior building was 1,600 sf larger and had 16 units, but now only eight units were proposed and the building was being set back further and configured differently. He reviewed the petition [timestamp 1:29:35]. Mr. Weinrieb reviewed the modifications to the site design [timestamp 1:34:12]. Attorney Durbin then reviewed the criteria [timestamp 1:38:50].

Mr. Rossi asked what the special condition of the property was that made it impractical to have the full allotment of the square footage required per unit. He said four units would be acceptable. Attorney Durbin said they would lose a unit from a residential standard because they couldn't round up, but he said it technically met the density standard with three units. He said the building had a lot of issues, which was why the owners were struggling to replace the tenant who left, and that it would need a full and costly renovation. As to the hardship with the land and given the size of the property and the scale of what had to be done, he said the applicant would end up doing a much larger scale commercial use if they were to propose three dwelling units. He said it would make little sense to have only three dwelling units and it would be contrary to the ordinance. He said the hardship was the location surrounded by residential uses, and the parcel's size was much bigger. He said it was two parcels from a legal perspective but it was one development property throughout the

years. He said the zoning was the hardship for the property because the building was in such poor condition that it could not be repurposed. Mr. Rossi asked if the reason was then economic. Attorney Durbin disagreed and said the reason was that it was a very large property that could be combined with a commercial use in addition to three residential uses, but the problem was that it created several problems to the area surrounding it related to traffic and other site issues. He said the ordinance allowed repurposing of an existing building up to eight dwelling units by special exception, and the applicant could not save the building and repurpose it for eight units but they still met the spirit and intent of the ordinance, and the hardship existed that should allow the applicant to at least replace the building and put eight dwelling units in it. Mr. Weinrieb said it came down to parking and access. He said if they renovated the building, they'd have to go back to NHDOT for a new driveway permit. He said it was unsafe access now because all the parking backed into Lafayette Road, which compromised the amount of parking for commercial use. He said if they were to take the building footprint and make it three units with commercial, they would only have five parking spaces because it wasn't practical to have commercial use with underground parking. He said it would be a much smaller building and the parking for the commercial use would have 15 or 20 parking spaces and the applicant would be asking for more variances.

Chair Eldridge opened the public hearing.

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

Greg Mahanna of Pheasant Lane said he was in favor of the application. He said it was a big ask in August, with four variances and some confusing press coverage, but the significant issue with the project had been addressed. He said the mass, size, and appearance of the building had significantly changed and it was more conforming with the residential structures to the north, south, and east. He said his biggest concern had been the sight line of concrete and parking but it was addressed. He said it was consistent with the setbacks, and the relief for the front parking would lessen an already nonconforming use. He said the second variance request for density relief created a less intense use.

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

No one spoke.

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

William Downey of Bow Street via Zoom said he was in favor of the proposal. He noted that sixty percent of all employees now worked from home, which meant less traffic, and the vacancy rates for commercial buildings were over 20 percent. He said there was a great hardship in maintaining the property as a commercial one, with a difficult entrance and exit. He said he spoke to some of the neighbors, who said they knew the project would be done well.

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

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

Mr. Mattson said it was interesting that even though it seemed like an intense ask to go from 7,500 sf per dwelling to 3,400 sf per dwelling, it was a less intense use of the property business than if it were a retail establishment, given the context of it being a MRB zone. Vice-Chair Margeson said she was the only person who voted for the petition the first time and had been very vocal about successive applications, and she would approve the new application.

*Ms. Geffert moved to **grant** the variances as presented and advertised, seconded by Mr. Rheume.*

Ms. Geffert said granting the variances would not be contrary to the public interest or the spirit of the ordinance because the access from Lafayette Road would be moved and conform to the zoning. She said it would do substantial justice because the variances requested would result in a project that conforms to the surrounding residential use and provides the community with additional housing. She said granting the variances would not diminish the values of surrounding properties, noting that the Board had no evidence of that and it was a good development that the neighbors supported. She said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because the property had special conditions by being MRB zoned, and given the zoning of the surrounding area, it made the property special and distinguished it from others in the area, and a fair and substantial relationship did not exist between the public purposes of the area zoning and its application to the property. She said it was difficult to make the property commercially viable, and trying to impose that on the property would make a hardship given the special condition of the unusual zoning for the parcel. She said the proposed use was a reasonable one and the variances should be granted. Mr. Rheume said the present application was more in conformance and the nature of the variance requests was much less imposing. He said it came down to the hardship and thought having the parking up against Hoover Drive made a lot of sense and was an improvement. He agreed that the area was zoned incorrectly and what was proposed made for a good transition between what was a large development on an SRB-zoned property but one that was recognized as having unique characteristics. He said there were a lot of negative aspects to the parcel that added to its hardship in terms of it being reused as a business.

Mr. Rossi said that not forcing the use of a commercial establishment on the lot was a good aspect of balance in allowing additional density for the residential application. He said he voted against it the last time due to his concern that the SRB-zoned lots north of the property on Lafayette Road would then be coming back to the Board for similar allowances in terms of density and square footage per dwelling unit, but since it was a uniquely situated MRB zone, he thought it was different from the SRB zone and the Board would not set a precedent for higher density development of the bordering lots and those that extended to the north and the SRB zone.

*The motion **passed** unanimously, 7-0.*

- C. The request of **Jeffrey Suttie and Katherine Clarcq (Owners)**, for property located at **485 Lincoln Ave** whereas relief is needed to extend the livable space of the primary structure into area that is currently a porch which requires the following: 1) Variance from Section 10.521 to allow a four (4) foot side yard where 10 is required; and 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 134 Lot 49 and lies within the General Residence A (GRA) District. (LU-23-195)

### **SPEAKING TO THE PETITION**

The applicants Jeff Suttie and Katherine Clarcq were present and revised the petition and criteria. [Timestamp 2:22:04]

Mr. Rheame noted that the aerial map had a small arrow on the right property but the zoning map had a box around the neighboring property. Mr. Rossi asked if there was open space on the side of the property where the enclosed porch would be, and the applicant 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 moved to **grant** the variances for the application as presented, seconded by Ms. Geffert.*

Mr. Rossi said it was a minor request and would not make a substantial change to the property's appearance nor present any difficulties in terms of massing and shadows, and the neighboring property had open space, so there wouldn't be any blocking of sunlight by building out the little section of the house. He said granting the variances would not be contrary to the public interest or present any health, safety, or welfare problems for the public, and the spirit of the ordinance would be observed. He said substantial justice would be done because there would be no loss to anyone in the area that would outweigh the loss and inconvenience to the property owners if they weren't allowed to proceed with their project. He said granting the variances would not diminish the values of abutting surrounding properties. He said literal enforcement of the ordinance would result in an unnecessary hardship because there was no real relationship between what was being done and the purpose of the ordinance. He said they weren't achieving anything in terms of reduced massing or preventing crowding into the next property.

Ms. Geffert concurred and had nothing to add. *The motion **passed** unanimously, 7-0.*

- D. REQUEST WITHDRAWN** The request of **Zachary Dombrowski** and **Meghan Black (Owners)**, for property located at **111 Gates Street** whereas relief is needed to demolish and reconstruct portions of the structure located at the rear and on the right side of the building which requires the following: 1) Variance from Section 10.521 to allow a) zero (0) foot front yard where five (5) feet are required, and b) zero (0) foot side yard where 10 feet are required; and 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 103 Lot 96 and lies within the General Residence B (GRB) and Historic District. **REQUEST WITHDRAWN (LU-23-193)**

The petition was withdrawn by the applicant.

- E.** The request of **Mark N Franklin and Julie S Franklin (Owners)**, for property located at **168 Lincoln Avenue** whereas relief is needed to demolish the detached garage and construct an addition to the primary structure that includes an attached garage which requires the following: 1) Variance from Section 10.521 to allow a) eight and a half (8.5) foot front yard where 15 is required, b) seven (7) foot right yard where ten (10) feet is required, and c) 33% building coverage where 25% is the maximum allowed; and 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 113 Lot 6 and lies within the General Residence A (GRA) District. (LU-23-196)

### **SPEAKING TO THE PETITION**

Attorney Derek Durbin was present on behalf of the applicants. He said the proposal was before the Board in March and the Fisher vs. Dover issue was addressed, but the Board didn't see any concerns. He reviewed the petition and criteria. [Timestamp 2:32:20]

The Board had no questions. Chair Eldridge opened the public hearing.

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

No one spoke.

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

Maxine Feintuch of 180 Lincoln Avenue said she was the neighbor most affected by the project. She said the house would affect her sunlight, privacy, view, and property value. She said the new plan was nearly the same and the mass was still too big for the lot and the design did not fit into the neighborhood. She said adding two floors above and garage and breezeway would create a wall 32 feet high and 67 feet long and there would not be much green space.

Esther Kennedy of 41 Pickering Avenue said the proposal was denied in March and she didn't see a huge change in the new plans and didn't see the hardship. She said the proposal needed to be looked at in accordance with the Master Plan as it how it fit into it.

Judith Rubenstein of Brewery Lane said the neighborhood was one of the most charming and iconic ones in Portsmouth and thought the structure would not conform to the neighborhood's character.

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

Abby Hackett of 47 Elwyn Avenue said she was a neighbor and realtor and was in favor of the petition because it would fit into the neighborhood's character and the addition would enhance the charm of the Little Harbour neighborhood.

Chris Hackett of 47 Elwyn Avenue said he was in favor because more people worked at home and needed more space and he felt that the house would enhance the neighborhood.

Attorney Durbin said he addressed Fisher v. Dover in his narrative but clarified that the 38 percent building coverage was actually 37.6 percent, where 33.4 percent exists. He said that was then, and there was also proposed a large wraparound porch in the front that would have encroached on the existing front porch and was three times larger in scale than was proposed now and also impacted the secondary front yard. He said the concerns about light, view, privacy, and space were legitimate ones any time there was an expansion of a nonconforming structure that was within the setbacks and encroaching. He emphasized that now they were taking everything out of the setbacks. He said he had addressed the hardship and found it interesting that the property was more constrained with respect to the setbacks but the applicant was still meeting them. He said people might not like the design, but the open space requirement would be doubled. He said the height proposed was just a fraction over 27 feet, and about 8 feet below what was permissible in the district. Vice-Chair Margeson said she believed that the application did not implicate Fisher v. Dover because of the removal of the wraparound porch, which drove some of the additional lot coverage. She said it was rejected in March due to overcrowding and overbulking due to the extension off the house and the construction of the garage. She asked how the project did not create overcrowding or overbulking when it was part of the same application. Attorney Durbin said what was proposed now was a smaller footprint and was smaller in terms of livable space; as for overcrowding structures, he said that would mean that every property in the surrounding area was overcrowding the land and the zoning ordinance was invalid as it applied to that area. He said he rejected overbulking as a rationale for denying any variance request because it didn't speak to any purpose in the ordinance, whereas overcrowding the land did. He said the Board was getting into massing and other issues that were normally considered by the Historic District Commission. He said the applicant was removing everything in the setbacks and expanding but in an area already occupied by structure.

Ms. Feintuch referred to the drawing of the house that was three stories high and long and asked what would happen to her property because of that. She said 4-5 houses in the neighborhood and two-car garages with pavement in front of them leading to the street, but the others did not.

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

## **DECISION OF THE BOARD**

Mr. Rossi said the Board often found themselves in this dilemma where the variance relates to something like lot coverage. He said it seemed to be an underlying inadequacy in the zoning ordinance that didn't give the Board much guidance in terms of factors like massing or architectural design. He said if it was outside the Historic District, the Board didn't have it in their jurisdiction, so it was always a balancing act of what the Board could consider or have control over. He said every time the Board decided a case like this, they were sort of cementing a precedent in terms of

allowing certain things to move forward that had problematic aspects to them in terms of massing and crowding but were still within the confines of the zoning ordinance. He said the standard logic would apply in side yard and rear yard aspects, and looking for existing noncompliance and whether or not the degree of noncompliance was increased or decreased wasn't really adequate for supporting a decision, so having the front yard setback go from 7.5 to 8.5 and the right yard setback from 1.5 and 8.8 to 7 and the building coverage from 33.4 to 33 would normally be within something he would feel comfortable with by saying that it was less nonconforming, but because of the other factors not reflected in the zoning ordinance, he felt that a stricter application of the things within the Board's jurisdiction was warranted. He said he would not support the application.

Vice-Chair Margeson said the primary reason that the Board did not approve the application the first time was not addressed in the current application. She said she toured the neighborhood and found that almost all the lots had houses in the front and a lot of land in the back, and it could alter the essential character of the neighborhood. She said there was a lot of overcrowding and overbulking and she did not see a hardship in putting the extension in the building. She said it brought it more in conformance with front yard setback but decreased the nonconformity by 1.8 feet in the right yard setback. She said she could not support it.

Mr. Rheume said there was a trend in Portsmouth where people were buying properties and tearing down a structure and building something new on it to maximize the living space. He said it made sense due to the lack of inventory and the high prices and interest rates. He said he wasn't at the first meeting but watched the video and was concerned that there was a sense that the applicant had the right to go up vertically, and he disagreed with that. He said the applicant was now giving up a one-story garage, a deck, and part of a porch in terms of coverage, but they were proposing to create technically two stories with big dormers. He said the applicant was allowed to increase the vertical height but that it was still a nonconforming structure. He said the Board was looking at substantial changes and a good-sized addition was asked for, and the only thing going for it was that it was within the setback and it was a corner lot with open space. He said the most affected property on Lincoln Avenue was toward the back end of the property, but he thought it was a major change from having very little outlying structures to a much larger structure. He said he didn't think the Board was obligated to approve it based on the other criteria. Mr. Rossi said the characteristics of the neighborhood argument spoke to the dilemma the Board faced and how they defined the characteristics. He said some argued that it was based on the permitted use of the neighborhood and whether it was in conformance with the usage in that area, and it was, so he felt that was not clear.

*Mr. Rheume moved to **deny** the variance request.* He said there were arguments to be made about whether it should be approved and that he was on the fence about it, but he thought the pendulum was far enough on the denial side.

*Vice-Chair Margeson seconded the motion.*

Mr. Rheume said the application failed the first two criteria because it was contrary to the public interest and did not observe the spirit of the ordinance. He said in theory there was an even trade of total lot coverage, but the nature of the lot coverage proposed was significantly different. He said

the applicant could have a smaller addition that would keep it closer to the 25 percent allowed. He said it was only 8 percent but seemed to take up a lot more room than that, and the overall massing and height had a negative aspect. Vice-Chair Margeson concurred and said she believed that it altered the essential character of the neighborhood and had the potential for other properties immediately surrounding it to do the same thing.

Mr. Rossi said he could not support the motion. He said if the owner lowered the height and came back, he would be asking for the same variance and would run into a Fisher v. Dover problem, and he didn't think that was fair. Vice-Chair Margeson said there needed to be finality in the Board's decisions for the abutters, ordinance, and the applicant. Chair Eldridge said she didn't have a problem with applicants coming back and thought it was important to learn from the process. She said the relief asked for by the applicant was tiny percentages and the setbacks were met, so light and air should not be issues. Mr. Mannle said the application was based on its totality and not on the variance requests and would not invoke Fisher v. Dover. He said the difference between the current application and the previous one was losing the side porch, which was a change.

*The motion to deny **failed** by a vote of 4-3, with Ms. Geffert, Mr. Rossi, Mr. Mattson, and Chair Eldridge voting in opposition.*

*Ms. Geffert moved to **grant** the variances as requested, seconded by Mr. Mattson.*

Ms. Geffert said the zoning ordinance didn't deal with the bulking issue and felt that the Board had to deal with the zoning they had. She said that once the Fisher v. Dover issue was resolved, the requested variances are not contrary to the public interest because the public interest does not manifest and the zoning ordinance doesn't deal with the bulking issue, and the public interest allowed for small dimensional setback items. She said the same logic could be used in observing the spirit of the ordinance. She said granting the variances would do substantial justice, noting that it was difficult to find a new house, so justice was serviced by allowing the applicant to continue to reside in his house and to make necessary changes to support his family. She said granting the variances would not diminish the values of surrounding properties, noting that there competing assessments from a realtor and her spouse and from a neighbor, so since the Board had evidence from both sides, it came down in favor of a neutral. She said literal enforcement of the zoning ordinance would result in an unnecessary hardship. She said it was hard in the current real estate market to find a larger home to accommodate a family. She said the zoning ordinance was only minimally different from what was being asked for, and special circumstances existed and the purpose was a reasonable one. Mr. Mattson concurred and said the application was a more modest one than the previous one. He said the applicant was asking for less variances and it was closer to conforming. He said bulk was not in the ordinance and the addition was within the setbacks, so light, air and privacy were addressed. He said the actual yard setback was for the one-story porch and the hardship was the undersized lot. He said the GRA district was already a zone where 8,500 sf was the norm and it was small, and the applicant's was under 6,000 sf, so it was even smaller and drove the issues of building coverage, which was similar with surrounding properties. He said it was also a corner lot, so that created special conditions where there is no fair and substantial relationship to the property.

Vice-Chair Margeson said she would not support the motion, noting that overcrowding and overbulking were important with respect to setbacks. She said the new structure would be within the setback requirements in the right yard and that it was seven feet previously and was a much more significant structure. She said the garage was currently in that setback at 1.5 and the primary structure was 8.8, and overcrowding and overbulking were what drove those setback requirements. She said hardship is whether there's something inherent in the land, and there was no fair and substantial relationship between the primary purpose of the zoning ordinance and its application to that land. She said financial considerations did not constitute hardship. Mr. Mattson said it was the new bulkhead that was less than two feet tall down to zero feet that was within the setback.

*The motion **passed** by a vote of 4-3, with Mr. Mannle, Vice-Chair Margeson, and Mr. Rheume voting in opposition.*

*At this point in the meeting, Mr. Rheume moved to **waive** the ten o'clock rule and continue with the last item. Mr. Mannle seconded the motion and it was unanimously **approved**, 7-0*

- F. The request of **Paula J. Reid 2003 Revocable Trust (Owner)**, for the property located at **410 Richards Avenue** whereas relief is needed to demolish and remove the existing detached garage and construct a new detached garage and associated drainage improvements, which requires the following: 1) Variance from Section 10.521 to permit a) 3.5 foot right side yard where 10 feet is required, and b) 30% building coverage where 25% is the maximum allowed; and 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 the Assessor Map 112 Lot 10 and lies within the General Residence A (GRA) District. (LU-23-198)

## **SPEAKING TO THE PETITION**

The applicant Paula Reid reviewed the petition. She said the garage was in disrepair and there was also drainage issues, which would be fixed by demolishing the garage and replacing it with one that was larger and would be more aesthetically consistent with the house. Her attorney Chris Wyskiel was present and said his letter to the Board addressed the criteria. He noted a correction that the widening of less than a foot toward the inside of the lot and the height less than 3-1/2 feet was actually 2-1/2 feet as defined by zoning. He briefly reviewed the criteria. [Timestamp 3:37:10]

The Board had no questions. 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**

*Ms. Geffert moved to **grant** the variance for the garage and the variance from Section 10.521 to permit the setbacks required, and also the building coverage and a variance from Section 10.321 to allow a nonconforming building to be reconstructed. Mr. Mannle seconded.*

Ms. Geffert said granting the variances would not be contrary to the public interest because it was in the public interest to deal with drainage, given the climate changes. She said the spirit of the ordinance would be observed, noting that she didn't think the minor variation in lot coverage was outside of it and that adding a garage was like what every other property in the neighborhood did. She said substantial justice would be done because the property owner would avoid an issue that had arisen and there was no contrary interest in preserving the zoning ordinance for the property without the variance granted. She said granting the variances would not diminish the values of surrounding properties, noting that the neighbor had said it was a fine change and there was no evidence that it would diminish anyone's property value in the immediate area. She said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because the property had special conditions of drainage issues and the garage was a hazard because the walls weren't straight, and the specific application of the ordinance provisions to the property would result in an unnecessary hardship. Mr. Mannle concurred and had nothing to add. Mr. Rheume said the Staff Report acknowledged that Section 10.321 was advertised but wasn't needed and not included in the approval of the variance request.

Ms. Geffert **amended** her motion as follows:

*Ms. Geffert moved to **grant** the variance for the garage and the variance from Section 10.521 to permit the setbacks required and the building coverage. Mr. Mannle seconded.*

*The motion **passed** unanimously, 7-0.*

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

There was no other business discussed.

#### **V. ADJOURNMENT**

The meeting adjourned at 10:52 p.m.

Respectfully submitted,

Joann Breault  
BOA Recording Secretary