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

7:00 P.M. May 21, 2024

**MEMBERS PRESENT:** Phyllis Eldridge, Chair; Beth Margeson, Vice Chair; Members David

Rheaume, Thomas Rossi, Paul Mannle, Jeffrey Mattson, Thomas

Nies; and Jody Record, Alternate

**MEMBERS EXCUSED:** ML Geffert, Alternate

ALSO PRESENT: Stefanie Casella, Planning Department

## I. APPROVAL OF MINUTES

A. Approval of the April 16, 2024 and April 30, 2024 meeting minutes.

The April 16 and April 30 minutes were approved as amended.

The **April 16** minutes were amended as follows:

On page 2, last paragraph, the word 'for' in the second sentence was changed to 'or', so the sentence now reads: "She thought the rules said if the motion to grant a variance or a special exception resulted in a tie vote, the resulting decision is denial unless a subsequent motion is made that receives at least four affirmative votes."

On page 7, the end of the first paragraph, the phrase "it would be on an existing lot that was already nonconforming" was changed to "it would be on an existing lot that was dimensionally nonconforming." (He noted that the structure was nonconforming and not the use).

On page 9, first sentence of the top paragraph, the words 'that was the general character' was changed to "that would alter the general character", so the sentence now reads: "He did not think there was anything in the petition that would alter the general character of the area and he believed it satisfied Sections 10.233.21 and .22."

The **April 30** minutes were amended as follows:

On page 5, first major paragraph, second sentence, the phrase "back side of the lot" was changed to "left side of the lot", so that the sentence now reads: "He said the applicant presented a decent

rationale as to why the rear addition had to be on the left side of the lot, but he was still concerned about the front yard setback because it was a significant deviation from what was already there."

## II. OLD BUSINESS

A. The request of Kerrin J Parker Revocable Trust of 2012 (Owner), for property located at 86 Haven Road whereas relief is needed to construct an addition to the existing structure which requires the following: 1) Variance from Section 10.521 to a) allow a 7.5 foot front yard where 10 feet is required by front yard averaging; b) to allow a building coverage of 26% where 20% is allowed; and 2) Variance from Section 10.321 to allow of 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 206 Lot 27 and lies within the Single Residence B (SRB) District. (LU-23-192) \*The Board will reopen the public hearing to accept new information.

Mr. Nies moved to suspend the rules and accept new information from the applicant. Mr. Rossi seconded. The motion **passed** unanimously.

## SPEAKING TO THE PETITION

[Timestamp 7:39] Attorney Derek Durbin was present on behalf of the applicant. He explained that the reason they were back was due to the Board's concern at the previous meeting that the previous front yard setback was shown as nine feet and the existing was 12 feet. He said a new surveyor was hired and found that the proposed front yard setback is 7.7 feet instead of nine feet, and the existing front yard setback was also 7.7 feet. He said it was also determined that the building coverage was overcalculated, which erred in the applicant's favor. He said it was revised from 29 percent to 26 percent. He reviewed the petition.

Mr. Nies said the drawing showed that much of the porch addition was probably over 10 feet from the property line. Attorney Durbin said it jogged back and was just over 10 feet, so the small portion extended into the 10-ft setback, with the greater portion just outside of it. Mr. Nies asked if the house next door had a 5-ft setback, and Attorney Durbin agreed.

Attorney Durbin then reviewed the criteria. The Board had no further questions.

## SPEAKING IN FAVOR OF THE PETITION

Ed St. Pierre of 15 Marriot Drive said he was in favor of the petition.

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

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

## **DECISION OF THE BOARD**

Mr. Rossi moved to **grant** the variances as presented and advertised. Mr. Mannle seconded.

[Timestamp 20:35] Mr. Rossi said that most of the addition of the porch was in an area that extends beyond the southeastern terminus of Haven Road and it's not possible that it would encroach upon a roadway in any substantial way. He said granting the variances would not be contrary to the public interest or the spirit of the ordinance because there was no public interest in maintaining the setback in a general area that is not a roadway. He noted that the requested dimensional variances for the porch were really de minimis vs. the current conditions of the property and would not substantially change the degree of nonconformance of the structure; therefore, there would be no loss to the public that is relatable to the changes being requested. He said granting the variances would not diminish the values of surrounding properties because the other nearby properties had similar if not lesser setbacks from the front lot line. He said the property was also surrounded on two sides by public land that is part of the school system and there was no possibility of impacting the value of that property. He said the hardship of the property was its irregular shape and its location relative to the empty lots that are part of the school system, so due to those unique characteristics, there is no relationship between the purposes of the ordinance, and denying the variances would not serve the purposes of the ordinance, so it satisfied the criteria that literal enforcement of the provisions of the ordinance would result in unnecessary hardship. Mr. Mannle concurred and had nothing to add.

Mr. Nies said the Board expressed their concern at the previous meeting about how close it might be to the sidewalk. He said the drawing made it clear that it was not any closer than it was before, and much of it was much farther from the sidewalk than many of the houses on Haven Road, so he did not think that concern was valid any longer.

*The motion passed unanimously, 7-0.* 

**B.** The request of **Atlas Commons LLC (Owner)**, for property located at **581 Lafayette Road** whereas relief is needed for after-the-fact installation of an awning sign which requires the following: 1) Variance from Section 10.1251.20 to allow a 32 square foot awning sign whereas 20 square feet is allowed. Said property is located on Assessor Map 229 Lot 8B and lies within the Gateway Corridor (G1) District. (LU-24-1)

## SPEAKING TO THE PETITION

The applicant was not present.

## **DECISION OF THE BOARD**

Mr. Rossi moved to **postpone** the petition to the May 28 meeting, seconded by Mr. Nies. The motion **passed** unanimously, 7-0.

C. 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 10.835.32 to allow 5 feet between the lot line and drive-thru and bypass lanes where 30 feet is required for each; 3) Variance from Section 10.835.31 to allow 18 feet between the menu and speaker board and the front lot line where 50 feet is required; 4) Variance from Section10.5B22.20 to allow up to 60 feet in building height within 50 feet of the street right-of-way line whereas up to 45 feet is permitted; 5) Variance from Section 10.5B34.70 to allow up to 60 feet in building height whereas 50 feet is permitted; 6) Variance from Section 10.5B34.60 to allow a 30 foot setback for a small commercial building whereas a maximum of 20 feet is permitted; 7) Variance from Section 10.5B33.20 to allow less than 75 percent front lot line buildout whereas a minimum of 75 percent is required for commercial buildings. Said property is located on Assessor Map 234 Lot 5 and lies within the Gateway Neighborhood Corridor (G1) District. (LU-24-44) **REQUEST TO WITHDRAW** 

## **DECISION**

The petition was withdrawn by the applicant.

#### III. NEW BUSINESS

A. The request of Ryan Leibundgut (Owner), for property located at 137 Walker Bungalow Road whereas relief is needed to demolish the front deck and construct a new deck on the front of the existing home which requires the following: 1) Variance from Section 10.521 to allow a 20 foot front yard where 30 feet is required; 2) Variance from Section 10.321 to allow of 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 202 Lot 4 and lies within the Single Residence B (SRB) (LU-24-10)

## **SPEAKING TO THE PETITION**

[Timestamp 27:47] The applicant Ryan Leibundgut was present to review the petition. He said he bought the house last summer and that the front of the house had an unfinished dormer. He said the front deck was also problematic and needed to be demolished. He said he would drop the old porch back half a foot farther from the road and extend it across the front of the house. He reviewed the criteria and said they would be met.

[Timestamp 32:02] Mr. Rheaume said the Board generally looked at the relative distance of some of the neighboring properties and homes, and he asked the applicant if he would be in alignment with the characteristics of the neighborhood. Mr. Leibundgut said the porch wouldn't look like it was any closer to the road. Mr. Rheaume noted that the neighbors across the street were situated far from Walker Bungalow Road. Vice-Chair Margeson verified with Ms. Casella that a wetland conditional use permit was needed because the entire lot was within the 100-ft buffer. The applicant said he was planning to apply for one after the variance approval.

Chair Eldridge opened the public hearing.

## SPEAKING TO, FOR, OR AGAINST THE PETITION

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

## DISCUSSION OF THE BOARD

[Timestamp 34:34] Mr. Rossi said he passed by the property frequently and thought the proposed changes were very much in keeping with the kinds of changes and beautification happening on Walker Bungalow Road in general. He said the project was quite fitting for the property. Chair Eldridge said the neighborhood was eclectic, with houses that were set up quite differently, and nothing that the applicant would do would be that different. Mr. Rossi said the project was an ideal type because it modernizes the house and makes it more livable and addresses a structural issue in regard to its integrity for water but would not create a massive new structure. Mr. Nies said it looked on the property map like the house was closer to the street than the other houses but that it didn't matter in this case because the other houses were set so far back that the neighbors wouldn't notice the change or the fact that the applicant was widening his porch.

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

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

[Timestamp 36:27] Mr. Mannle said he drove by the site and thought the request was minimal because it would not change the current setback. He said the 30-ft setback was problematic on that road but it was more of a rural setting than a semi-urban one. He said the houses were diverse and the applicant wasn't really changing anything but just extending the front of the house to have a more presentable street presence. Referring to Sections 10.233.21 and .22, he said granting the variances would not be contrary to the public interest because the public didn't have much interest in the porch and it would observe the spirit of the ordinance. Referring to Section 10.233.23, he said granting the variances would do substantial justice because nothing would really change. Per Section 10.233.24, he said the values of surrounding properties would not be diminished and most likely would be improved. Per Section 10.233.25, he said literal enforcement of the provisions of the ordinance would result in unnecessary hardship because the property has special conditions that distinguish it from other properties in the area, and owing to those special conditions, a fair and substantial relationship does not exist between the general public purposes of the ordinance's provision and the specific application of that provision to that property, and the proposed use is a reasonable one. Mr. Mannle said enforcing the ordinance would be a great hardship for the applicant, noting that the applicant was not changing anything other than expanding the porch length of the house for a better street aesthetic. Mr. Rossi concurred and had nothing to add.

*The motion passed unanimously, 7-0.* 

**B.** The request of **John C. Wallin** and **Jeanine M. Girgenti (Owners),** for property located at **5 Cleveland Drive** to amend the Variances granted on July 18, 2023 to install a 6-foot fence along the primary and secondary front of the property to include the following: 1) Variance from Section 10.515.13 to allow a 6 foot fence to be installed on top of a 3.5 foot tall retaining wall to create a total structure height of 9.5 feet where 4 feet is allowed. Said property is located on Assessor Map 247 Lot 74 and lies within the Single Residence B (SRB) District. (LU-23-92)

## **SPEAKING TO THE PETITION**

[Timestamp 40:26] The applicants John Wallin and Jeanine Girgenti were present. Ms. Girgenti said they previously received permission from the Board to install the 6-ft fence for the inground pool. Their landscaper then said the wall would not be secure enough for the patio, so an Allen Block wall was installed instead. She said they were then informed by the City that the wall was a change from the original variance and were asked to stop the work. She said they were back for approval to install the 6-ft fence and she reviewed the criteria.

[Timestamp 47:40] Mr. Nies said he wasn't at the first meeting and asked if there was a significant difference in the location of the fence between what was approved last year and what was now proposed. Ms. Girgenti said there was not. She said that the Board previously agreed that the fence could be placed at the height of the pool, so the wall did not change where the fence would be located. Mr. Wallin said the wall was below the yard level and was not visible from the street. Mr. Nies said the new picture of what was proposed showed that the proposed fence would be behind the Allen Block wall. He asked if there was a plan for linkage between the wall and the fence. The applicant said there was not. Mr. Nies concluded that the plan was to put a fence some distance between the retaining wall that was a separate structure, and the applicant agreed.

[Timestamp 49:40] Vice-Chair Margeson said she viewed the property and saw that the Allen Block wall was very visible from the streetscape and she did not see any other fences in the area. She asked if the applicant considered using bushes to provide streetscape for the pool. Mr. Wallin said they previously had a plan to landscape the yard but the City asked them to stop the fence installation, and the landscapers said that the rest of the dirt in the backyard should be leveled with the fence and that everything should be planted after that. He said there would be landscaping between the wall and the street and between the fence and the wall. Vice-Chair Margeson said the fence ordinance was meant to prevent a blocked-off or walled look. She said there was a taller fence behind the Allen Block wall on an elevated part of the property six feet from the grade, which concerned her. Ms. Girgenti said the height of the property didn't change, even though the wall was installed. She said there was only a 7" difference because one step of the deck was lost, and the wall only made it look like the property was raised. She said the fence would go in the same location as previously requested. Mr. Rossi asked how far the fence would be set back from the retaining wall. Ms. Girgenti explained that the pool was rectangular and the wall came out like a vee to the pool. She said the fence would go at the middle of the vee and would be four ft inside of the wall at the smallest part of the vee. She said it would be ten feet at the biggest opening of the vee. Mr. Rossi concluded that it would not look like one continuous structure.

[Timestamp 53:58] Mr. Rheaume asked Ms. Casella why the property line the applicant's home shared with the neighboring home was considered the left side yard and not the right. Ms. Casella said Cleveland Drive drove the address, so that was the primary front. She said the City looked at it as having technically three lot lines: Cleveland Drive was the primary front, Taft Road was the secondary front, and the neighboring lot line was the left side yard. Mr. Mattson asked how far from the retaining wall the fence would need to be to not be considered the fence height plus the retaining wall height. Ms. Casella said the reason a variance was triggered was because it was different than what the original application proposed, and it was also at one point within three feet. She said when the City measured grade from existing to proposed, it is five feet out from that, so because it was within that three feet, it triggered going down to the bottom of the wall. She said when there are fences on top of retaining walls, the City looked at it as an entire structure height, even if the proposed is below to the top, so it would read as 9-1/2 feet. Mr. Nies said it seemed that the fence was not on top of the retaining wall, as the City memo indicated, so it was unclear why it was being treated as one structure and not two. According to the applicant, he said the nearest point is four feet away from the retaining wall. Ms. Casella said the definition of existing grade or average grade plane explained how to measure grade plane on a variable surface and that it was five feet out at varying degrees. She said the primary aspect was that, from the bottom of the wall to the top, it was different than what was originally proposed, so the applicant had to return. It was further discussed.

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. Nies questioned why the applicant needed a new variance. He said the proposed fence is in the same location and is the same height as what was previously approved and it is not connected to the retaining wall to form one structure, so the height of the two should not be combined. Staff explained that the project was significantly changed by the addition of the retaining wall from what was previously approved and so needed to be reauthorized.

Mr. Rossi moved to **grant** the variance for the petition as presented and advertised, seconded by Mr. Nies.

[Timestamp 1:01:40] Mr. Rossi said that the Board was looking at a variance to approve something they already approved, which was the fence at this height on this property, and the reason for the variance request is that there was a change in the grade past the retaining wall, and that change brought the ground level in that area closer to street level, which stimulated an interpretation by the Planning Department that a new variance was needed. However, because the height of the fence is basically identical to what was approved previously, and because the fence is visually set back from the retaining wall, he said it will not appear as a monolithic structure any higher than what the Board approved in the past. He said granting the variance would not be contrary to the public

interest, especially having the fence at this height. He said it would serve a legitimate purpose for securing the pool against accidental access, especially by minors. He noted that pool drownings are a substantial cause of mortality in children and it serves the public interest to have a secure fence around the pool area. He said granting the variance would do substantial justice because of the location of the lot and the lack of impairment of any valuable sight lines. He said there was no public interest that would be served by denying the owners the opportunity to build the fence. He said it would not diminish the values of the surrounding properties, noting that providing a reasonable screening of pool paraphernalia including the pool's mechanical units would preserve the property values of the surrounding properties. He said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. He said the hardship of the property as it relates to this variance is the change in the grade that has resulted in a technical change in the measurement of the height, but the change of the grade really does not change the relative height of the fence vs. street level and vs. the surrounding properties, so that is a unique characteristic of the property, and because of that, there is no relationship between denying this variance that had already been approved vs. the current conditions. Mr. Nies concurred. He said the special conditions are clearly the grade and he didn't think the pictures did it justice. He said the way the property increased in back in height is really a condition that makes it difficult to construct a fence that provides privacy and safety without having it relatively high from the street, and the fence's height hasn't changed since the last variance was granted.

[Timestamp 1:06:13] Vice-Chair Margeson said she would not support the motion because she thought it was a significant change. She said a person was only allowed to have a 4-ft fence, and the combined total was nine feet. She said the issue was that it is a secondary front yard and there is a construction of a fence around that entire secondary front yard, which is against the spirit and intent of the ordinance. She said the fence ordinance was meant to keep things from being walled off. Mr. Rheaume said he was on the Board when the requirement was added to the ordinance and, prior to that, they had no requirement for fence height. He said most homes in Portsmouth had a tall fence up along a sidewalk or close to the property line. He said one of the property's hardships was that it had two front yards and no rear yard, and the applicant had to choose a side of their house to be the back yard of their property. He said Mr. Nies noted the contour issues and the fact that the neighboring properties were up on a bit of elevation themselves, which added to the applicant's case. He said the privacy element was important as well as the safety requirement. He said the fence would be set back fairly far from the road that had no sidewalk and was more of a driving than a pedestrian area. He said it was still within the spirit and intent of the ordinance when it was enacted several years ago. Chair Eldridge agreed and said she would support the motion.

The motion passed by a vote of 6-1, with Vice-Chair Margeson voting in opposition.

C. The request of Edmund R. St. Pierre (Owner), for property located at 15 Mariette Drive whereas relief is needed to create a second driveway in front of the existing garage which requires the following: 1) Variance from Section 10.1114.31 to allow two driveways on a single lot where only one is allowed per section 3.3.2.3 of the Site Review Regulations. Said property is located on Assessor Map 292 Lot 167 and lies within the Single Residence B (SRB) District. (LU-24-57)

#### SPEAKING TO THE PETITION

[Timestamp 1:10:47] The applicant Edmund St. Pierre was present to review the petition. He distributed photos and other documentation to the Board. He reviewed the petition in detail and the criteria and said they would be met.

[Timestamp 1:24:11] Vice-Chair Margeson asked if the bench shown on the existing conditions photo was where the bus stop was. Mr. St. Pierre agreed. Vice-Chair Margeson said she recognized that the lots were involuntarily merged but asked where the paper street was. Ms. Casella explained that it was Parcel One and that it was one lot now. She said the parcel used to be a separate lot for the paper street, which was merged into Parcel Two. Vice-Chair Margeson said the deed restriction noted that no structure could be built on Parcel One that was merged on Parcel Two unless it was an accessory to the one on Parcel Two.

Chair Eldridge opened the public hearing.

## SPEAKING TO, FOR, OR AGAINST THE PETITION

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

## **DECISION OF THE BOARD**

Vice-Chair Margeson moved to **grant** the variance for the petition as presented and advertised, seconded by Mr. Rheaume.

[Timestamp 1:26:50] Vice-Chair Margeson said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. She said the spirit and intent of the ordinance is not to have multiple driveways on one lot, but the applicant's case was an exception because of the lot's special conditions, and she believed it was acceptable. She also noted that the plan was the preferred one by the City's traffic engineer as opposed to the other one and it was the traffic engineer's professional opinion, so she took that into consideration. She said substantial justice would be done because there was no benefit to the public that is outweighed by a loss to the applicant. She said the public would not be harmed at all and would not lose anything by the property having two driveways on it. She said granting the variance would not diminish the values of surrounding properties, noting that the Board received no testimony from the public and there was another property in the immediate area that had a double driveway on it. She said the property has special conditions that distinguish it from others in the area, and owing to those special conditions, a fair and substantial relationship does not exist between the general public purposes of the ordinance and the specific application of that provision to the property, and the proposed use is a reasonable one. She said the property has special conditions due to an involuntary merger, and as part of that merger, there is a deed restriction that says that a structure cannot be constructed on one of the lots, the part of the lot that is now one lot that has the garage on it and that is not an accessory to the house that's on the other part of the lot. She said there was no other property in the area that has those special conditions. She said the part of the property that will need the second driveway

leads to an existing garage, and the proposed use is a reasonable one because a driveway is needed to access an accessory garage to a property. Mr. Rheaume said he thought it was in keeping with the spirit of the ordinance and the overall characteristics of the neighborhood, which had a scattering of driveways in different locations. He said the applicant provided good evidence in terms of the City's potential concern of the driveway going into the intersection. He said there were other driveways that go right into the intersection or close to it. He said he agreed with the City's traffic engineer assessment. He said there was a low volume of traffic going through and the intersection itself was wide open, with large curves and good sight lines, which reduced some of the concerns with vehicles entering and exiting into the intersection. Relating to hardship, he said the applicant benefited, due to the two parcels and a former paper street, and the structure was quite separated from the rest of the house. He said the house had its own internal garage but was on the opposite side of the lot, so the two driveways would be far apart and the perception would be different than two driveways being close together on the lot.

*The motion passed unanimously, 7-0.* 

**D.** The request of **Elizabeth M.** and **Torben O. Arend (Owners)**, for property located at **1 Rockaway Street** whereas relief is needed to construct a porch and mudroom onto the front of the existing structure which requires the following: 1) Variance from Section 10.521 to allow a 24 foot front yard where 30 feet is required. Said property is located on Assessor Map 230 Lot 11 and lies within the Single Residence B (SRB) District. (LU-24-46)

## **SPEAKING TO THE PETITION**

[Timestamp 1:33:37] Chris Crumpet of CWC Design was present on behalf of the applicant and reviewed the petition. He reviewed the criteria and said they would be met.

The Board had no questions, and 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. Rheaume moved to **grant** the variance for the petition as presented and advertised, seconded by Mr. Mattson.

Mr. Rheaume said normally this would cause some concern in the sense that the home was a fully compliant one and the applicant was requesting a variance in the front yard setback that complied to the ordinance, but the overall circumstances met all the criteria. He said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said the applicant made a good argument that the 30-ft setback would be consistent with how the other

properties in the micro neighborhood are aligned relative to their property lines up against the assortment of streets. He said it would not present anything that looks out of place with the character of the neighborhood. He noted that it was the only house on that side of the street and it would be consistent. He said granting the variance would do substantial justice. He said the applicant was adding a modest addition to the home and the only enclosed portion would be a 9'x6' mudroom, otherwise it was an open porch area that wasn't substantial and aligned with the major front facade of the house. He said there was no public interest that would outweigh the applicant's benefit. He said granting the variance would not diminish the values of surrounding properties. He said he did not see any impact to property values in the micro neighborhood. He said the street was very short and the applicant had an oddly shaped lot, but the home was placed in a logical location on the lot, and any expansion to provide a porch would bring it closer to Rockaway Street. He said the request was modest and thought the hardship requirement was met due to those special conditions and the small unique nature of the micro neighborhood.

Chair Eldrige noted that a letter was received by the Board in support of the project.

*The motion passed unanimously, 7-0.* 

## IV. ADJOURNMENT

The meeting adjourned at 8:45 p.m.

Respectfully submitted,

Joann Breault BOA Recording Secretary