

**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, 2018*

MEMBERS PRESENT: Chairman David Rheume, Vice Chairman Jeremiah Johnson, Arthur Parrott, Peter McDonell, Christopher Mulligan, Alternate John Formella

MEMBERS EXCUSED: Jim Lee, Patrick Moretti

ALSO PRESENT: Peter Stith, Planning Department

I. APPROVAL OF MINUTES

A) January 17, 2018

ACTION TAKEN: *It was moved, seconded, and passed by unanimous vote (6-0) to **approve** the January 17, 2018 minutes with one amendment.*

Chairman Rheume stated that Alternate Board Member Mr. Formella would vote on all cases due to the absence of Mr. Lee and Mr. Moretti.

II. PUBLIC HEARINGS – OLD BUSINESS

Mr. Mulligan and Mr. Formella recused themselves from the vote.

A) Case 1-1
Petitioner: James M. Fernald, Appellant
Property: 996 Maplewood Avenue
Assessor Plan: Map 219, Lot 4
Zoning District: Single Residence B District
Description: Appeal
Request: Appeal from an Administrative Decision regarding the issuance of a building permit for Unit C of the above property.
(This petition was postponed from the January 17, 2018 meeting.)

Chairman Rheume read the petition into the record.

SPEAKING IN FAVOR OF THE PETITION

The appellant James Fernald was present to speak to the appeal. He reviewed the history of the project's previous denials and approvals. He explained how he appealed the approval for three buildings on the lot because one of the homes was 1,938 square feet and was denied. He said the variance was supposed to expire after one year, but no building permit was issued. He said he noticed several discrepancies after the excavation process began, including that the total footprint was 38% greater than granted, so he filed another appeal. He felt that the Planning Department did not give proper legal notice for a public meeting for the approval of three homes, and that as an abutter he did not have the chance to speak to the revised plans. Mr. Fernald discussed in detail the legal notice and the discrepancy in square footage that was approved. He said the plans indicated three homes with a 1,696 s.f. footprint, but at that time he opted to wait for the building permit. He said the changes in the site plan had an increase in density and that he would have spoken against it at the December 2016 Planning Board meeting if he had known about the Legal Notice. He said the Planning Department did not properly review the approved site plans for the footprint and that the Technical Advisory Committee (TAC) did not recommend approval of the site plan for three homes with a 1,938 footprint. He emphasized that the building permit should not have been issued because the submitted plans were for 1,938 square feet and that its issuance was in violation because the variance expired.

Francesca Marconi Fernald of 1000 Maplewood Avenue said she was a direct abutter and had to deal with construction equipment on her property, blocked access, the lack of Canadian geese, and rodents. She said the water being pumped into the foundation hole was leaching into the pond, and she was concerned about caustic elements. She said that the overdevelopment was impacting her home and way of life.

T. Jean O'Brien of 13 Fairview Drive said she was a direct abutter and that she also had a rodent problem. She said the Canadian geese were not on the pond for the first time in 58 years. She said the neighbors had water in their basements, and that the buildings were too big.

Zoe Stewart of 8 Fairview Drive said the pond might be conservation land and that it would be illegal to pump water into it. She was also concerned about the rodent infestation and about overdevelopment and thought two houses on the lot were plenty.

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Tim Phoenix was present on behalf of Chinburg Development and said that he had also represented the original developer, Lorax Sustainable Development. He noted that Building C had been delayed for three months and that the BOA meeting was not the forum for water concerns but rather the issuance of the building permit. He reviewed the project's history in detail, stating that the variance was granted for three homes by the Board of Adjustment (BOA) in August 2016, after the developer decreased the homes from five to three. He pointed out that no variance was required for the size of the buildings, so none was requested. He said that all appeal rights with respect to the variance would have expired in December 2016. He noted that the Fernalds and others appealed to the Superior Court and their appeal was denied, so the decision on the variance became final 30 days after the original decision. He agreed that the

original application was for 1610 square feet, which the notice indicated, but through TAC's process, the building footprint changed to the present 1,938 square feet, which was the basis for the Unit C appeal. He said it was important to note that no further review of the footprint size was required. He said the application complied with all the Zoning Ordinance's density and other applicable requirements, and that the only non-conformance was the three single-family dwellings on one lot, which later became conforming. He pointed out that the buildings were shorter as well. He concluded that the overall proposal was found to be consistent with the BOA and Planning Board approvals and, if that had not been the case, then the applicant would have been required to go before the BOA again for a new variance and to the Planning Board for an amended site plan review. He also noted that TAC recommended the 1,938 square feet, but there was an error in the notice about the square footage. He said the Planning Board held a public hearing in which the abutters were notified. He said the purpose of the Legal Notice was to advise abutters and neighbors that their rights might be affected and to investigate it. He said there was enough information for Mr. Fernald to be present at the meetings and to determine for himself that the 1938 square footage was approved.

Vice-Chair Johnson asked whether the claim that the change in square footage was driven by TAC or by the owner. Attorney Phoenix said it was driven by the owner. Vice-Chair Johnson verified that Attorney Phoenix agreed with the statement that the represented footprint of each building differed from the BOA approval to the TAC and the Planning Board presentations and was improperly advertised. Attorney Phoenix said the square footage on at least one of the structures carried the 1,696 square footage. Vice-Chair Johnson said he understood that Attorney Phoenix felt that the weight was on the abutter to react after being notified of a meeting, but he felt that it would seem difficult if the project was incorrectly notified.

Mr. Parrott stated that Attorney Phoenix was glossing over the increase, which Mr. Parrott felt was a large fairly one. He asked whether Attorney Phoenix thought 1,696 square feet going to 1,928 square feet wasn't of much significance. Attorney Phoenix said it was an increase of about 13 to 14%. but pointed out that it was a shorter building. Mr. Parrott said it was a whole lot bigger than 13% or 14%. Attorney Phoenix insisted that it was 14.2%. Mr. Parrott asked whether Attorney Phoenix thought that was a minor change in the eyes of the public. Attorney Phoenix said it was found by TAC and by the Planning Board to be appropriate and that he considered it to be within the realm of what was reasonable without the need of going back to the Board of Adjustment. Mr. Parrott concluded that TAC could change something already approved by the BOA to that degree, and it was okay to Attorney Phoenix. Attorney Phoenix agreed. Mr. Parrott said he disagreed.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Fernald said that the developer stated during TAC review that Lorax changed the proposed dwelling layout, resulting in an increased footprint for each dwelling. He said that, at the time of the public hearing, site plans identified the 1,696 square feet and that the change to 1,938 square feet happened after the TAC meeting, so in the Letter of Objection to the appeal, the developer stated that the notice did not list the original 1,696 s.f. footprint. He said the purpose of the Legal Notice was to give the reader a warning that his interests may be affected. He said his arguments against the proposal were about the intensity of the development. He said the record showed that

he could not attend the meeting and that he emailed comments to TAC that revolved around landscape issues. He said he thought the buildings were 1,696 square feet and assumed that the Legal Notice was correct. He concluded that the Legal Notice did not apprise him of the proposed changes, thus failing to provide reasonable warning.

Chairman Rheume asked Mr. Fernald to discuss how he waited for the building permit to be issued before making his appeal. Mr. Fernald said when he first reviewed the site plans, his concern was the intensity, but then he noticed that the building layout had changed. He said he looked at the revised plans and thought the 15% difference wasn't a big deal, so he decided to wait and see what happened. He said when the excavation began, he noticed the size of the foundation, which drove him to look at the actual site plans that were approved by the Planning Board, and that was when his appeal process began.

Mr. McDonell asked if Mr. Fernald saw the Planning Board approval and realized it was for 1,938 square feet per dwelling unit at that time and that he could live with 14%. Mr. Fernald disagreed, stating that the information on the size of the homes during the applicant's presentation for the variance worked out to be about 1,500 square feet per home, and it was granted. He said it went to TAC, and the plans indicated 1,696 square feet. He said he was okay with the 15% increase, and the later documents all stated 1,696 square feet and that the footprint didn't change, so he didn't attend the Planning Board meeting. He said the plans were approved at 1,696 square feet but had stated 1,938 square feet.

Attorney Phoenix said they were talking about the difference between 1,696 and 1,938 square feet. He said he understood the argument about the notice stating the 1,696 square feet but didn't think it was that significant. He said a prudent person would check the plans and meeting minutes and find out what was really granted. He said the decision became final and TAC had the correct plans, and the foundation permits were issued. He said Mr. Fernald saw the foundation go in and waited for the building permit. He said it was unreasonable for the appellant to come in over a year later regarding the technicality of a building permit. Attorney Phoenix read Mr. Fernald's arguments and discussed them. He concluded that Mr. Fernald's failure to go back and check what really happened was on him and not on the applicant. He said the decision from the BOA did not become final until that appeal was over and that it was unfair of Mr. Fernald to say that the project didn't get a building permit within a year. He said Mr. Fernald was on notice that issues were happening that affected him and had the obligation to make sure that the final decision didn't affect him negatively.

Mr. McDonell said he understood the point of the applicant relying on the passage of time after the site plan approval, and he understood Attorney Phoenix's argument about the appeal of the issuance of the building permit. He asked whether Attorney Phoenix meant that he couldn't appeal the issuance of a building permit, or the building's particular permit because the basis on which the appeal was made dealt with the site plan approval and an appeal of that should have happened. Attorney Phoenix replied that it was the latter.

Mr. Fernald said he relied on the Planning Board staff's ability to make decisions and to accurately identify the square footage of a building on every document. He said he waited because the letter of approval stated 1,696 square feet and not 1,938 square feet, so it was

reasonable to feel that everything was all set. He said he was asking that someone review the whole process and ask how it got so out of ‘whack’. He said the developer cited that the variance would be valid for two years and the expiration date should have been based on the issuance of the Superior Court’s final judgment. Mr. Fernald said that didn’t prevent the applicant from utilizing the approval unless the person appealing it obtained an order restraining the applicant from using the approval.

Attorney Phoenix said it wasn’t true that no document showed the 1,938 square footage. He referred to the December 2016 decision of the Planning Board stating that 1,938 square feet were approved. He said Mr. Fernald knew what the size was and did nothing for 9-10 months until after the building was up.

Francesca Marconi Fernald said it was the Board’s job to ensure that everything was right, as well as the attorney’s job.

No one else rose to speak, and Chairman Rheume closed the public hearing.

DECISION OF THE BOARD

The Board discussed various aspects of the appeal. Chairman Rheume pointed out that what was before the Board was the appeal for the building permit. Mr. McDonell thought the Board could dispose of the appellant’s argument that the one-year variance approval period expired. He said the Ordinance was amended before the period expired and that it was clear to him that it should have been a two-year period.

Chairman Rheume asked Mr. Stith what the Planning Department’s interpretation of the RSA was. Mr. Stith said they were treating all cases approved as two years. He said the amendment was made in January 2017 to be consistent with state code and that the Planning Department was using it as a standard for everything before that was in a pending status.

Mr. McDonell said there was a lot of discussion about numbers shown where and when relating to whether the Planning Board had approved the larger footprint, but that he felt it was clear that TAC and the Planning Board approved the 1,938 square footage, so it came down to whether there was something less than a proper Legal Notice.

Vice-Chair Johnson said he agreed that the Board members were aware of the square footage but asked whether they knew they were looking at three units. He said it seemed to him that they were. He said it was a strange situation because the Board reheard cases all the time about something that changed a fraction of a percentage, and he was surprised that they didn’t get the petition bounced back. He said he thought that it was probably because the variance for density wasn’t requested. He said if the Board had been presented with three units, he wondered whether they would have approved it. He said he saw it as something that fell through the cracks and that the applicant followed through because he got all the approvals.

Mr. Parrott said he hadn’t changed his mind and felt that a lot of factors made the situation unusual to the point of the petition being changed after the fact, with respect to what the Board

did. He said it was significant that when the Board approved something, they expected that it would be the same presentation and the same project. He said he disagreed that a 14% change in a project, when it was all about size, placement and setbacks in a project that size, was not significant and felt that Vice-Chair Johnson made a good point with respect to the significance of that type of change. He said he didn't think it was a trivial issue to the Board and that they could just move it along or say that everyone should have been more careful in their review or the neighbors should have checked on things in the Planning Department every week. He said that was unreasonable and that the public relied on the City boards and staff to apply the rules fairly, accurately, and consistently.

Vice-Chair Johnson asked what would happen to the property owner if the Board approved the appeal. Chairman Rheume said it was tough to say whether it would impact the property owner or open it up to a lawsuit against the City, especially with the foundation approved. Mr. Stith noted that it was specifically for Unit C and that other permits were approved for Units A and B. He said he thought it would revoke the Unit C permit.

Vice-Chair Johnson asked whether the property owner would have the chance to present to the Planning Board again. Chairman Rheume said he thought it would end up in court. He said he shared the public's frustration and thought there was a lot of bait-and-switch tactics by the project. He said the building sizes were presented to TAC and the Planning Board and then they suddenly grew and was something different than what was presented to the Board legally. He said the other aspects, such as the water issue, the geese, and so on, were valid concerns but could have happened regardless of there being one building or three and that the Board didn't consider that. He said the Board had to put aside those frustrations and consider the issue from a legalistic standpoint. He said it was an appeal of the BOA approval that went through the courts and was affirmed, and also an appeal of the Planning Board's decision. He said he recognized that there was misleading information in what was presented but asked whether it rose to the level of invalidating the Planning Board's decision. He pointed out that the resulting building permit was being appealed. He said it was a matter of timing but legalistically, there was an indication of the 1,938 square footage number, and it wasn't appealed then. He said that things changed during the process, there was some confusion perhaps caused by a lack of diligence, but he asked how much notice the Planning Department was required to give from a legalistic standpoint. He said the changing project was never properly reflected at a high level and wasn't updated, but he asked whether it was enough to say that the City or building inspector was in error in issuing the building permit, and he said he did not think so. He said it required a lot of attention from the interested parties to ensure that they knew and understood what was going on. He said that the building permit was issued accordingly to the end result of that entire process and was legitimate.

Vice-Chair Johnson said he agreed with Chairman Rheume's comments. Mr. McDonnell agreed that the ship of the site plan approval had sailed. Chairman Rheume said he didn't see any significant argument as to how what happened with other Boards invalidated the building permit.

*Mr. McDonnell moved to **deny** the appeal, and Vice-Chair Johnson seconded.*

Mr. McDonell stated that he would incorporate some of the earlier discussion. He said there were arguments made by the appellant and thought it was clear that the time of construction under the variance had not expired and that the Planning Board approval was granted for the larger square footage of the units. He said he didn't buy the appellant's argument. He said there were some unfortunate steps taken along the way but felt that ultimately proper Legal Notice was given and the missteps made were not an error that would rise to the level of making the notice improper. He said he understood the discussion from both parties about reliance and thought it was reasonable to rely on the Planning Department staff and other City officials but thought that one could not go too far down that road legally because the responsibility was on the builder. He said if the appellant didn't appeal a decision because he didn't dig into the weeds enough, Mr. McDonell didn't think it would be grounds to overturn that building permit issuance.

Vice-Chair Johnson said he would echo his earlier comments and that he concurred with most of what Mr. McDonell said. He said he felt that the information and tools that the building inspector was given to decide on a building permit were proper. He said he could understand the abutters' issues and knew that the property was squeezed for more than it was worth and also thought that bait-and-switch was the proper term, but the legal terms the Board had in front of them didn't allow them to do anything differently.

Mr. Parrott said the Board was being asked to rule based on the information they had, and it was a relatively narrow issue about the actions of one official who wasn't present to explain. He said that no information had been presented that said that whoever signed the permit did something egregious or incorrect. Chairman Rheume said he hoped the Planning Department would examine what went wrong and hoped that everyone learned from it.

The motion to deny passed by unanimous vote, 4-0.

III. PUBLIC HEARINGS - NEW BUSINESS

Mr. Mulligan and Mr. Formella resumed their voting seats.

- 1) Case 2-1
 Petitioner: Jennifer S. Benjamin
 Property: 180 Sherburne Avenue
 Assessor Plan: Map 112, Lot 31
 Zoning District: General Residence A
 Description: One-story left-front addition.
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:
1. A Variance from Section 10.521 to allow a 5'6"± right side yard where 10' is required;
 2. A Variance from Section 10.521 to allow 29%± building coverage where 25% is the maximum allowed;

3. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance.

Chairman Rheume read the petition into the record.

SPEAKING IN FAVOR OF THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant and introduced the owner and the project designer. He reviewed the petition, noting that the applicant wanted to build a new entrance with a deck on top of it and convert the front porch to living space. He reviewed the criteria and said they would be met.

Chairman Rheume said he was concerned about the yard setback and light and air for the abutter, and he asked Attorney Phoenix to address the rear and front expansions. Attorney Phoenix said the front would infill a porch and wouldn't use up too much space. He said they needed the setback relief on the back and believed that there was adequate air, light, and space.

Chairman Rheume said the porch infill was a defining aspect of the neighborhood's character. He asked how that wasn't negative to the appearance of the neighborhood. Attorney Phoenix said he didn't know what the other houses looked like, but the tax map indicated that they were similarly situated on their lots. He said the front steps would remain, so there would be the same setback. He thought it was reasonable if the owners didn't want a front porch.

The project designer Matt Beebe said there was a variety of different houses on that street. He said if they had seen porches on every house, they might have changed the design to reflect it, but noted that the project had structural elements that would reflect porch posts.

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

No one rose to speak, and Chairman Rheume closed the public hearing.

DECISION OF THE BOARD

*Mr. Mulligan moved to **grant** the variances as presented and advertised, and Mr. Parrott seconded.*

Mr. Mulligan said that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance because the essential character of the neighborhood would not be altered by what was proposed, nor would it affect the public's health, safety, and welfare. He said substantial justice would be done because the loss to the applicant if denied would outweigh any gain to the public. He noted that the existing structure violated the setback and slightly violated the building coverage, so what was requested was only a slight increase in the building coverage. He said granting the variances would not diminish the value of surrounding properties because the project would significantly upgrade the property and have a

positive effect on surrounding home values. He said the property had special conditions because it was a small lot with non-conformities due to its siting and dwelling location, so there was no fair and substantial relationship between the purpose of the sideyard setback and the lot coverage ordinance. He said it was a reasonable use, a residential use in a residential zone.

Mr. Parrott said he concurred with Mr. Mulligan and had nothing to add.

Chairman Rheume said he would support the project despite some concerns about the infill of the porch, although he agreed that it wasn't a defining neighborhood characteristic.

The motion passed by unanimous vote, 6-0.

- 2) Case 2-2
- Petitioners: Dorothy M. Kierstead and Theresa Sessions
- Property: 50 Lovell Street
- Assessor Plan: Map 147, Lot 2
- Zoning District: General Residence C
- Description: Construct two, two-family structures.
- Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:
 1. A Variance from Section 10.521 to allow a lot area per dwelling unit of 3,423± s.f. where 3,500 s.f. is required.

Chairman Rheume read the petition into the record.

SPEAKING IN FAVOR OF THE PETITION

Project Engineer Doug LaRosa was present to speak to the petition on behalf of the applicant. He reviewed the petition in detail, noting that the applicant wanted to build two 2-family structures on the rear and demolish the existing garage and shed. He said the resulting five dwelling units would have 3,423 square feet of lot area per dwelling and that the project met parking and access requirements. He reviewed the criteria and said they would be met.

Mr. Mulligan noted that the applicant could build an additional three units on the lot without any relief because it was less than 40 square feet shy of what was needed for the fifth unit. He asked whether any other dimensional relief was needed, and Mr. LaRosa said there wasn't.

Mr. Parrott said his issue was the first two variances, particularly the one that would not alter the essential character of the neighborhood. Mr. LaRosa said the neighborhood was residential and comprised of multi-family and single-family structures that were on 3,500 s.f. lots. He said some areas were less than 3500 square feet and some were a little over 3,500 s.f., but not by much. He said the four units would have 28 square feet less than what was required as well as the same density of the rest of the neighborhood, which was in keeping with the neighborhood's character.

Mr. Parrott said his other issue was for the folks who lived along that section of Cass Street and Old Parish Way and were used to looking out at open space but would now have to look at a 39-ft high building at the ridge and more than five times as much paved space. He said the two very large structures would be a major change in the neighborhood's character. Mr. LaRosa said there were some structures with a unique configuration that had not been developed as yet and that it was easy to design a single-family house on a lot. He said they wanted relief to add the four units, which he agreed would change the neighbors' view of the back yard, but said the owner had the right to develop his land and wouldn't develop it to the full extent of the building area allowed. He said the potential was that an underdeveloped lot would be developed and should be expected. Mr. Parrott argued that the lot was developed and had a nice house on Lovell Street. He said the neighborhood was important to the people who lived there and that they felt it would be built in essentially their backyard. He said that looking out into a vacant yard was much different than looking at a 39-ft tall structure surrounded by five feet of pavement.

In response to the Board's questions, Mr. LaRosa said the lot area per dwelling unit for the five buildings was a little over 3,500 square feet, as well as for the Old Parish Way buildings. He said the preliminary designs indicated identical buildings and that the intent was to show what would be built. He said the intent was not to ask for a height variance in the future. Mr. LaRosa discussed the formula for the 39-ft height and said it would be determined at the site plan stage.

SPEAKING IN OPPOSITION TO THE PETITION

Edith Currier of Cass Street said she was concerned about fire truck access and additional water in people's basements and backyards. She said it would impact her home's value.

Brad Stoll of 55 Lovell Street said he was concerned how the construction equipment would access the narrow property, the additional number of cars, the impact on the character of the neighborhood, and the building materials.

Sarah O'Callahan of 209 Cass Street said she agreed with the previous comments. She said she was previously assured by another contractor that the water issues would be resolved, but they weren't. She said that just plopping buildings in back yards didn't work.

John Rando said he represented the Old Parish Way Condominium Association and felt that the water issue should be addressed by the Planning Board. He said the contractor put storm drains behind the units that didn't do enough, and he asked where the water would go if the project's turf was covered with asphalt.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. LaRosa said that most of the comments needed to be addressed at the site plan stage with TAC and the Planning Board. He said the City was diligent about drainage issues. He said the construction equipment would have access along Old Parish Road because the shed and garage would be demolished. He said the building materials would be clapboard. As for impacting the character of the neighborhood, he said the applicant entered into an agreement with the former

owners and that the abutters could have approached them at that time and ask for a common area or a park. He said the applicant wanted just a small bit of relief for an additional building.

No one else rose to speak, and Chairman Rheaume closed the public hearing.

DECISION OF THE BOARD

The Board discussed the petition. Mr. Stith noted that there was a letter in opposition from a neighbor at 121 Madison Street.

Mr. Mulligan said that, at first, he thought the proposal was a significant intensification of development at that site but that he wasn't blown away by the proposed preliminary designs. He said hopefully they would be modified to something better looking, though. He said he was struck by how everything proposed could be built the next day without any relief if it was three units instead of four, along with the amount of relief the applicant needed for the fourth unit, and he thought it was diminuous. He said he didn't see how the argument against the project could hold up. He agreed that there were concerns about access and drainage that would be dealt with by the Planning Board and site review, and if they couldn't get resolved to their satisfaction, something would have to change.

Mr. Parrott said he understood the three units vs. four, but said that four units were before the Board that were two large buildings, so the variance requirements did apply. He said he spoke about the change in perception in the neighborhood for the immediate neighbors, but the Board's fourth criteria was the value of surrounding properties not being diminished. He said the Board heard no testimony on that, but he felt that the change from looking out over a back yard to seeing the side or back of a 39-ft high building would be a definite negative factor to those houses, in part because all the other lots in the area weren't that big and didn't have huge back yards. He said he thought that the petition failed those two criteria.

Mr. McDonell said he saw it both ways. He said it was a minimal request for relief and that the applicant could build something almost the same. He said if it were four units, the neighbors would have the same concerns as five units. He said the proposal was squeezing in an extra unit potentially. He thought even four units was a bit much. As far as whether the project changed the neighborhood, he said it was tricky because on the Cass Street side, it was typical single-family residential, and on Madison Street, it was completely different. He said there could be an opportunity to bridge that gap if the lot were developed. He said he didn't see the hardship of placing a typical single-family on the back part of the lot and didn't see it meeting all the criteria, even though the request was for very minimal relief. He said he agreed with Mr. Parrott that it was potentially a bit much and could see his point as to the value of surrounding properties being impacted by the view change of the six houses on Cass Street. He said the water issues would also have a potential impact on surrounding properties.

Mr. Formella said he saw it both ways. He said it was minimal relief, but squeezing a fifth unit didn't strike him as much of a hardship, and he noted that the additional vehicles would be a significant 25% increase. He said the applicant had a tough time meeting all the criteria due to the hardship criteria.

Chairman Rheume said he thought it was a massive proposed monolithic structure, especially at the front elevation. He said the applicant was taking advantage of a loophole in the Ordinance because a two-family dwelling was a permitted use for GRC, and multi-family dwellings up to four units were allowed. He said five units would require a special exception. He discussed the intent of the Ordinance and concluded that going beyond a large building with four connected units was not what the neighborhood should have. He said the applicant wanted to push the smallest of the Ordinance’s allowable lot area per dwelling units. He said there wasn’t enough of a hardship for the fifth unit and that the 3,500 square footage as a line in the sand in that application, especially considering the other loophole the applicant was taking advantage of. He said it was too much.

*Mr. McDonell moved to **deny** the variances as presented and advertised, and Mr. Parrott seconded.*

Mr. McDonell acknowledged that the Board had discussed the petition at length and that the spirit of the Ordinance would not be observed, and that the essential character of the neighborhood would be altered if the petition were granted. He said there were similar developments on the Madison Street side but nothing like it on the other side immediately abutting the property. He said the value of surrounding properties would be diminished, especially the views of the back yard from the immediate abutters and others as well. He said he didn’t see a hardship because it wasn’t about letting someone build an extra unit in addition to one they already had but rather was the difference between four and five units. He said it was a small difference incrementally in comparison and didn’t see any hardship or an argument that would be imposed by the literal enforcement of the Ordinance.

Mr. Parrott said he concurred with Mr. McDonell and referenced his prior comments. He added that Chairman Rheume’s comments were pertinent with respect to the intention. He said the Ordinance didn’t refer to putting multiple structures on a property just because the reference was to the total number of units. He said he couldn’t find anywhere where it stated that there could be many different structures on one lot, even if it was not otherwise allowed by the zoning.

*The motion to deny **passed** by a vote of 5-1, with Mr. Mulligan voting in opposition to the motion.*

- 3) Case 2-3
 Petitioner: Jeffrey J. Caron
 Property: 325 Thaxter Road
 Assessor Plan: Map 152, Lot 39
 Zoning District: Single Residence B
 Description: One-story right rear addition.
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:
1. A Variance from Section 10.521 to allow a 4’± right side yard where 10’ is required;

2. A Variance from Section 10.521 to allow 28.1%± building coverage where 20% is the maximum allowed;
3. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance.

Chairman Rheume read the petition into the record.

SPEAKING IN FAVOR OF THE PETITION

Arilda Densch was present to speak to the petition on behalf of the applicant. She submitted letters of approval from the two immediate abutters. She also noted that the other abutters approved of the project. She reviewed the petition, stating that the deck would be removed and replaced by the addition, the privacy fence would block the view of the backyard from the neighbor to the right, and the house on Lot 38 had a right-of-way to share the driveway. She reviewed the criteria and said they would be met.

Vice-Chair Johnson asked whether the existing deck was counted in the total coverage, and Ms. Densch agreed.

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

No one rose to speak to the petition, and Chairman Rheume closed the public hearing.

DECISION OF THE BOARD

*Vice-Chair Johnson moved to **grant** the variances as requested and presented, and Mr. McDonell seconded.*

Vice-Chair Johnson said it was a straightforward proposal for a tasteful and simple design. He said granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance because the design would fit well into the neighborhood and would repurpose an already-utilized space. He said it was kind of a vertical expansion with a very slight increase in the current open space and building coverage, so he didn't think that any proposed changes were offending. He said that, even though the addition would align with the existing wall within the setback, it would be no more in violation than what existed. He said granting the variances would do substantial justice because the unimposing addition appeared to have no adverse effects on the public or the most affected abutters. and people were in support. He said the value of surrounding properties would not be diminished because the home was a small, high-quality addition with a slight increase in square footage. He said he could see a slight uptake in property value and possibly surrounding. He said the hardship was that the home was on undersized lot deficient in street frontage, had an angular lot line to the right that didn't help much with any type of sideways expansion and, due to the existing narrowness of the lot and the siting of the right-of-way driveway, the existing building was already at the front corner two feet

off the setback. He said that nothing proposed was any more offensive than what existed and felt that the project passed the hardship test.

Mr. McDonnell said he concurred with Vice-Chair Johnson and had nothing to add.

*The motion **passed** by unanimous vote, 6-0.*

At this point in the meeting, it was moved, seconded, and passed to go beyond 10:00 and hear the rest of the petitions.

- 4) Case 2-4
 Petitioner: Kathryn Michele Arbour
 Property: 86 Emery Street
 Assessor Plan: Map 220, Lot 87-1
 Zoning District: Single Residence B
 Description: Two family dwelling.
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:
1. A Variance from Section 10.440, Use #1.30 to allow a two family dwelling on a lot where only a single family dwelling is allowed.

Chairman Rheume read the petition into the record. He noted that the petition was before the Board previously and was tabled and withdrawn, and the applicant had a revised version. He also stated that Fisher vs. Dover would not apply.

SPEAKING IN FAVOR OF THE PETITION

Jeff Mattson said he was the owner's husband and reviewed the application. He stated that the Auxiliary Dwelling Unit (ADU) was designed to look like a single-family Cape with an attached barn. He said the ADU would allow his wife's parents to move in. He said he was remodeling the existing barn and had hired a builder to work on the proposed dwelling. He emphasized that the proposed second dwelling would be moved further away than originally planned to respect the neighbors and that the one-story dwelling would be at the basement level of the neighbor, so the neighbors would not be impacted. He reviewed the petition in detail and then reviewed the criteria and said they would be met.

Chairman Rheume asked whether there were any ADU requirements that could be manipulated that would get Mr. Mattson out of owner occupancy before the project was finished. Mr. Mattson said the issue was owner occupancy requirements and the intention was not to have an absentee landlord. He said they could not occupy the ADU because it was under construction. Chairman Rheume asked whether Mr. Mattson studied the ADU section and had anything specific to offer. He reminded him that he had said he'd be happy to have the Board stipulate that all the ADU requirements would apply. Mr. Mattson said the stipulation was that the owner would occupy the dwelling as soon as it was able to be occupied. He said it would take a while to

be in full compliance with the ADU requirements, however, but said he had hired a builder and were trying to finish it up by autumn and that the barn and ADU would be occupied in a year.

Mark Mattson of 51 Cottage Street said he was Jeff Mattson's father. He said the applicant wanted the ADU so that she could be a caregiver for her parents. He also said he felt that the opposed neighbors were opposed before they could no longer store their kayak, vehicles, snowplow, etc. on the property.

Katheryn Arbour of 86 Emery Street said she was the owner. She reviewed the recommendations made by the boards and neighbors over the previous two months. She said she reached out to two adjacent neighbors for feedback and redesigned the plan accordingly. She said the project fit in better with the neighborhood. She reviewed in detail the location, privacy, architecture, and the ADU issues.

SPEAKING IN OPPOSITION TO THE PETITION

Juliana Flintosh of 261 Myrtle Avenue said she was a direct abutter and was concerned about the effect on her property. She said the applicant had been working on the barn for over three years. She said the ADU was denied by the Planning Board because the property was not near completion and that it impinged on her residence. She said her issues were privacy and property values and said there was no hardship because a single-family or duplex could be built.

John Flintosh of 261 Myrtle Avenue said the Planning Board denied the petition due to privacy and owner-occupied issues. He said he didn't know how one could go for a second dwelling when the first one wasn't close to completion. He also stated that the two lots next to 86 Emery had bids by the same builder and was concerned that two single-family units or a duplex would be built. He said the owner could go from three buildings to potentially six.

Diane Kozikowski of 287 Myrtle Avenue said she was a direct abutter. She said the corner should house four single-family lots and not be overbuilt. She said the applicants were denied an ADU by the Planning Board and then took the same house and stuck it to the side of the garage and had been working on it for three years. She said the project did not meet the nature of the neighborhood and would diminish surrounding property values.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Mattson said the neighboring vacant lots were smaller than his, and he noted that he was requesting occupancy stipulations.

No one else rose to speak, and Chairman Rheume closed the public hearing.

DECISION OF THE COMMISSION

Mr. Stith told the Board not to get confused about the ADU vs. a two-family dwelling. He said the applicant was willing to build the structure as an ADU and self-impose stipulations. He said they were meant to be dealt with through the Planning Board, however, unless the Board

conditioned it on something similar. Chairman Rheume explained how it was a core principle of the Planning Board. He said the BOA was protective of single-family districts and did not want multi-dwellings to creep in. He said it was a unique situation that the Board was tasked with. Mr. McDonnell asked whether the Board could impose a requirement that the property be owner occupied within a year. Mr. Stith said the applicant wanted the structure to be an ADU but could not meet the criteria. He said he didn't know whether it could be stipulated that that the project met all the ADU requirements. He said it was a Planning Board issue. It was further discussed and was suggested stipulating that one of the units had to be owner occupied. Chairman Rheume said that what was proposed met the ADU requirements, but if the Board granted it and didn't specify all the requirements, they potentially would allow the applicant to build something else. He said they had to be careful about granting and wording it.

Vice-Chair Johnson agreed that the single-resident zones were holy to the BOA, and he noted that the Board was seeing additional ADUs in single-resident zones that were fully compliant. He said the Planning Board also struggled with it. Chairman Rheume said he recognized that the Planning Board had the better expertise, but the issue was still complicated. He said it would take quite a few months to a year for both places to be occupied and noted that most homes were built within a few months. He said it was an imposition to the neighbors and added to their frustration. Mr. Formella said he sympathized with the applicant but said it was difficult to fashion an ADU out of a variance for a two-family dwelling. He said he thought the Planning Board would deal with the location and privacy concerns and was concerned about setting a precedent out of fashioning an ADU with a variance.

Chairman Rheume said it could be one large home and be within the setback requirements. He said it came down to a two-family dwelling in a single-family district. He said he had a hard time getting over that aspect and finding a way to manipulate the application to try to give the applicants what they wanted, but thought it would be complicated and difficult to enforce. He said the applicants were trying to do the right thing, but the quandary of making it a second-family dwelling unit was the killer.

Mr. Parrott said there were privacy concerns. He said the present house was 25 feet off one property line and 19 feet off the diagonal line, both of which were conforming. He said the proposed new house was 22 feet off the line, which wasn't much different. He said that the placement of the new house didn't violate privacy because the existing house was situated in a similar respect to the property line. He noted that the barn home conversion was 10-1/2 feet off the adjacent property line, which also conformed. It was further discussed. Mr. Mulligan suggested that the Board approve it with a stipulation that the applicant would comply with the section of the ADU that required owner occupancy and also require the Planning Department to issue an annual certificate. Chairman Rheume said the Board could do that but thought it was doing what the Planning Board didn't allow. It was further discussed.

DECISION OF THE BOARD

*Mr. Formella moved to **grant** the variances with the following stipulations:*

- 1) That the variance be approved for a two-family dwelling but that one of the occupants be owner-occupied;*

- 2) *That both dwelling units be in the same ownership; and*
- 3) *That a certificate to that effect comply with both, be issued by the Planning Board, and be renewed annually.*

Mr. Mulligan seconded the motion.

Mr. Formella said the Board was trying to achieve what the applicants would be allowed to do with the ADU if the timing worked out better. He said that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance. He said that the essential character of the neighborhood would not be altered, noting that there were other multi-family homes in the area that looked like single-family ones. He also said it would not affect the public’s health, safety, and welfare. He said that granting the variances would do substantial justice because the gain to the applicant would outweigh any harm to the public and the loss to the applicant if denied would be much greater. He said the values of surrounding properties would not be diminished because there were other multi-family homes in the neighborhood. He said the applicants made a substantial effort to meet as many of the neighbors’ recommendations as they could. Mr. Formella said that literal enforcement of the Ordinance would result in unnecessary hardship for the applicant due to the special conditions that the lot was larger than most in the area and the timing was an issue. He said there was no fair and substantial relationship between the general purposes of the Ordinance and the single-family limitation because if the timing had worked out better, the applicant would be able to build the proposed second dwelling unit as an ADU. He said it was a permitted use and reasonable.

Mr. Mulligan concurred with Mr. Formella and added that the project would not overburden or overcrowd the neighborhood. He said a substantial setback was respected, it was a reasonable use, and the applicant put in a lot of time and was willing to modify it in a reasonable fashion.

Chairman Rheume stated that he would not support the petition. He said he had great empathy for the applicant but did not see a hardship associated with the property itself. He said the hardship was the situation that the applicants found themselves in. He said the Board was treading on a path that they should not be going down and felt that there were other options to get the applicants out of their dilemma. He said the Planning Board was normally in charge of that sort of issue.

The motion passed by a vote of 5-1, with Chairman Rheume voting in opposition.

- 5) Case 2-5
- Petitioner: KL Boston Revocable Trust, Kelly L. Boston, Trustee
- Property: 465 Cutts Avenue
- Assessor Plan: Map 210, Lot 27
- Zoning District: Single Residence B
- Description: Extend existing garage and front porch.
- Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:

1. A Variance from Section 10.521 to allow a secondary front yard setback of 10.5'± where 30' is required;
2. A Variance from Section 10.521 to allow 23%± building coverage where 20% is the maximum allowed;

Chairman Rheame read the petition into the record and noted that it was granted in November but there were some small changes.

SPEAKING IN FAVOR OF THE PETITION

The applicant Kelly Boston was present to speak to the petition. She introduced her contractor Steve Brown. Ms. Boston stated that the City discovered there were dimensional calculation issues previously and that she was back with the correct percentages. She reviewed the criteria and said they would be met. Mr. Brown said he hadn't previously calculated the setbacks for the shed, decks, and so on and assumed responsibility for the discrepancies.

Mr. Mulligan asked whether the renovation was to an existing dwelling. Ms. Boston said it was the existing dwelling and that she wanted to extend the garage and do a porch and patio.

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

No one rose to speak, and Chairman Rheame closed the public hearing.

DECISION OF THE BOARD

*Mr. Mulligan moved to **grant** the variances as presented and advertised, and Mr. McDonell seconded.*

Mr. Mulligan stated that it was a minor adjustment to a previously-approved project and that granting the variances with the adjustments would not be contrary to the public interest or to the spirit of the Ordinance. He said the essential character of the neighborhood would remain residential and that the public's health, safety, or welfare would not be affected. He said granting the variances would do substantial justice because the loss to the applicant if denied would far outweigh any gain to the public by requiring that the ordinances be upheld. He noted that Brigham Lane didn't exist when the house was built. He said granting the variances would not diminish the value of surrounding properties but would improve them. He said the project had special conditions in that it was a corner lot and the house was built long before the second front yard was created with the creation of Brigham Lane, which distinguished it from others in the area, so there was no fair and substantial relationship between the purpose of the Ordinance and its application to the property. He said it was just a technical change to correct the record and met all the criteria.

Mr. McDonell said he concurred with Mr. Mulligan and had nothing to add.

*The motion **passed** by unanimous vote, 6-0.*

- 6) Case 2-6
- Petitioner: Evon Cooper
- Property: 287 Maplewood Avenue
- Assessor Plan: Map 141, Lot 36
- Zoning District: Character District 4-Limited
- Description: One-room addition on existing foundation.
- Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:
 1. A Variance from Section 10.5A41.10A to allow a 2.49'± side yard where 5' is the minimum required;
 2. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance.

Chairman Rheume read the petition into the record.

SPEAKING IN FAVOR OF THE PETITION

Jason Pearson of Seacoast Finishers was present to speak to the petition on behalf of the applicant. He stated that previous submitted plans were approved to the Historic District Commission (HDC) and that the design had not been altered. He reviewed the criteria and said they would be met.

In response to Mr. Parrott’s questions, Mr. Pearson said the small room had existed for a long time and that the edge of the house continued out. He said the footprint was smaller than the original and that everything was torn down. He said it looked like there were some interruptions to the old foundation but that it was tough to tell without investigating it.

Vice-Chair Johnson asked how the floor frame related to the existing foundation. Mr. Pearson said it was close to the existing requirement and would sit on top of the plates on the foundation. He said he wouldn’t need to excavate where the foundation extended off the back of the house.

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

No one rose to speak, and Chairman Rheume closed the public hearing.

DECISION OF THE BOARD

*Mr. Parrott moved to **grant** the variances as presented and advertised, and Vice-Chair Johnson seconded.*

Mr. Parrott said that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance. He said it was an unusual application because it had

been before the Board more than once and was restoring something old that had been there a long time. He said the fact that it was over the property line made it difficult as well. He said that building the room on the back would not alter the character of the neighborhood nor threaten the public's health, safety, or welfare. He said granting the variances would do substantial justice because it was hard to see any public interest in the restoration of a small, modest room on the back of the house, and it would be a benefit to the house to have the additional space added to the interior. He said the value of surrounding properties would not be diminished because the project would restore something that existed in that shape, or maybe even bigger. He said the existing foundation was part old and part new and was an eyesore that didn't add anything to the property. He also said the antique window from the former Yoken's restaurant was a nice architectural feature. He said the hardship was that the odd placement of the property with respect to the property line was something that couldn't be changed, and that the existing foundation already invited replacement on top of it. He said the project clearly met the criteria.

Vice-Chair Johnson said he concurred with Mr. Parrott and agreed that it was an area with small setbacks. He said the applicant had to balance the existing foundation being tied into the existing building and thought it made sense to put it where proposed. He said it was small and acceptable.

*The motion **passed** by unanimous vote, 6-0.*

IV. ADJOURNMENT

*It was moved, seconded, and **passed** by unanimous vote to adjourn the meeting at 11:40 p.m.*

Respectfully submitted,

Joann Breault
BOA Recording Secretary