

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

**7:00 P.M.**

**February 21, 2024**

**MEMBERS PRESENT:** Beth Margeson, Vice Chair; David Rheame; Paul Mannle; Thomas Rossi; Jeffrey Mattson; ML Geffert, Alternate; Jody Record, Alternate

**MEMBERS EXCUSED:** Phyllis Eldridge, Chair

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

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Vice-Chair Margeson was Acting Chair for the evening. She called the meeting to order at 7:00 p.m. Both alternates took voting seats.

**I. APPROVAL OF MINUTES**

**A. Approval of the January 23, 2024 minutes.**

*Ms. Geffert moved to **approve** the minutes, seconded by Mr. Mannle.*

There were a few recommended changes as follows:

On page 4, Vice-Chair Marge was changed to Margeson.

On page 5, the word ‘surmised’ was changed to ‘observed’ to read as follows: “Mr. Rossi observed that there was no quantitative analysis of any kind.”

On page 7, the phrase ‘of substantial increase’ was changed to ‘or substantial increase’ so that the phrase now reads: “no creation of a traffic hazard or substantial increase in the level of traffic congestion”.

On page 9, it was added to Mr. Rheame’s motion discussion that the hardship was his second criterion identified as the reason he thought the petition failed.

On page 11, Mr. Rheame and not Mr. Rossi made the motion and amended motion, and Mr. Rossi seconded.

*The motion to approve the **amended** minutes **passed** unanimously, 7-0.*

## II. OLD BUSINESS

- A. REQUEST TO WITHDRAW** The request of **Giri Portsmouth 505 Inc. (Owner)**, for property located at **505 US Route 1 Bypass** whereas relief is needed to demolish the existing structure and construct a new hotel with a drive thru restaurant which requires the following: 1) Special Exception from 10.440 Use #10.40 hotel where it is permitted by Special Exception; 2) Variance from Section 10.1113.20 to allow parking spaces between the principal building and a street; 3) Variance from Section 10.1113.41 for parking located 1 foot from the lot line where 40 feet is required; 4) Variance from Section 10.575 to allow dumpsters to be located 1 foot from the lot line where 10 feet is required; 5) Variance from Section 10.835.32 to allow 1 foot between the lot line and drive-thru and bypass lanes where 30 feet is required for each; and 6) Variance from Section 10.835.31 to allow 37 feet between the menu and speaker board and the front lot line where 50 feet is required. Said property is located on Assessor Map 234 Lot 5 and lies within the General Business (GB) District. (LU-23-199) **REQUEST TO WITHDRAW**

\*Please note the Variances for this application were denied at the January 23, 2024 Board of Adjustment meeting and the Special Exception was continued to the February meeting pending additional information to be provided by the applicant.

### DECISION OF THE BOARD

Chair Margeson announced a suspension of the rules was needed to allow the applicant to withdraw their application.

*Mr. Mannle moved to **suspend** the rules, seconded by Mr. Rheaume. The motion **passed** unanimously, 7-0.*

*Mr. Mannle moved to **accept** the request to withdraw, seconded by Mr. Rheaume. The motion **passed** unanimously, 7-0.*

- B. REQUEST TO POSTPONE** The request of **Friends of Lafayette House in care of Melanie Merz (Owner)**, for property located at **413 Lafayette Road** whereas relief is needed to construct an attached caretakers unit to the existing residential care facility which requires the following: 1) Variance from Section 10.331 to extend, enlarge, or change the lawful nonconforming use without conforming to the Ordinance; and 2) Variance from Section 10.334 to extend the nonconforming use to a remaining portion of the land. Said property is located on Assessor Map 230 Lot 23A and lies within the Single Residence B (SRB) District. (LU-23-208) **REQUEST TO POSTPONE**

### DECISION OF THE BOARD

Acting Chair Margeson noted that the petition was postponed the previous month and that Ms. Casella said that any postponement would have to be re-noticed.

*Mr. Mannle moved to **postpone** the petition, seconded by Ms. Record. The motion **passed** unanimously, 7-0.*

*Mr. Rossi then **moved to take New Business, Item C, 550 Sagamore Avenue, out of order.** Mr. Mannle seconded. Mr. Rossi recused himself from the discussion.*

[Timestamp 6:25] Acting Chair Margeson said Chair Eldridge and Ms. Casella consulted the City Attorney because the petition was before the Board in October and was denied. She said the appeal was now pending before the Housing Appeals Board and it was like having two applications before the Board at the same time. She said Deputy City Attorney McCourt gave the Board three options: 1) determine that the BOA rules preclude the submission of a second application until the first application is completely final; 2) determine that the application fails the Fisher v. Dover test, and 3) hear the application on its merits and treat it like a new application.

Ms. Geffert asked if the appeal before the Housing Appeals Board was presently stayed. Acting Chair Margeson said it was per agreement between the City and the applicant. She said the concern was that it's stayed and then another application would be coming forward. Ms. Geffert noted that 'stayed' did not mean 'dismissed' and asked what the basis for the stay was. Ms. Casella read the email she received from Attorney McCourt and summarized that he agreed to stay the appeal, which is pending before the Housing Appeals Board, and that he did so with the agreement from Attorney Phoenix that they would only pursue one variance approval to final approval. He said the approval currently pending before the Housing Appeals Board is no longer pending before the BOA and therefore Staff could accept the second application. It was further discussed. [Timestamp 10:45]

[Timestamp 19:42] *Mr. Rheume moved to **suspend** the rules and allow the applicant's representative to discuss the single topic before the Board so that he could provide the applicant's perspective. Ms. Record seconded. The motion **passed** unanimously, 6-0.*

Acting Chair Margeson read the petition into the record. She opened the public hearing.

[Timestamp 20:43] Attorney Tim Phoenix was present on behalf of the applicant and said it was not uncommon for a matter that was denied to be appealed to protect the rights while another less impactful project was brought forward. He said the applicant was stuck until the Board decided on the issue of Fisher v. Dover, and he believed Fisher v. Dover should not be invoked. He said he cleared his position with the City's Legal Department and was told that because he was appealing, it was no longer before the Board but was in the court system. He said if the Board found that Fisher v. Dover did not apply, he would go forward with the application and withdraw the other one.

Mr. Mannle asked if Attorney Phoenix would be willing to withdraw that evening's application until the appeal was done. Attorney Phoenix said it would be a 7-8 month process and that he would

have to confer with his client to about withdrawing. Mr. Mattson said he did not think the Board should postpone the application because it could result in having two applications in the future, even though the applicant had said he wouldn't do that. Attorney Phoenix said they did not want to withdraw and would go forward with that evening's application, whatever the decision.

Acting Chair Margeson closed the public hearing.

*[Timestamp 25:50] Mr. Rheaume moved that the Board proceed with the application on the basis of Attorney's third recommendation that the Board hear the application as it would normally be presented. Ms. Geffert seconded the motion.*

Mr. Rheaume said he understood the Acting Chair's concerns but thought there was a good-faith effort made by the applicant and that the Board could make that more formal by any motion they made that evening, which would make it clear that in the event it passed Fisher v. Dover and the Board accepted the applicant's variance request and approved it, there would be a withdrawal of the other pending case before the Housing Appeals Board. Ms. Geffert asked if the application, including an initial consideration of whether Fisher v. Dover is triggered and depending on that determination, a possible determination of the application may proceed and would not create an issue under Rule Misc. 7 Subsection 4. Mr. Rheaume agreed and said it would not constitute a second application before the Board and that potentially Fisher v. Dover would apply.

*The motion **passed** by a vote of 5-1, with Acting Chair Margeson voting in opposition.*

*Mr. Mannle moved to put the application back in order of the agenda, seconded by Mr. Rheaume. The motion **passed** unanimously, 6-0.*

### **III. NEW BUSINESS**

- A.** The request of **DSM MB II LLC (Owner)**, and **Bruno Fonzo (Applicant)** for property located at **1500 Lafayette Road Unit 6** whereas relief is needed to establish a UPS store which requires the following: 1) Special Exception from use #7.30 consumer service where it is permitted by Special Exception. Said property is located on Assessor Map 252 Lot 2 Unit 6 and lies within the Gateway Center (G2) District. (LU-24-5)

Mr. Rossi resumed his voting seat.

### **SPEAKING TO THE PETITION**

[Timestamp 30:38] Bonita Mulver of 8 Linwood Ln, Stratham NH and owner of the proposed UPS store was present. She said there were 11 other retail spaces nearby and that the Portsmouth Planning Department determined that a special exception was required. She reviewed the criteria and said they would be met.

The Board had no questions.

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

John Matthews said he represented the shopping center and had been involved with the property since the mid-90s. He said he handled most of the leasing and noted that the postal use was at the center once before and that it would be a good use for the shopping center's customers.

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

### **DECISION OF THE BOARD**

*Mr. Rossi moved to **grant** the special exception, seconded by Ms. Geffert.*

Mr. Rossi said it was a use that is allowed in the zoning ordinance by special exception, so it satisfies Criterion 10.232.21. He said it would pose no hazard to the public because it would be a simple operation that's very consistent with others currently in the shopping center and had been in the past, with no hazard presented to the public. He said there would be no detriment to property values, as evidenced by the fact that the property owner's representative felt that this would be a good use within this facility and consistent with its other uses. He said it would not represent a change in the essential characteristics of the area, noting that there was a Fed Ex facility across the highway and a similar shopping center in close proximity. He said granting the special exception would pose no creation of a traffic safety hazard, noting that it was normal consumer traffic which should fit in without much notice or impact on the high volume of traffic going in and out, particularly for the Market Basket and some of the facilities there. He said it would be located far enough away from the Market Basket that he didn't think parking would be problematic for the use of the UPS store, and he saw no impact on municipal services, which satisfied Criterion 10.233.25. He said there would be no change in the building's structure and therefore no impact of increase in stormwater runoff onto any adjacent properties, satisfying Criterion 10.233.26.

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

- B.** The request of **Timothy S. Wheelock and Susan V. Denenberg (Owners)**, for property located at **414 State Street Unit 2** whereas relief is needed to convert a ground floor commercial unit to a residential unit which requires the following: 1) Variance from Section 10.642 to allow a residential unit on the ground floor where nonresidential is required in the Downtown Overlay District; and 2) Variance from Section 10.5A41.10A to allow 806 square feet per dwelling unit where 3,000 square feet is required. Said property is located on Assessor Map 116 Lot 13 Unit 2 and lies within the Character District 4-L1 (CD4-L1) and Downtown Overlay District (DOD). (LU-24-6)

### **SPEAKING TO THE PETITION**

[Timestamp 39:38] The applicant and joint owner Tim Wheelock was present. He said he spent 17 years trying to rent the ground-floor condo unit commercially but found it difficult because all the other condos in the building were residential and there were complaints from those owners about the amount of traffic generated and customers loitering on the front steps when it was recently a therapy office. He explained why it should be a residential condo and reviewed the criteria. He said some of the hardships was that the condo wasn't appropriate for professional use for more than two people at a time and it didn't meet the minimum 3,000 sf per dwelling unit.

Acting Chair Margeson opened the public hearing.

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

No one spoke, and Acting Chair Margeson closed the public hearing.

### **DECISION OF THE BOARD**

*Mr. Rossi moved to **grant** the variances for the application as presented and advertised, seconded by Mr. Rheume.*

Mr. Rossi said granting the variances would not be contrary to the public interest, noting that the public interest in Portsmouth currently was not one that was crying out for additional office space but looking for additional residential space, so by allowing the unit to be used as residential instead of office would be consistent with the public interest. He said it would also meet the spirit of the ordinance. He said it would do substantial justice because there would be no loss to the public that would justify depriving the owner of the use of the property, and it would not diminish the values of surrounding properties, noting that the only evidence presented to the Board was that it would have a positive impact on those values. He said literal enforcement of the ordinance would result in an unnecessary hardship, which related to special conditions and circumstances of the building. He said the Board was really considering two variances, the use variance for residential and the square footage variance, which would normally require a 3,000 sf per dwelling unit. He said therefore that the special conditions of the property must relate to both of those. He said the first instance was in terms of the use, and the intended purpose of the ordinance was to encourage pedestrian-oriented businesses within the Downtown Overlay District (DOD), and since there was a dearth of such businesses in that area, the Board was not violating the spirit of the ordinance because it was consistent with the characteristics of the immediate surrounding neighborhood that such uses are really not prevalent. Regarding the 3000-sf per dwelling unit, he said the special condition of the property was the historic nature and antiquity of it. He said there were no reasonable options for expanding the space from the unit to achieve a 3,000-sf footprint, so that was a special condition and hardship that spoke in favor of the application. He found that the criteria overall were satisfied.

Mr. Rheume concurred. He said the applicant made a good case that the immediate surrounding properties really did not reflect the concept put forward for the DOD, and having this active street life doesn't really work in practice. In this case, he said it felt far more residential than other parts of the DOD. He cited a case a few years back on Chapel St when the Connie Bean Center was

reconditioned and there was a new residential structure built as part of that; he said it was a good argument that that portion of Chapel St had no businesses on it. He said he thought that spoke to the first two criteria that look at the characteristics of the neighborhood. In terms of the lot area per dwelling unit, he said it was an existing structure and that the real change was in 1987 when it was condoized and broken up into five components that made the lot area per unit of the condo a fixed entity. He said although 3,000 sf was required, the current square footage was 968 sf and was being reduced to 806 sf, which wasn't that substantial of a change and in both cases went below what was required. He said it was a reasonable request and did reflect a hardship because the building was subdivided in 1987. Acting Chair Margeson said she would support the petition, noting that she had been vigilant in the past about the DOD being important for the economic vitality of the City and that it was a very intentional zoning provision. She said the ground floor in the DOD should consist entirely of non-residential but that Unit One was residential and was a preexisting nonconforming use, so she thought that was really the hardship.

*The motion passed unanimously, 7-0.*

- C. The request of **Frances E. Mouflouze Revocable Trust of 2015 (Owner)**, for property located at **550 Sagamore Avenue** whereas relief is needed to demolish the existing structure and construct a three dwelling unit building which requires the following: 1) Variance from Section 10.440 Use #1.51 to allow a three dwelling unit structure where it is not permitted. Said property is located on Assessor Map 222 Lot 11 and lies within the Single Residence B (SRB) District. (LU-24-9)

Mr. Rossi recused himself from the petition.

## **SPEAKING TO THE PETITION**

[Timestamp 1:02:30] Attorney Tim Phoenix was present on behalf of the applicant and introduced the applicant's son Ted Alex, project engineer Eric Weinberg, the appraiser Brian White, and the architects Mark Gianniny and Richard Desjardins. He briefly presented the Fisher v. Dover issue. He said the previous application was denied and on appeal, which had to be done because if the Board found that Fisher v. Dover did apply, the applicant could not proceed and would have nothing. He said the applicant did a material change of having one structure instead of two and was only asking for one variance.

[Timestamp 1:09:55] The Board discussed whether Fisher v. Dover should be invoked and decided that it should not. Attorney Phoenix reviewed the petition and criteria. He noted that the applicant could do a 3-lot subdivision with a road and three standalone homes if he wanted to. He said the lot was four times the minimum lot size in the area and that the applicant could accomplish the same functionality by what they proposed. He said the extra units wouldn't be noticeable and that they were in an area that had a confluence of different zoning requirements, so the project would fit in.

[Timestamp 1:23:54] Mr. Rheume asked what the thinking was in positioning the new structures, in particular the barn structure that was so close to the property line, and what options the project

team had. Attorney Phoenix said one of the issues was the closeness of the house near the lot line and that they wanted to give it some space. Mr. Weinberg said they tried to figure out where to put the driveway compared to the existing one. He said it almost met the setbacks on the other side. He said they wanted to balance the open space between the houses and the development area on each side instead of moving it closer north to the house on the opposite side. Mr. Rheaume said they were past the end of the existing house but not by much. Mr. Weinberg said they tried to push it as forward as possible. Mr. Rheaume said the parking requirement was only four spaces and that the applicant would provide a lot more than that. He asked if the applicant would provide parking space in front of the garage for Unit 3. Mr. Weinberg agreed and said there would be two spaces for each unit and additional parking behind the garage bays.

[Timestamp 1:29:20] Acting Chair Margeson said the lot's size was quite large and asked how much square footage of the lot was being built on. Mr. Weinberg said it was about 25,000 sf, which was about 40 percent of the lot. Acting Chair Margeson said it reduced the lot area per dwelling unit by 8,000 sf. Mr. Weinberg said it would be no different than having a 40-acre parcel with a single-family house on it because it was still one lot. Acting Chair Margeson said the size of the lot allowed for three dwellings to go on it when actually it was only 25,000 sf of the lot being built on. Mr. Weinberg said they could have proposed one giant building and used up all the forest area. Acting Chair Margeson asked why the applicant couldn't build a single residence home on the lot. Attorney Phoenix said the hardship was how large the lot was. He said they believed there were special conditions because the lot was four times the required lot size, and considering its overall envelope, he asked why the applicant would want a McMansion that would cover just as much area when he could provide more affordable housing. He noted that the depth of the property was three times its width. He said the primary issue was the lot area per dwelling unit to keep neighbors from being on top of each other and have light and air.

Acting Chair Margeson opened the public hearing.

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

Gerald Duffy of 428 Pleasant Street said he lived on Sagamore Avenue for a few years. He said Portsmouth was experiencing a critical housing problem and that it was the City's role to enable housing construction for a wide variety of residents.

Byron Matto of 17 Field Road said the project was in line with the broader objectives of the City's housing policies and also adhered to the zoning criteria. He explained how the project met each criteria and said the project would alleviate the housing shortage and serve a critical public need.

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

Duncan MacCallum of 536 State Street said there had to be special conditions to constitute a hardship, and the kind of hardship that justified the granting of a variance wasn't the personal circumstances of the property owner but had to be in the land itself. He said there was no hardship.



Linda Brown of 650 Sagamore Avenue said the only thing that changed in the application was that one structure was decreased. She said the traffic would still be a concern and thought the variance request was pure greed to make more money using every inch of the property.

Christana Wille McKnight of 546 Sagamore Ave said the project would directly impact her family and that she would not have bought the house if the proposed three-family condo were there. Paige Trace of 27 Hancock Street said there was no hardship and that the City needed affordable housing for everyone.

Esther Kennedy of 41 Pickering Avenue said the City had zoning laws and she did not see a hardship. She asked that the Board support the people who lived in that area.

Petra Huda of 280 South Street said it was an SRB single-family residence, which meant one unit and not three. She said it would not be consistent with the neighborhood and the SRB District.

Jim Lee of 520 Sagamore Ave said he was a secondary abutter to the project and didn't think it was the right place for it. He said the ordinance said three or four dwelling units could not be built on that lot and a two-family unit could not be built. He explained why the criteria were not met.

Suzan Harding of 594 Sagamore Ave said she didn't feel someone had to devour every little piece of property to build something on it. She said she bought her property to appreciate the peace and quiet and the land behind it and never imagined this project would be built there.

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

Attorney Phoenix said the point was made that the project would take the property out of compliance, which was what every variance did. He said the traffic would go through Planning Board approval. He said there would be fencing and screening to protect the neighbors to the north and south. He said the 3-building coverage was 1,882 sf per unit, including the garage. He said it wasn't about greed and that the zones across the street and their intense uses couldn't be ignored and there was much greater density up the street than what the applicant proposed.

The owner's son Ted Alex of 104 Locke Road, Rye, said the plan was reduced from four to three homes and would allow over half the lot to stay in its natural state. He said it had been about keeping his mother in an assisted living home. He noted that his mother died a few days ago.

Gary Cameron of 110 Field Road called in via Zoom and said there were inaccurate and inappropriate comments made. He said it was never about greed but about allowing his mother-in-law to self-finance her living in her few remaining years with dignity.

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

### **DISCUSSION OF THE BOARD**

[Timestamp 2:29:14] Mr. Rheume said it wasn't about greed but was about the fact that people's properties were one of their major assets and everyone wanted to maximize the value of that asset. He said the Board existed to look at anything related to the ordinance and to look through the criteria to see if an ordinance is being correctly applied to a property. He said there were special conditions that said when zoning is applied to a particular parcel, it might not make as much sense as other parcels, but it came down to the criteria. He said he logically appreciated what the applicant tried to do in coming back before the Board. He said the applicant went back to the original characteristics of the neighborhood by trying to create the single-family home look in the front and putting the additional units in the rear to make it look like there could have been a building there previously. He said what the application came down to was the special conditions of the property and whether the lot was large enough to accommodate three single-family homes and was sufficient reason to allow the one structure being there. He said there was nothing in the previous decision about the Board saying that the present home could not be demolished, but he said it could be and that someone could put a new structure of indeterminate size on the lot. He said the key factor was hardship and the special conditions and whether the size of the proposed structure allowed the Board to conclude that it could be an acceptable use for the property.

Mr. Mattson agreed that the hardship criteria was the most important. He said the lot size in a single-family zone only had to be 15,000 sf and the lot was 62,000 sf, which could fit four single-family homes. Relating to hardship, he said it wasn't only the size of the property but also its shape that affected it and affected how easily it could be subdivided. He said the ordinance did not allow more than one freestanding dwelling on a property, which was partially why the previous project was denied. He said the applicant was only asking for one variance and the single structure resulted in a 94 percent open space, which had an effect of it looking like a single-family home from the street and fitting in with the neighborhood's existing character. He said one could also apply the big apartment buildings across the street that were part of the character of the neighborhood. He said the project had a fair and substantial relationship to the ordinance and preserved light, air, and privacy, it had the 94 percent open space, and the single structure was within the setbacks and met the density requirements. For those reasons, he said the hardship could be met.

Acting Chair Margeson said she could not support the application because it failed on hardship. She said there had been no demonstration by the applicant showing that the property couldn't be used for a single-family residence. She said the characteristics of the neighborhood was intentionally set out by the City, noting that Sagamore Court was the Garden Apartments/Mobile Home District, Tidewatch was a planned unit development, and there was the SRB zone across the street, and a lot of that was because most of the lots were smaller sizes. She said there was a spirit and intent problem but that the application mostly failed on hardship. She said an abutter bought into an area relying on the zoning ordinance and that it wouldn't change except for an exceptional circumstances, and she didn't think the application met that exceptional circumstance.

## **DECISION OF THE BOARD**

*Mr. Mattson moved to **grant** the variance for the application as requested, seconded by Mr. Rheaume.*

Mr. Mattson said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance, and the proposed use would not conflict with the explicit or implicit purpose of the ordinance. He said the way the SRB District was defined, it was 1-3 dwellings per acre, and that was how the 15,000 sf per dwelling was arrived at. He said this project was almost 21,000 sf per dwelling. He said the project must not alter the essential characteristics of the neighborhood. He said in the current project, the structure from the street looked like a big farmhouse with a barn attached. He noted that there were other 3-unit dwellings within the property's proximity. He said the project would not threaten the public's health, welfare, or safety or injure public rights. He also noted that the new design allowed someone to drive forward instead of having to back out on Sagamore Ave, so public safety would be improved. He said granting the variance would do substantial justice because he did not see any harm to the general public outweighing the potential benefit to the applicant to make use of their property and that this type of proposal was much better than a subdivision approach. He said granting the variance would not diminish the values of surrounding properties, noting that the Board heard from a professional appraiser that the previously proposed 4-unit project would not do so, so it was fair to say that a single building with three units would not. He said literal enforcement of the ordinance would result in an unnecessary hardship, meaning that because of the special conditions of the property that distinguished it from other properties in the area, there was no fair and substantial relationship between the general public purposes of the ordinance's provision and the specific application of that provision to the property. He said the general public purposes of the ordinance were to preserve light, air and privacy, and in this situation, that would be maintained because it was entirely within the setbacks and met the density. He said the special conditions of the lot were that it was more than four times the size required in a single residence district and was relatively narrow and deep, and those factors, combined with the fact that it was also in proximity to other zones that allowed great density, created special conditions for the property. He said the proposed use was a reasonable one and that the proposed building would not alter the essential characteristics of the neighborhood and would fit in with the residential purposes of the zoning.

Mr. Rheaume suggested a **stipulation** stating that a building permit will not be issued until such time that the legal status of the BOA's action on October 17, 2023 is resolved. Mr. Mattson agreed.

Mr. Rheaume said if the motion passed, the applicant would be bound on which way they chose to go. He said a concern he had with the barn structure was the open space in the back crowding the house to the front of the property, and he also had concerns with the 576 Sagamore Ave property, which was the most affected from a light and air standpoint. He said nothing that the applicant proposed fell within the required setback for the zone. He said the SRB zone was generous to the amount of buildable area and there was only a 10-ft setback on either side. He said the SRA zone on the other side of the street required bigger lots and was more restrictive on the setback, so in that sense the applicant was within his rights. From a light and air standpoint, he said the most imposing portion of the proposed structure was toward the back, so it came down to hardship. He said the

Board was not responsible to solve the City's housing crisis but was looking at what the property had for characteristics. He said the parcel's size and shape had the ability that if it were subdivided and continued to have the same number of proposed homes, it made more sense to create smaller units more clustered together that preserved the open area in the back of the property, which was a general benefit to property owners, especially Walker Bungalow. He said he knew it was more impactful to the people on the Sagamore Avenue end of the property, but that it made sense overall as a holistic solution. He said the issue of the micro neighborhood v. the macro neighborhood, and he asked if the Board was considering it against the adjacent properties or if it more broadly included a larger area around the property. He said there was no distinct requirement that the Board had to follow, but there was a fair amount of variety in the overall neighborhood. He said what was proposed would not feel out of character of that overall neighborhood, so in that more macro sense, he thought it met the criteria and recommended approval.

The **amended** motion was as follows:

*Mr. Mattson moved to **grant** the variance with the following **condition**:*

- *A building permit shall not be issued until such time that the legal status of the BOA's action on October 17, 2023 is resolved by the appeal to the Housing Appeals Board.*

*Mr. Rheaume seconded. The vote **failed** by a tie of 3-3, with Mr. Mannle, Ms. Record, and Acting Chair Margeson voting in opposition.*

[Timestamp 2:52:39] The Board discussed whether they should move to deny or move to approve with different criteria. Acting Chair asked for a motion to deny.

*Mr. Mannle moved to **deny** the variances on the grounds of hardship. Ms. Record seconded.*

Mr. Mannle said he appreciated what the applicant did to improve the project but was bound by the rules and that he didn't see the hardship in the property. He said a special condition did exist because it was a bigger lot, but he wouldn't say it was narrow, considering that it had a 140-ft width. Ms. Record agreed and said she didn't see what could be there to influence what the applicant was proposing to put there and that she didn't see the hardship.

*The motion **failed** by a tie vote of 3-3 with Ms. Geffert, Mr. Rheaume, and Mr. Mattson voting in opposition.*

Mr. Mattson said Mr. Mannle noted the special conditions of the property by addressing the narrowness of it. He said it was 434 feet deep, where a typical lot would only be 100 ft deep, so even if it was 140 ft wide, it was more than four times as deep. He said if one considered a square v. a rectangle, it was an elongated narrow-shaped parcel. Mr. Mannle said it was a rectangle of 140 x 280 ft. Mr. Rheaume said he empathized with the makers of the motion and that he mostly struggled with the hardship as well, but within the context, he thought it made sense. Acting Chair Margeson said the applicant could take whatever comments they wanted to use for an appeal if necessary.

- D.** The request of **Cynthia J. Walker and Michael Walker (Owners)**, for property located at **46 Willow Lane** whereas relief is needed to demolish the existing shed, construct an addition to the primary structure and construct a detached garage which requires the following: 1) Variance from Section 10.521 to allow: a) 6.5 foot right yard where 10 feet is required; b) a 2 foot front yard where 15 feet is required; and c) 28% building coverage where 25% is the maximum; 2) Variance from Section 10.571 to allow an accessory structure to be closer to the street than the primary structure; 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 133 Lot 18 and lies within the General Residence A (GRA) District. (LU-24-8)

### **SPEAKING TO THE PETITION**

[Timestamp 3:02:20] Applicants Cynthia and Michael Walker were present to speak to the petition. Ms. Walker reviewed the reasons why they wanted to build a one-car garage and place it in the proposed location. She said they also wanted to extend the back of the house by six feet as part of the addition plan. Mr. Walker reviewed the criteria and said they would be met.

Mr. Rossi said the only part of the project that perplexed him was the placement of the garage. He agreed that there was a lot of open space around that corner of the property but was concerned that pushing the garage within two feet of the lot just because the owners of 50 Willow Lane had no plans to expand their structure's footprint felt like a race of who got there first. He said if there was a 2-ft setback allowed for the garage, the light and space issues would be more difficult for Willow Lane in the future if they wanted to build close to that lot line. Mr. Walker said there was an existing fence on the back that he was going to continue for 40 feet, so all that would be seen from the neighbor's lot would be the top of the garage. Mr. Rossi asked why the garage couldn't be moved back and attached to where the addition was being built. Mr. Walker said the original plan had it attached just on one corner, but they had to ensure that the turn could be made into the garage. He said the other option was to put it further down, but that even went closer to the other house to the left. Mr. Walker said it would preserve a private yard space and let more sun into the house. He said the neighbor couldn't add onto the space between the two houses, given the confines of the property. Ms. Clark said the owner of 50 Willow Lane had no objection and saw the logic of placing the garage there. She said it would also minimize the amount of pavement. Acting Chair Margeson said there wouldn't be a turning problem if the garage was placed next to the addition. Mr. Walker said they wanted to put a gate between the garage and the house to have a nice hardscape behind the house. He said if they pushed it back, they'd have to push it all the way back into the garage and the door would face the left, so the garage and door would have to be wider.

Acting Chair Margeson opened the public hearing.

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

No one spoke, and Acting Chair Margeson closed the public hearing.

## DISCUSSION AND DECISION OF THE BOARD

Mr. Rheume said he had been concerned about the 2-ft setback where 15 ft was required, which he felt was a significant ask, but after the discussion he thought it was okay. He said any proposal to turn the garage 90 degrees and put it up against the house or close to the house was a concern, though. He said the applicant could put the garage further, but then impervious surface and more pavement would be added and there wouldn't be much more light and air. He said the neighbor was okay with the proposal but the Board had to look out for concerns of future owners. He said the application had unique circumstances and the garage was a modest request.

*Mr. Rheume moved to **grant** the variances for the application as requested and advertised, seconded by Mr. Mannle.*

Mr. Rheume said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said the 6-1/2 ft off the property line to the back of the property was an extension of the existing line for the existing home, so there was no public interest or change in the essential characteristics of the neighborhood that would be observed. He said a single-car garage was common in the neighborhood, although not in that specific area. He said what was being asked for was somewhat congruent with the overall neighborhood where garages are tucked into locations that are closer than the Board would normally have for setbacks in other neighborhoods. He said granting the variances would do substantial justice because he didn't see anything in the public purposes that the arrangement the owner was asking for would be really perceived. He said the single-car garage and its placement was nothing that would have a negative impact on the public. He said it would not diminish the values of surrounding properties because the applicant was only asking for a small extension off the back of the property, and overall coverage that was slightly greater than what was required. He said the single-car garage was a modest request and its impact on the neighboring property would not be excessive. He said the hardship was that the plans to expand the existing home were not insubstantial but a logical direction that was necessary to expand the home. As to the current distance of the current home and where the expansion needs to be, he said there was no great way to add the garage on as an extension to that proposed expansion of the property and that it had to be in the orientation that it was in. He said putting it anywhere else on the property would add only a minimal benefit in terms of setback to the neighboring property with a lot of additional impervious surface and a loss of open air for the other portions of the property, so he thought it was a reasonable use. Mr. Mannle concurred. He said when he drove by the property, he immediately recognized the problem and that he had no issue with the garage being in the proposed location.

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

- E. The request of **Joel and Jessica Harris (Owners)**, for property located at **2 Monroe Street** whereas relief is needed to construct an enclosed breezeway, landing and staircase which requires the following: 1) A Variance from Section 10.521 to allow 27% building coverage where 25% is the maximum allowed; and 2) Variance from Section 10.516.10 to allow a 10-

foot front yard where 12 feet is required by the front-yard exception for existing alignments. Said property is located on Assessor Map 152 Lot 8 and lies within the General Residence A (GRA) District. (LU-23-154)

### **SPEAKING TO THE PETITION**

The applicant Joel Harris was present and said it was an after-the-fact variance request. He explained that he was before the Board two years ago and got a variance for a breezeway but then decided to enclose it. He said the contractor told him it wouldn't be an issue, but a 3-ft landing had to be added that pushed the project two feet closer to the property line than what was allowed. He reviewed the criteria and said they would be met.

Mr. Rossi asked the name of the contractor. Mr. Harris said it was Daryl Cook from Trio Construction but that he thought the contractor had a new company. Mr. Rheume asked how the nonconformance came to the attention of the Planning Department. Mr. Harris said he received a stop work order and then discussed it with the Planning Department. Mr. Rheume asked if the stop work order was generated from a building inspection and Mr. Harris agreed.

Acting Chair Margeson opened the public hearing.

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

No one spoke, and Acting Chair Margeson closed the public hearing.

### **DECISION OF THE BOARD**

Mr. Rossi said if it had been part of the plan originally, it would not have affected the Board's decision to approve the previous variance. He said the change in lot coverage was de minimis and should present no problem, and it was clear to him that it was not the intention of the homeowner to work outside of the approved variance and outside of the zoning ordinance.

*Mr. Rossi moved to **grant** the variances for the application as presented and advertised, seconded by Mr. Mannle.*

Mr. Rossi said the impact of the project would make no change to the characteristics of the house and would fit within the overall characteristics of the neighborhood, so he believed that the first two criteria of not being contrary to the public interest and observing the spirit of the ordinance were satisfied. He said substantial justice would be done, particularly since it was a retroactive variance that the Board was granting and would be a significant inconvenience to the property owner if the Board were to deny the variance. He said therefore there would have to be a commensurately significant benefit to the public in doing that, and he didn't see that as a possibility, so that criterion was also met. He said granting the variances would not diminish the values of surrounding properties because the project would fit in perfectly with the surrounding properties and would not alter the characteristics of the overall construction project, so he could not see it having an impact

on property values. He said literal enforcement of the ordinance would result in an unnecessary hardship. He said the hardship was special conditions of the property that affects the variance being applied for, and in this case the condition is that the construction had already been completed and there was no good reason to change it, so he believed that the hardship criteria was met. Mr. Mannle concurred and noted that if all the issues had been brought up in the original application, he had no doubt that it would have been approved.

Acting Chair Margeson said she would support the motion but had a problem with after-the-fact variance requests. She said she would take the applicant's word that it was the contractor's problem. She agreed with Mr. Rossi that if it had been part of the original application, it would have passed. She said the variance request was minimal and thought the experience had been painful enough that it would act as a deterrent for any future after-the-fact variance requests. Ms. Geffert agreed that there was an unnecessary hardship but for precedent purposes, she didn't want the case for hardship to be that someone bungled the construction and created a hardship. She said she felt that the special condition was that there was no sidewalk and no street, so it was an unusual lot in that way. She said once that was acknowledged, getting closer to the front of the yard was an irrelevancy for this property because of its special characteristics, so there was no fair and substantial relationship between the public purpose of the ordinance, which was a real setback from the public space on this property due to the odd frontage that it has.

*Mr. Rossi said he would **amend** his motion to include Ms. Geffert's comments.*

Mr. Rossi said he thought the Board was seeing too many after-the-fact variances lately and that he hoped contractors in Portsmouth understood that it was public information, and while it wasn't the Board's purpose to keelhaul anyone who made a mistake, he thought it was important for contractors to understand which contractors are able to comply with the zoning ordinance and which ones are unable due to lack of knowledge of whatever the case may be. He said that was why he asked for the contractor's name. Mr. Rheaume said it might also be reflective of the building inspectors being more sensitive to some of the Planning Department's requirements and that it could be a combination of both things Mr. Rossi agreed and said he didn't mean to imply bad intent on anyone's part, but he felt that some contractors seemed to be better at it than others.

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

#### **IV. ADJOURNMENT**

The meeting adjourned at 10:39 p.m.

Respectfully submitted,

Joann Breault  
BOA Recording Secretary