

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

**7:00 P.M.**

**June 18, 2019**

**MEMBERS PRESENT:** Chairman David Rheaume, Vice-Chairman Jeremiah Johnson, Arthur Parrott, Jim Lee, Chris Mulligan; Alternate Phyllis Eldridge, Alternate Chase Hagaman

**MEMBERS EXCUSED:** John Formella, Peter McDonell

**ALSO PRESENT:** Peter Stith, Planning Department

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**I. APPROVAL OF MINUTES**

**A) May 21, 2019**

*It was moved, seconded, and passed by unanimous vote to **approve** the May 21, 2019 minutes as amended.*

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**B) May 28, 2019**

*It was moved, seconded, and passed by unanimous vote to **approve** the May 28, 2019 minutes as amended.*

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Chairman Rheaume announced that both alternates, Ms. Eldridge and Mr. Hagaman, would vote on all petitions.

**II. PUBLIC HEARINGS – OLD BUSINESS**

Mr. Mulligan recused himself from the vote.

**A) Case 5-5**

Petitioner: 56 Middle Street LLC

Property: 56 Middle Street

Minutes Approved 7-16-19

Assessor Plan: Map 126, Lot 19  
District: Character District 4-Limited and the Downtown Overlay District  
Description: Convert to a duplex and construct rear addition.  
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variances:  
a) ~~from Section 10.5A41.10A to allow a building footprint of 2,646± s.f. where 2,500 s.f. is the maximum allowed;~~  
b) from Section 10.5A41, Figure 10.5A41.10A and Section 10.5A43.60 & Figure 10.5A43.60 to allow a duplex in the Downtown Overlay District where it is not permitted; and  
c) ~~from Section 10.321 to allow a lawful nonconforming structure to be extended, reconstructed or enlarged without conforming to the requirements of the ordinance.~~  
(This petition was postponed from the May 21, 2019 meeting and has been amended by the withdrawal of items a) and c). Relief is still required for item b.)

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

Attorney Tom Watson was present on behalf of the applicant to speak to the petition. He asked for five additional minutes for his presentation.

*It was moved, seconded, and **passed** by unanimous vote to allot five additional minutes.*

Attorney Watson reviewed the property's history. He said the applicant previously received variances for the first-floor residential change and a renovation to the addition, and he said the same factors applied to the request for a duplex. He reviewed the criteria and noted that there were parking easements associated with the building and the abutters that were not legally recorded. He said the abutters felt that the project would interfere with the easement and cause them to lose their parking spaces, and he explained in detail why that would not be the case.

In response to Chairman Rheume's questions about parking, Attorney Watson said three spots would be provided for the abutters and that they could also use the seven spaces on the back lot. He said there was no formal parking plan for the duplex owners but felt that the combination of the corner spaces and the easement rights on the back parking spaces would be sufficient for three spaces. Chairman Rheume noted that the applicant had withdrawn a few items, and he asked what exactly was proposed. Attorney Watson said the first and second floors would be residential and the addition would be part of Unit 2. He said the addition would not be taller or have more mass than the previous application that included the gable, garage, and dormers. Chairman Rheume asked why the applicant changed to a duplex after previously convincing the Board that a single-family use was more appropriate. Attorney Watson said a duplex was second only to a single-family use. In response to further questions from the Chair, Attorney Watson

said the addition would be a smaller unit and that he thought the spiral staircase would be the only connector between the first and second floors.

Mr. Parrott said neither the November 18 plan nor the April updated plan indicated parking spaces. He said the Board's regulations called for dimensions and locations of parking spaces, and he asked why there were no dimensions plans. Attorney Watson said there was no parking required because the property was in the Downtown Overlay District. Mr. Parrott said it was stated that easements covered the parking, and he said the applicant couldn't have it both ways. Attorney Watson said that two designated spaces on State Street were indicated in the 2018 plan and that he submitted a schematic showing the seven spaces along an easement. Mr. Parrott said it didn't mean much without dimensions.

Mr. Hagaman asked if the two spaces on the State Street easement would be for the duplex. Attorney Watson said those spaces would go with one dwelling and the owner could also use the other spaces. He said the two State Street spaces would stay as presented.

Chairman Rheume opened the public hearing.

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

Steve Bergeron of 47 State Street said he was an abutter. He said the seven spaces were not exclusive and were originally for client parking and that he was told that the two surface spaces would go to the garage. He said the proposed addition was still too big because it added a second building unit to a previously proposed single-family garage. He felt that the duplex residents would use the non-exclusive parking spaces but that the abutters had rights to those spaces as well. He also noted that there were no engineering site plans or elevation plans, so the neighbors didn't know what the project would look like. Vice-Chair Johnson asked Mr. Bergeron to explain which parking spots would be affected. Mr. Bergeron said Spaces 1 and 2 would be removed from the abutters and that the third space might also be eliminated.

Pat Driscoll of 495 State Street said she was also an abutter and that it was an access problem as well as a parking one for her because the applicant had rights to go on her lawn or driveway. She said the parking spaces were unclear and that the deed wasn't registered. She said she didn't see any hardship and felt the project would have a diminutive effect on abutters.

Christopher Mulligan of 74 Austin Street said he owned the other condominium at 487 State Street above Mr. Bergeron's unit. He said the credit of four parking spaces didn't mean that the applicant was entitled to limit parking for the abutters, which he thought would result in a diminution of property values. He noted that the two-bay garage from the first proposal was replaced with full-on living space. He said the 1980 schematic plan was not a recorded plan and that parking spaces 1 and 2 were part of 56 Middle Street and could be dedicated surface parking exclusively for that property. He said he'd never seen anyone park in those spaces and didn't think they existed as presented. He said the easement was not an exclusive one and was created by an attorney's office over the years for use during normal business hours. He said an expensive

condo downtown was a different use and that the residents would expect exclusive use of the parking. He said the seven spaces were not exclusive and felt that the applicant wanted to use those spaces for his use. He said there was no parking plan. He felt that the driver for the two units was the size of the building, which the applicant planned to make even bigger. He asked what the logic was for the request relief, seeing that there were no floor or elevation plans provided. He said the petition did not meet all the criteria and should be denied. Vice-Chair Johnson asked whether parking spaces 1 and 2 were either not used or not often used. Mr. Mulligan said people couldn't angle into the spaces and that the spaces were barely striped.

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

Attorney Watson said it was not the applicant's opinion that the seven spaces were not exclusive. He said the spaces were always dedicated to the use of the previous law firm and that there was no arrangement that they could be used during off-hours. He said spaces 1 and 2 existed and that their stripes were visible. He said the petition met the criteria.

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

### **DISCUSSION OF THE BOARD**

Vice-Chair Johnson said he would not support a motion to approve and suggested tabling the petition so the applicant could provide additional information. He said that the drawings suggested that the lack of parking information was purposeful and played into the potential for diminution of surrounding property values. Mr. Parrott said the minimum requirements of the Board's rules and regulations stated that building plans and elevations of any proposed structures were required. He agreed with Vice-Chair Johnson that a complete package should be before the Board. He said the parking was an odd and unusual situation that would affect other nearby properties and their values as well as the applicant's property value.

Mr. Hagaman said he agreed but felt that it was a new use of the structure so he was less concerned about the elevation but more concerned about the parking's effect on the abutters, especially with the easements involved. He said he wanted to see a more detailed plan as to whether there was a new agreement or an easement clarification that a duplex use could impact the parking arrangement. He said the parking was an issue. Ms. Eldridge said the project wouldn't change the neighborhood but would have a big effect on the neighbors.

### **DECISION OF THE BOARD**

*Vice-Chair Johnson moved to **table** the application to the July 16, 2019 meeting and that the applicant provide the following information:*

- A diagram of parking on the site plan;
- Current architectural information, both in elevation and plan, for the proposed addition;
- Intent of parking for the two duplex units; and

- Further clarification as possible regarding the easements and expected future use of the parking lot.

*Mr. Hagaman seconded.*

Chairman Rheaume explained why he would support the motion, noting that more information was required and that the Board had to know that the structure would not be taller or bigger.

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

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### **III. PUBLIC HEARINGS – NEW BUSINESS**

Mr. Mulligan resumed his voting seat.

#### **1) Case 6-1**

Petitioners: William Brinton Shone and Tatjana Rizzo Shone  
Property: 11 Elwyn Avenue  
Assessor Plan: Map 113, Lot 27  
District: General Residence A  
Description: Installation and placement of HVAC condensers.  
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variance:  
a) from Section 10.515.14 to allow a 7'± setback where 10' is required for a mechanical system.

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

The applicant William Brinton was present to speak to the petition. He said he needed an 8-ft setback and not a 7-ft one. He said the condensers would be screened with a 6-ft fence and would be in the most optimal location. He reviewed the criteria and said they would be met.

Mr. Hagaman asked how loud the three units would be and whether the fencing was designed to dampen the sound. He said it looked like a fair amount of distance to where those units were placed relevant to the adjacent property owner. Mr. Brinton said the decibel information was in the packet. He said the neighbor would not be affected because the units would be screened and not have any open ends. He said the units were standards ones.

Chairman Rheaume opened the public hearing.

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

Katherine Arakelian of 18 Kent Street said she was an abutter and that the condensers were next to her backyard. She thought there would be a loud, continual hum and felt that the proximity and level of noise were concerns that would affect neighboring properties.

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

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

### **DICUSSION OF THE BOARD**

Mr. Parrott said the Board usually was provided with the manufacturer's literature indicating decibel levels. Ms. Eldridge asked Mr. Brinton if he knew the decibel level. Mr. Brinton said it would be 53-64 decibels per unit and that not all three would run at the same time because one unit was for heating. Chairman Rheume said the applicant had the right to put up a 6-ft fence and that he was trying to be a good neighbor. He said something could be worked out if the units were noisy. Mr. Parrott noted that normal conversation at three feet was rated 60-65 decibels.

### **DECISION OF THE BOARD**

*Ms. Eldridge moved to **grant** the variance for the petition as presented, and Vice-Chair Johnson seconded.*

Ms. Eldridge said it was a normal request and that granting the variance wouldn't be contrary to the public interest and would observe the spirit of the Ordinance because that sort of noise was expected during the summer and the units seemed to have a low decibel level. She said substantial justice would be done and the values of surrounding properties would not be diminished because the applicant would take great care to place the units in the least disruptive location, given how exposed the house was. She said the special condition of how open the house was pointed to a fair and substantial relationship and met the ordinance.

Vice-Chair Johnson concurred. He said substantial justice would be done because the applicant by right could install the units in other locations just a few feet away and the perceived noise would be the same, so to expect the applicant to build a platform at a much greater cost would not pass the balance test. He said the condensers would be in a less offending spot than some of the house itself and that the applicant could put in window units if he wanted to, which would be closer to the property line if they were on the exterior wall.

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

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#### 2) Case 6-2

Petitioners:       Petition of Eric D. Weinrieb and Rachel L. Hopkins  
Property:         9 Middle Road  
Assessor Plan:    Map 152, Lot 47

District: General Residence A  
Description: Reconstruct deck and stairs with deck expansion.  
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:  
a) a variance from Section 10.521 for a 7'± secondary front yard where 15' is required.

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

The applicants Eric Weinrieb and Rachel Hopkins were present to speak to the petition. Mr. Weinrieb said they couldn't sit on the front porch anymore because of excessive traffic, so they wanted to reconstruct and expand the deck. He noted that there were two letters of support from abutters and that a detailed narrative addressing the criteria had been provided to the Board.

Chairman Rheaume asked whether the applicant had considered having a set of stairs off the deck going down to the driveway instead of following the existing deck arrangement. Mr. Weinrieb said they didn't want to take down the dogwood tree, so the proposal was the least intrusive. He also asked for a definition of what the plus or minus increment was, noting that it was something done on assessor maps for distances and could be an issue for land surveys.

Chairman Rheaume opened the public hearing.

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

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

### **DECISION OF THE BOARD**

*Mr. Lee moved to **grant** the variance for the application as presented. Vice-Chair Johnson seconded.*

Vice-Chair Johnson said it wasn't unreasonable for the Board to include a number to define the increment. He proposed 12 inches plus or minus. Mr. Lee said he was agreeable.

The motion was amended to the following:

*Mr. Lee moved to **grant** the variance for the application, with the following stipulation:*

- *Plus or minus one foot from the seven feet.*

*Vice-Chair Johnson seconded.*

Mr. Lee said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said it would not diminish the value of surrounding properties, noting that the abutters were in support. He said the hardship was that the property

was burdened by fronting on two streets so it had multiple front setbacks, and traffic made the existing porch unusable, so enlarging the front deck would provide peace and quiet.

Vice-Chair Johnson concurred. He said it was a low incremental request in the change of size from the public's perspective and wouldn't be noticeable. He said he was comfortable with the plus or minus because it was the type of site where the property line would still have more property between it and the street and would allow even more relief granted to the applicant due to its location. Regarding hardship, he said it was a corner lot and the siting of the building was skewed, making it difficult to site everything and fit the setbacks. Chairman Rheame noted that another hardship aspect was the existing landscaping and trees that would prevent the applicant from making a more compliant solution.

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

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### 3) Case 6-3

Petitioners: Nancy H. Alexander Revocable Trust, Nancy H. Alexander, Trustee, owner and High Definition Fitness, LLC, applicant  
Property: 620 Peverly Hill Road  
Assessor Plan: Map 254, Lot 6  
District: Industrial  
Description: Yoga studio.  
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:  
a) a special exception under Section 10.440, Use #4.40 to allow a yoga studio up to 2,000 s.f. of gross floor area in the Industrial District.

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

The applicant's father Lee Smith was present to speak to the petition in her absence. He said there was a karate studio next door to the property and that a Rumble Tumble facility was previously approved but the owner had decided not to do it. He said there was 60 parking spaces.

In response to the Board's questions, Mr. Smith said the 30'x40' studio was smaller than the Rumble Tumble and would have three classes a day, with a minimum of ten people.

Chairman Rheame opened the public hearing.

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

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

### **DECISION OF THE BOARD**



*Vice-Chair Johnson moved to **grant** the special exception, and Mr. Mulligan seconded.*

Vice-Chair Johnson said it was a good location for that type of use and that it just needed more oversight. He said the Board previously reviewed the property and there appeared to be ample parking, access, utilities, and so on. He said most yoga studios typically had a small-to-moderate size class a few times a day, so it would have low-intensity use. He said the standard as provided by the ordinance for the particular use was permitted by special exception, and that granting the special exception would pose no hazard to the public or adjacent properties on account of potential fire, explosion, and release of toxic materials, noting that it was not the case for a yoga studio. It would pose no detriment to property values in the vicinity or change in the essential characteristics of any area including residential neighbors or business and industrial districts on account of location, scale of buildings and other structures, parking areas, odor, other pollutants, storage of unsightly vehicles, and so on. He said those things were not an issue for a yoga studio, and that parking and access ways already had successful existing adjacent uses on the site. He said it was a good location for that type of use because it was modest in intensity and occasion. He said granting the special exception would pose no creation of a traffic safety hazard or substantial increase in the level of traffic due to the expected amount of usage and patrons. It would pose no excessive demand on municipal services including water, sewer, police and fire protection, and so on. He said it was a small limited size and amount of time that people would be there and, with that type of activity, would not be much of an issue. Granting the special exception would pose no significant increase of stormwater runoff onto adjacent properties or streets because the existing impervious material and building on the site would not change.

Mr. Mulligan concurred and had nothing to add.

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

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Mr. Mulligan recused himself from the petition.

4) Case 6-4

Petitioners: 2422 Lafayette Road Associates, LLC, owner, Pinz Portsmouth, LLC  
applicant  
Property: 2454 Lafayette Road  
Assessor Plan: Map 273, Lot 3  
District: Gateway Neighborhood Mixed Use Corridor (G1)  
Description: Restaurant/bar with 250-500 patrons and a bowling alley.  
Requests: Variances and/or Special Exceptions necessary to grant the required relief  
from the Zoning Ordinance including the following special exceptions:  
a) from Section 10.440, Use #9.12 to allow a nightclub or bar with an occupant  
load from 250 to 500 where the use is only allowed by special exception; and  
b) from Section 10.440, Use #4.20 to allow an indoor amusement use where  
the use is only allowed by special exception.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernie Pelech was present on behalf of the applicant and owner to speak to the petition. He reviewed the site's history, noting that it had been upgraded over the years and that the project would replace the former Big Lots. He said the special exception requests were for the size of the restaurant and bar and the indoor amusement use, pointing out that the restaurant patrons would be on the low side of 250-500 and that the total occupancy of the building would be about 440 people. He reviewed the special exception criteria and said they would be met. He also noted that fire suppression plans were submitted to the City and met all codes, everything would be contained in the building except for the seasonal outdoor seating, traffic studies were done, and there would be no extra municipal services required.

Mr. Hagaman asked about parking needs. Attorney Pelech said there were preliminary parking studies done and that the requirement was for 112 spaces, whereas parking for Big Lots was 110 spaces. He said they could apply for a Conditional Use Permit (CUP) if additional parking was necessary. Mr. Stith said the parking calculations were under the old zoning and that another parking analysis would be done that would probably incorporate the shared parking.

In response to the Board's questions, Attorney Pelech said the applicant would not use the entire Whole Lots building. He said the common wall would be well insulated to dampen sound. He said the operating hours would be weekends beginning around 9 a.m., with the restaurant open until ten or eleven o'clock, and weekdays opening around noon. He said the number of employees would be around 20-30 people. Chairman Rheame asked where the restaurant and bowling would be on the property. Attorney Pelech said it would be to the right of the building and that the greenscape between the building and the movie theater would be fenced. He noted that the two other proposed restaurants on the master site plan would not happen.

Chairman Rheame opened the public hearing.

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

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

**DECISION OF THE BOARD**

Mr. Hagaman asked Mr. Stith if the outdoor seating area design had a requirement for a safety abutment to prevent vehicles from crashing through the fence. Mr. Stith said he wasn't aware of one and had not seen the proposed fence. Attorney Pelech said they would consider bollards.

*Mr. Parrott moved to **grant** the special exceptions for the application as presented, and Mr. Hagaman seconded.*

Mr. Hagaman asked that a safety abutment or something similar be added to the motion as an amendment, and Mr. Parrott agreed.

*The amended motion was to **grant** the special exceptions for the application as presented, with the following stipulation:*

- *a safety abutment or bollard shall be added near the outdoor seating area.*

Mr. Parrott said the site had a long history of commercial and retail and felt that it was an appropriate use for the space, which had been vacant for a while. He said the recreational use was compatible with Water Country and the theater and noted that it would be set back from the street and any nearby residences, with the exception of the apartment complex, and would have plenty of parking. He said standards as provided by the ordinance for the particular use was permitted. He said granting the special exceptions would pose no hazard to the public or adjacent properties on account of potential fire, explosion, or release of toxic materials because the activities were benign. He said it would pose no detriment to property values in the city because of the way it would be used, and he felt that it would probably enhance nearby property values and help the other businesses in the area by drawing people into the plaza. He said granting the special exceptions would not impact any areas including residential neighbors or business and industrial districts on account of location, scale of buildings, and other structures. He said it was an existing building that would not be changed, with existing parking areas and access ways. He said granting the special exceptions would pose no hazardous odors, smoke, gas, other pollutants, noise, glare, outdoor storage, and so on. He said he didn't expect there to be any of that. It would pose no creation of traffic safety hazards or substantial increase in the level of traffic congestion in the vicinity. He said the parking for that area was self-contained and off the road and would not force people to park in someone's neighborhood, and he felt that the design and existing large space would not have any detrimental effect on outside properties. He said if too many people tried to gain access to the parking lot, it would self-correct because people would leave. He said granting the special exceptions would place no excessive demand on municipal services including but not limited to water, sewer, waste, fire and police protection, schools, and so on. He said all those things were non-factors with the type of limited activity proposed for the area and building. He said it would pose no significant increase in stormwater runoff onto adjacent properties because there would be no physical changes that would create additional stormwater runoff. He said the petition met all the criteria.

Mr. Hagaman concurred with Mr. Parrott. He added that, based on the City Staff memo and the Board's conversation, future variances may be needed, but the proposal met the special exception criteria, especially criteria #4 in regard to traffic safety hazards by stipulating that parking bollards and abutments would be added to protect the outdoor dining area.

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

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Mr. Mulligan was recused from the petition.

#### 5) Case 6-5

Petitioner: Richard Fusegni  
Property: 201 Kearsarge Way

Assessor Plan: Map 218, Lot 5  
District: Single Residence B  
Description: Subdivide one lot into three.  
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variance:  
a) from Section 10.521: a) to allow 83'± of continuous street frontage where 100' is required.

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

Attorney Bernie Pelech was present on behalf of the applicant and reviewed the petition, noting that the applicant had decided not to go through with the previous variance 3-lot subdivision and wanted to subdivide the property anew. He reviewed the criteria and said they would be met. He also said the applicant would place a conservation easement behind the three lots to preserve the stand of pine trees.

In response to Mr. Hagaman's questions, Attorney Pelech said the applicant had considered whether or not to subdivide into two lots and protect the trees by having fewer lots, but given the fact that there was 283 feet of frontage and over an acre in lot area, a variance for one lot to have 83 feet of frontage would still meet all the other requirements of the ordinance. He said that connecting three potential new houses to municipal services would require subdivision approval from the Planning Board as well as site plan approval.

Chairman Rheume asked why the former Oak Street's three areas were appended onto the lots but not included in the calculations. Attorney Pelech said it was the entire lot, including the front part and the part that would be under the easement in the back. He said the portion of half of the paper street was not included in the lot size calculation. Chairman Rheume said Lot 2 seemed to be gerrymandered and that one house would face a corner. Attorney Pelech said the westerly line of Lot 2 was drawn in three phases was because the applicant wanted to ensure that he had enough frontage on Kearsarge Way for the driveway and that there would be 100 feet of frontage for Lot 1 and frontage on both Kearsarge Way and Birch Street on Lot 2. He noted that almost half of each lot would be under a conservation easement, making the usable lot 700-800 feet for any future user, and that there would be ample room for a reasonably-sized house on each lot.

Chairman Rheume opened the public hearing.

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

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

### **DISCUSSION OF THE BOARD**

Mr. Lee said he would approve a motion in favor because it looked like a decent plan to make the best use of what was left of the property. Mr. Hagaman said he was not inclined to support

the project, based on the street frontage and lot lines, and that it seemed better for a subdivision of two instead of three. Vice-Chair Johnson said he was torn because the nature of the lot sizes would drive smaller house sizes, especially Lot 2. He said it was reasonable, but that his standard was high for subdividing a lot, especially subdividing lots out and having a nonconforming lot in the end when the lot could easily be subdivided into two. Mr. Lee said that smaller lots would necessitate building smaller and more affordable houses, which would benefit the city. He felt that the variance for 83 feet instead of 100 feet from the frontage was relatively small. Mr. Hagaman said it was a sparsely populated area and agreed that subdividing it into the street lots would necessitate building smaller houses, but would create a four-home subdivision due to the house already being built on the subdivided lot and would make the area seem dense. Chairman Rheame agreed. He noted that most of the lots were large, with small older homes, and said he also had heartburn with the gerrymandering of the property lines to make it work out. He said it was an odd way of subdividing and that it also seemed odd to have a home facing the corner of a lot between two streets. Vice-Chair Johnson said he thought it was a perfect application, four residences on more than an acre, with plenty of room, and didn't pose a density issue by the fact that the parcels all had the proper amount of square footage. He said it just didn't have enough frontage. He said it wasn't the Board's job to create infill or affordable housing, even though the fringe properties were the kind where development of housing stock with more appropriate pricing could be increased. Chairman Rheame noted that the project would force the driveway onto the non-conforming lot and would empty out on a very traveled way.

## DECISION OF THE BOARD

*Mr. Hagaman moved to **deny** the variance for the application, and Mr. Parrott seconded.*

Mr. Hagaman said the application failed on at least two out of the five criteria. He said it would alter the essential character of the neighborhood, and he didn't believe there was a hardship. He said there was the opportunity to see a subdivided lot be in complete conformance with the ordinance, but the owner chose not to do that based on economic reasons, which wasn't sufficient to overcome the hardship requirement. Mr. Parrott concurred and said he also had a problem with the hardship. He said the shape of the lot was too contrived and thought there was plenty of room to do a more traditional type of subdivision into two lots that would look better and be more consistent with the neighborhood. He said he was torn but felt that the project could be redesigned better and conform more to the ordinance.

Mr. Lee said the Board was missing an opportunity. He said the lots were located as one came into the subdivision, and the fact that the parcel was burdened by the short section on Birch Street make it hard to make a straight line. Ms. Eldridge said she would vote against the motion because she felt that a modest house on one-third of an acre would look natural, and she wasn't bothered by the odd shape of the middle lot and that it didn't seem to overburden the area. Chairman Rheame said he was also torn, noting that the property was burdened because it wasn't on one straight road that might result in lots that made more sense.

*The motion to deny **passed** by a vote of 4-2, with Mr. Lee and Ms. Eldridge voting in opposition.*

*It was moved, seconded, and **passed** unanimously to hear the rest of the petitions past ten o'clock.*

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Mr. Mulligan resumed his voting seat.

6) Case 6-6

Petitioners: Joel Johnson  
Property: 165 Union Street  
Assessor Plan: Map 135, Lot 65  
District: General Residence C  
Description: After-the-fact variances for a third floor dormer and rear deck.  
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variances:  
a) from Section 10.521 to allow a 2'± left side yard where 10' is required for the dormer;  
b) from Section 10.521 to allow a 3.5'± left side yard where 10' is required for the deck; and  
c) 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.

**SPEAKING IN FAVOR OF THE PETITION**

The applicant Joel Johnson was present to speak to the petition. He stated that the Building Inspector had gone to his home to check code for a burst water pipe and noticed that no permits were pulled for the dormer and deck that were installed by the previous owner. He referenced his letter that addressed the criteria and said it would be a hardship to remove the dormer and deck.

In response to Chairman Rheaume's questions, Mr. Johnson said his building had no windows facing the next-door structure and that he didn't want to put the dormer on the opposite side.

Chairman Rheaume opened the public hearing.

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

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

**DECISION OF THE BOARD**

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

Mr. Mulligan stated that there would be an injustice if the variances were denied. He said before the new building was erected, there was a dilapidated paint shack abandoned for 20 years. He said he could see why someone would put something up there and think no one would see it, but given that the new structure was built in the same footprint, he couldn't imagine anyone having heartburn over setbacks. He said granting the variances would not be contrary to the public interest because the essential characteristics of the neighborhood would remain the same and there would be no change to what had been there many years. He said it would do substantial justice because the loss to the applicant if complete compliance were required would force the applicant to remove the deck and dormer, which would not counterbalance any benefit to the public. He said the values of surrounding properties would not be affected, pointing out that someone thought it was a good idea to build just feet away from the encroachment, and it sold immediately. He said the hardship was that the property was a preexisting and nonconforming condition, a skinny lot, with a structure that maximized the lot, so there was no fair and substantial relationship between the setbacks and their application to the property. He said it was a reasonable use, a residential use in a residential zone, and should be approved.

Mr. Parrott concurred and had nothing to add.

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

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#### 7) Case 6-7

Petitioners: Charles J. & Kimberlee S. McCue  
Property: 105 Middle Road  
Assessor Plan: Map 152, Lot 18  
District: Single Residence B  
Description: Second floor bedroom addition.  
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variances:  
a) from Section 10.521 to allow a 5'± right side yard where 10' is required; and  
b) 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.

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

The owner Charles McCue was present to speak to the petition. He said the house was small on the inside and that it was logical to extend the house to claim the air space over the 2014 reconstruction. He reviewed the criteria and said they would be met.

In response to the Board's questions, Mr. McCue said they would transition from three bedrooms to two on the second floor and would put a third bedroom on the third floor. He said the house was well within the required setbacks and would not allow views into neighbors' windows.

Chairman Rheume opened the public hearing.

### **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 for the application as presented, and Mr. Lee seconded.*

Mr. Mulligan said it was a modest proposal, with no huge amount of extra living space being added, and that trying to follow the existing setback encroachment was what drove the relief request. He said granting the variances would not be contrary to the public interest and would not alter the essential characteristics of the neighborhood nor affect the public's health, safety, and welfare. He said substantial justice would be done because the loss to the applicant if requested to comply would pose no gain to the public, noting that the addition wasn't huge and followed the same encroachment. He said granting the variances would not diminish the values of surrounding properties, noting that they were not negatively impacted. He said the hardship was that the skinny lot already had existing encroachment, so there were special conditions and no fair and substantial relationship between the purpose of the Setback Ordinance and its application to the property. He said it was a residential use in a residential neighborhood and met the criteria and should be approved.

Mr. Lee concurred and had nothing to add.

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

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#### 8) Case 6-8

Petitioners: Andrew J. Marden

Property: 60 Elwyn Avenue

Assessor Plan: Map 113, Lot 22

District: General Residence A

Description: Subdivide one lot into two lots.

Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including variances from Section 10.521 to allow the following:

- a) 3,457± s.f. lot area and lot area per dwelling unit where 7,500 s.f. is the minimum required;
- b) 2,943± s.f. lot area and lot area per dwelling unit where 7,500 is the minimum required;
- c) 50'± of continuous street frontage where 100' is required;



- d) lot depths of 58'± and 68'± where 70' is the minimum required; and
- e) 30%± building coverage where 25% is the maximum allowed.

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

Attorney Derek Durbin as present on behalf of the applicant. He reviewed the petition, noting that it was a unique property and the only one with frontage on both Elwyn Avenue and Sherburne Road, and it was larger than most of the neighborhood's properties. He said the applicant wanted to subdivide the lot into two so he could build a new residence on one lot and maintain the existing house on the other lot. He said that selling the other lot with the existing house on it would fund the project of adapting the new home to the applicant's disability. He reviewed the criteria, noting that the applicant also wanted to demolish some back outbuildings.

Chairman Rheume asked if the applicant considered an Accessory Dwelling Unit (ADU) option. Attorney Durbin said it was discussed but that it was financially more feasible for the applicant to sell the other lot and parlay the profit into the new home construction. Chairman Rheume said there were other options, like a reverse mortgage, that could support a more modest structure to meet the applicant's needs and keep it within the boundaries. Attorney Durbin said his client chose the option he did because it was the one that gave him more flexibility. He said the project would fit in with the modern density of the neighborhood.

Chairman Rheume opened the public hearing.

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

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

### **DISCUSSION AND DECISION OF THE BOARD**

Mr. Hagaman said he struggled with the characterization of the lot being made similar to the rest of the neighborhood, noting that he counted 18 properties around on Elwyn Avenue, Sherburne Road, and Lincoln Avenue on the tax map photo that were closer in size to the existing property before subdividing, and only eight properties that were similar to what it would be if it were subdivided. He said one of the properties would be in the minority and would be similar to an adjacent property that was only 50'x53', and that the other property sizes, with a few exceptions, were very similar to what currently existed.

Ms. Eldridge said she felt the opposite because the house was between Sherburne Road and Elwyn Avenue, which was the significant area that the Board was looking at, and the new size would be exactly like seven of the neighbors, so it was very much in keeping with the immediate neighbors. She said the backyard looked like it was the missing tooth on the street. Vice-Chair Johnson agreed, noting that a fair amount of relief was asked for, but that it would bring the lot more in conformance with the character of the immediate surrounding neighborhood. He agreed

with Ms. Eldridge's tooth analogy, in that the property was unique because it had a big gap and was the only property that had that.

*Mr. Lee moved to **grant** the variances for the application as presented, and Mr. Mulligan seconded*

Mr. Lee said the project made sense and met the criteria. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said substantial justice would be done because it was the reasonable thing to do. He said granting the variances would not diminish the value of surrounding properties. He said the hardship was that there was no fair and substantial relationship between the public purpose of the ordinance provision and its specific application, and the proposed use was a reasonable one.

Mr. Mulligan said the special conditions were that the property had frontage on both Elwyn Avenue and Sherburne Road, although the dwelling faced Elwyn Avenue and Sherburne Road and the facing portion of the property was the missing tooth on Sherburne Road. He said that was a characteristic that distinguished it from others in the immediate vicinity, and that there would be no fair and substantial relationship between the lot size and frontage and other dimensional requirements and their application to the property, especially considering the immediate abutters on Sherburne Road and Elwyn Avenue. He said that what was being created was almost identical to what existed up and down the street. He also agreed with Mr. Hagaman that there were some larger lots, but most of them had 50 feet of frontage and none had frontage on two different streets, so they were butting up against two properties, which created larger lot sizes. For those reasons, he said it met the hardship criteria. As far as the loss to the applicant v. the gain to the public if strict compliance with the ordinance were required, he said he didn't know what the gain to the public would be, given that there was very little compliance in the neighborhood, and he didn't think it would be an appreciable increase in the amount of density, noting that the applicant could place an ADU on his property if he wanted to.

Mr. Hagaman said he would support the motion, noting that the missing tooth analogy was an effective one for Sherburne Avenue and made sense.

Chairman Rheame said he would not support the motion because when the neighborhood was subdivided in 1899, bigger and uniform sites were important. He said it was corrupted over the years but didn't see that adding density to it would serve the public purpose with the amount of relief required. He said the ADU law was passed with that type of situation in mind and to give people opportunities to create modest units. He said he was more comfortable filling up the gap in the neighborhood with something more modest and kept as part of the same property to limit the variation that would take place over the years.

*The motion **passed** by a vote of 6-1, with Chairman Rheame voting in opposition.*

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9) Case 6-9

Petitioners: Haven Properties LLC  
Property: 187 McDonough Street  
Assessor Plan: Map 144, Lot 43  
District: General Residence C  
Description: Demolish existing home and construct new dwelling, including lot line revision.  
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variances:  
a) from Section 10.521 to allow the following:  
1) a 4'± right side yard where 10' is required;  
2) a 2'± left yard where 10' is required;  
3) a 10'± rear yard where 20' is required;  
4) 49%± building coverage where 35% is the maximum allowed;  
5) a lot area and lot area per dwelling unit of 2,537± s.f. where 3,500 is required; and  
6) 48'± of continuous street frontage where 70' is required; And,  
(b) 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.

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

The applicant Jeff Demers was present to speak to the petition. He said he also owned 178 McDonough Street. He distributed a letter of approval and some sketches to the Board.

Attorney Derek Durbin was also present on behalf of Mr. Demers. He said the house was in significant disrepair and that portions of it encroached the abutting properties to the left and rear. He said it was more feasible for the applicant to have the structure demolished and rebuild it in a different location. He said the applicant purchased 669 square feet of railroad land to remove the current boundary encroachments. He said it could be stipulated that the lot line could be adjusted. He said the new home would be larger than the existing one and would have an attached garage. He reviewed the criteria and said they were met.

In response to Mr. Hagaman's questions, Mr. Demers said that the house was inhabitable because the interior was in rough shape and had a slanting foundation, holes in the second and third floor walls, and parts of the building on the neighbor's property. He said the lot line could not be moved if the building was rehabilitated because the lots were too small and every foot was coveted. He said the lot line was at the corner of the building and that he negotiated with the railroad to allow him to buy 11 feet from the center of the track out, which would make the fence be on his property by a foot.

Mr. Mulligan said the deck on top of the garage and being four feet from the property line concerned him because it would dominate and intrude on the eastern neighbor's privacy. He asked if the applicant had considered moving the deck somewhere else. Mr. Demers said it

would impinge on the rear setbacks. He said the massing on the second floor was pulled back from the property line, which he felt made it conforming. He said he was trying to step down to meet the setback more and would be open to screening on the east side of the roof deck.

In response to Chairman Rheume's questions, Mr. Demers said the existing house had around 1500 square feet of living space and the proposed home had 2,200 square feet. He said the two feet from the jut-out on the second floor was critical because of the floor plan and architectural components relating to the kitchen, dining area, and living room.

Chairman Rheume opened the public hearing.

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

Lisa Hewitt of 167-169 McDonough Street said she opposed the project because the nonconforming lot would be made more nonconforming by increasing lot coverage. She said the proposed home was huge for the lot and the neighborhood, and that parking would be an issue. She said it would alter the essential characteristics of the neighborhood, which consisted of 150-year-old modest homes and felt that the proposed house of three floors with multiple decks was nothing like the rest of the neighborhood. She said the 4-ft setback would not be pleasant for abutters and that the project would set a precedent for older historic homes to be demolished and replaced with huge houses.

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

Elizabeth Bratter of 159 McDonough Street showed photos of abutter homes. She said the deck system seemed massive and said decks created noise. She asked if the sliding door would face the abutter's bedroom. She said the proposed home looked like it could be a future Airbnb.

Attorney Durbin said 46 percent of the lot was taken up by the building and that several lots were similar in nature. He said lots of properties had structures encroaching into the setbacks. He said the applicant would rent the property if he could, but believed that the new house would be in keeping with the neighborhood.

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

### **DISCUSSION OF THE BOARD**

Vice-Chair Johnson agreed that the house was larger than the existing one but thought there were tradeoffs with the footprint. He said he had no problem with the 4-ft setback because it helped leverage the additional square footage from the railroad. He said the decks could be concerning, as far as audio and visual issues, but could be addressed with screening. Mr. Lee said the house's design was 'George Jetson' looking, and massive. He said it didn't fit the character of the neighborhood and the requested relief was aggressive. Ms. Eldridge said it was a great-looking house and the lot coverage was only 3 percent greater than it was, so there wasn't that much

building coverage, but there was an additional 35 percent of space. She said most of the houses on that street were different from one another, but she understood the concerns about the doors and decks and the possibility of a future Airbnb. Mr. Hagaman said he was less concerned about the style of the home but thought the size was bigger than most. He said the house could be much more conforming. Mr. Mulligan said it was an interesting design but wasn't sure if it was appropriate for the lot, noting that the elevated decks would pose a problem in the crowded neighborhood. He said it would pose a substantial decrease in privacy to the east neighbor. He said the expansion might not be as aggressive as it seemed due to the railroad property acquisition because that land was part of the existing home's backyard and fenced in. He said the house was too aggressive and too massive. Chairman Rheaume said the applicant wanted to tear down a perfectly good house, and he cited a few cases of historic homes demolished in Portsmouth. He said demolishing the house would correct the encroachment on another property, but getting rid of the proposed garage would make everything conform more and also get rid of the deck that faced the neighbor, and the property would still have the two off-street parking spots. He said the proposal was not a solution.

### **DECISION OF THE BOARD**

*Mr. Lee moved to **deny** the variances, and Mr. Parrott seconded.*

Mr. Lee said the petition only needed to fail one criteria, and he said the applicant was not burdened by zoning restrictions that made it distinct from other similar properties. He said the relief was already over 46 percent and that he took into consideration the sideyard setbacks, especially the left sideyard setback, and the mass of the house.

Mr. Parrott said he concurred with Mr. Lee and the rest of the Board. He said the deck over the garage was inappropriate and added to the bulk of the house, and he felt that it was too much for the lot and the neighborhood. He said the proposal failed on Criteria 1 and 2.

Mr. Hagaman suggested tabling the petition to the July meeting to avoid a Fisher v. Dover situation. Chairman Rheaume said he felt that there were enough substantial issues and wanted a significant redesign, not tiny adjustments, which would not invoke Fisher v. Dover. He said he would support the motion to deny because there was a lot of relief requested and there were other ways to bring the property more in compliance and spirit and still make it a usable home that preserved the character of the neighborhood better.

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

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### **IV. OTHER BUSINESS**

Chairman Rheaume stated that the Superior Court overturned the Board's decision on the High Street property. He suggested that the Board members read the document. Mr. Stith said the

applicant filed a motion to reconsider. Chairman Rheaume said it would be good to reflect upon what the Superior Court said, in any case.

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**V. ADJOURNMENT**

*It was moved, seconded, and passed by unanimous vote to **adjourn** the meeting at 11:30 p.m.*

Respectfully submitted,

Joann Breault  
BOA Recording Secretary