

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

7:00 P.M.

**August 27, 2019,
Reconvened From
August 20, 2019**

MEMBERS PRESENT: Chairman David Rheame, Vice-Chairman Jeremiah Johnson, John Formella, Arthur Parrott, Jim Lee, Chris Mulligan, Alternate Phyllis Eldridge, Alternate Chase Hagaman

MEMBERS EXCUSED: Peter McDonell

ALSO PRESENT: Peter Stith, Planning Department

Chairman Rheame asked that Petition 7-2 for the appeal of the 27 Thaxter Road petition decision appeal be addressed out of order.

Chairman Rheame, Mr. Mulligan and Mr. Parrott recused themselves from the vote, and Vice-Chair Johnson read the petition into the record.

It was moved, seconded, and passed unanimously to take Petition 7-2 out order. (See Page 2).

I. OLD BUSINESS

Mr. Mulligan recused himself from the Request for Rehearing, and Alternates Ms. Eldridge and Mr. Hagaman assumed voting seats.

A) Request for Rehearing regarding property at 56 Middle Street

Chairman Rheame read the petition into the record and asked whether the request had merit. Mr. Hagaman said he recalled the letters of support from the abutters based on the new agreement. Chairman Rheame agreed that there were successful agreements between the three parties that could be more fully implemented in the future. Ms. Eldridge, Mr. Lee, and Mr. Parrott said the new information, the agreement between the abutters, and the parking resolution were enough to rehear the petition. Mr. Parrott noted that he expected the Board to receive at the rehearing all the parking specifics that were previous significant concerns.

*Vice-Chair Johnson moved to **grant** the Request for Rehearing, and Mr. Hagaman seconded.*

Vice-Chair Johnson concurred with the Board's comments. He thought the main issue was the diminution of surrounding property values due to the parking situation but felt it was worthwhile to rehear the petition since the most affected abutters were in support of the project and the previous owner had presented interesting testimony. Mr. Hagaman concurred, noting that the new or different evidence could impact the Board's previous analysis.

Chairman Rheume said he would support the motion. He said the applicant previously felt that the Board violated the U.S. Constitution because the easements were off the table and not something the Board should consider, but Chairman Rheume thought the nature of the easements wasn't the Board's issue to decide, although it didn't mean it could not be part of their analysis. He said that rehearing the case would result in true justice.

*The motion was **approved** by unanimous vote, 7-0.*

II. PUBLIC HEARINGS – OLD BUSINESS

Chairman Rheume, Mr. Mulligan and Mr. Parrott recused themselves from the petition, and Alternates Mr. Hagaman and Ms. Eldridge assumed voting seats. Vice-Chair Johnson was Acting-Chair.

A) Case 7-2. Petition of Kenneth K. and Deborah A. Jennings for property located at **27 Thaxter Road** to Appeal a Decision of the Portsmouth City Council to restore two involuntary merger lots. Said property is shown on Assessor Plan 66, Lot 39 and lies within the Single Residence B District. **Note: This petition was postponed from the July 16, 2019 and the August 20, 2019 meetings.*

The applicant Deborah Jennings requested that the appeal be postponed to the September 17, 2019 meeting because only five Board members were available due to recusals and an absence.

DECISION OF THE BOARD

*Mr. Formella moved to **postpone** the appeal, and Ms. Eldridge seconded.*

Mr. Formella said the Board typically granted requests to postpone if there were only five members available to vote and he saw no reason not to. Ms. Eldridge concurred.

*The motion **passed** by unanimous vote, 5-0.*

III. PUBLIC HEARINGS – NEW BUSINESS

Alternate Ms. Eldridge assumed a voting seat.

1) Case 8-8. Petition of 202 Court Street Property Group LLC for property located at **202 Court Street** for renovation of existing structure and conversion from a mixed use building to a multi-family residence wherein the following variances are required: a) from Section 10.515.14 to allow a 3’ setback from the rear property line where 10’ is required for a mechanical system; b) from Section 10.515.14 to allow an 8.4’ setback from the left property line where 10’ is required for a mechanical system; c) from Section 10.5A44.31 to permit parking spaces that are not located at least 20’ behind the façade of a principal building; d) from Section 10.5A41.10A to allow a minimum lot area per dwelling unit of 1,705 s.f. where 3,000 s.f. is required; e) from Section 10.1114.32(a) to allow vehicles entering and leaving parking spaces to pass over another parking space or require the movement of another vehicle; and f) from Section 10.1114.32(b) to allow vehicles to back into or from a public street or way. Said property is shown on Assessor Plan 116, Lot 35 and lies within Character District 4L-1.

SPEAKING IN FAVOR OF THE PETITION

The applicant Matt Silva said he was the contractor and a partner in the project. He reviewed the petition, noting that the old garage would be converted to residential space. He said the parking would include front parking for visitors, tandem parking in the garage for two units, and one parking space in the garage for one unit. He said the residents would have to back out in the right-of-way shared by the building and the City. He reviewed the criteria in detail.

In response to Mr. Mulligan’s questions, Mr. Silva said the dormer would be the only change in the footprint, and the previous two uses in the building would convert to one use consisting of a single-story unit in the back and two 2-story units upstairs. In response to Mr. Hagaman’s questions, Mr. Silva said there would be no increase in traffic that would impact the fire station because the right-of-way was open to the public and vehicles would have access through the parking area. He said the project team had considered having just two units and making the lower floor parking and storage, but the lower dirt floor would have to be filled in and vehicles couldn’t navigate the building. He said a third party would do the toxic cleanup.

Vice-Chair Johnson asked if the applicant had been before the Technical Advisory Committee (TAC), noting that TAC had concerns about backing into the road. Mr. Silva said they had been before the Historic District Commission (HDC) and that they planned to have people back across their own parking space and not into Court Street. Mr. Parrott noted that the back wall of the brick building close to the applicant’s building was starting to crumble and asked if the applicant had any say over what happened to it, seeing that it had parking beside it where the tenants would back out. Mr. Silva said they were offered to purchase the building but didn’t, but he felt there was sufficient room between the two buildings.

In response to Chairman Rheume's questions, Mr. Silva said they had a few work sessions with the HDC and would have a public hearing at the October meeting. He said the four requested variances were different than the six originally submitted because they realized they needed further variances after talking to the Planning Board. He said the total area square footage of the property changed to 1,705 square feet. Chairman Rheume pointed out that an area on the survey sheet didn't correspond to the three parking spots next to it, and he asked where the eight parking spaces would be. Mr. Silva explained that four spaces would be outside parking and four would be internal parking. He said the building had a license with the City to park vehicles in three parking spaces, which were currently used by the fire station. Chairman Rheume said if cars were parked in the gray area, it would make it difficult for other vehicles to get in and out of the garage. Mr. Silva said it would be fine for average cars but not trucks or SUVs and that it would be addressed with TAC. He said the setback requests were for HVAC equipment.

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

Rick Becksted of 1395 Islington Street said the parking might be challenging and that the tandem parking would have to be marketed well. He said he encouraged the use of the other three spaces.

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

DISCUSSION OF THE BOARD

Mr. Mulligan said it appeared that there was a lot of relief requested, but most of it was driven by the size and shape of the existing built environment. He said the real issue was whether moving to three dwelling units was too much for the setting, but he thought it was appropriate. He said he wasn't concerned about the stacked parking because he thought it would be easy enough to juggle cars without backing into traffic and didn't foresee a conflict with nearby uses or traffic in the area. He said he could support it. Chairman Rheume said that TAC would sort out the parking challenges. He said there was a lot of relief requested for the lot-area-per-dwelling unit but thought it was appropriate for in the downtown area.

DECISION OF THE BOARD

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

Mr. Parrott said he agreed with all the comments about the desirability of changing the structure, noting that the building's location next to the fire station was an unusual one but a logical place for lodging. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said the variances had more of a technical nature, with the exception of the size, and that the building was big enough to carry the three units. He said the essential character of the neighborhood wouldn't be altered because the building had been there a long time and the basic arrangement wouldn't change. He noted that vehicles had

been parked there for a long time and would pose no harm to public rights. He said granting the variances would do substantial justice because the benefit to the applicant was obvious and allowing the re-use of the old building wouldn't be detrimental to the public interest, plus it would look much better once the siding was removed. He said values of surrounding properties would not be diminished because the upgrade would be a plus for the neighborhood, and the hardship that distinguished the property from others in the area was the unusual location. He said the building was suitable for residential use and that the petition met all the criteria.

Mr. Mulligan concurred. He said the project would require HDC and Planning Board approval, so the public's health, safety, and welfare would be adequately protected. He said the property had several hardships, but the historic firehouse structure deserved to be saved and the applicant deserved some leeway in facilitating it. He said most of the relief was driven by what existed on the ground and that the only significant change was in the lot area per dwelling, but he felt that the building could support three dwelling units. Chairman Rheaume said he would support the motion. He said the property had a jog that went out to the front of the property line; otherwise, the building was close to the property line but in areas where there was open space on adjacent lots.

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

Alternate Mr. Hagaman assumed a voting seat.

2) Case 8-9. Petition of Shannon Leah Harrington and James St. Pierre for property located at **20 Taft Road** for the addition of stairs to an existing deck and a new lower deck wherein the following variances are required: a) from Section 10.521 to allow a 4' rear yard where 30' is required; b) from Section 10.521 to allow 28% building coverage where 20% is the maximum allowed; 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. Said property is shown on Assessor Plan 268, Lot 91 and lies within the Single Residence B District.

SPEAKING IN FAVOR OF THE PETITION

The applicant Shannon Harrington said she wanted to add to the existing deck so that it would go partly around the pool, and the project wouldn't affect the landscaping.

Chairman Rheaume asked what drove the request for relief and why the applicant wanted that particular deck size. Ms. Harrington said there was space enough and that her four daughters wanted more room to enjoy the pool with their friends. Mr. Hagaman asked why the applicant didn't just continue the line of the pool to the deck and go deeper to make the deck sixteen feet. Ms. Harrington said her contractor thought it made sense to do it the other way. Mr. Mulligan noted that nothing was developed at the rear of the property and the zoning map showed a paper street. Ms. Harrington said it was supposed to be a road and was currently greenspace.

Chairman Rheume asked for clarification on the setback relief. The project contractor Kelly Elliot said they wanted the deck to go out eight feet toward the wetlands but there was no way to see where the property line was due to the woods, so they ‘guesstimated’. In response to further questions, Ms. Elliot said there was no fence on the property line but that the deck wouldn’t impede on anything and no trees would be removed.

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

Mr. Formella said the request was reasonable because it only asked to extend eight feet further and there were woods in the back. He said granting the variances would not be contrary to the public spirit or the spirit of the ordinance, and the essential character of the neighborhood would not be affected because the deck would be in the backyard next to the pool where there was already a deck close to the woods. He said substantial justice would be done because the applicant would have a loss if they couldn’t build the deck, given the number of people who lived in the home, and it was reasonable to expand the deck so that the family could enjoy the pool. He said granting the variances would not diminish the values of surrounding properties because the deck would be built in a location that would not affect the neighbors and the woods would shield it. He said literal enforcement of the ordinance would result in an unnecessary hardship because the pool’s location was a unique feature to the property, which made the setback relief minor, and going closer to the back of the lot where the woods were would be less disturbing than going to the side of the house. He said they were unique conditions that distinguished it from others in the area, so there was no relationship between the typical purpose of the setback ordinance and the property. He said the proposed use was a reasonable one.

Mr. Lee concurred, noting that on his site visit he saw a tall fence on each side of the property that would shield the deck from the neighbors.

Mr. Hagaman said he would not support the motion because the request failed the hardship criteria. He said the deck could have been designed in a way that didn’t violate the setback as much. Chairman Rheume said he would support the motion because the request was minimal due to the woods in the back.

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

Mr. Mulligan recused himself from the petition. Both alternates assumed voting seats.

3) Case 8-10. Petition of Dagny Taggart LLC for property located at **3 Pleasant Street** to demolish a portion of the rear of the building and construct an area along the rear of the building with access components to facilitate handicap access, and an elevator, wherein the following variance is required: a) from Section 10.5A41 and Figure 10.5A41.10D to allow a 0' rear yard where 5' is required. Said property is shown on Assessor Plan 107, Lot 31 and lies within Character District 5 and the Downtown Overlay District.

SPEAKING IN FAVOR OF THE PETITION

Attorney Jim Schulte representing the applicant was present, with owner Mark McNabb, project engineer John Chagnon, and project architect Mark Mueller. He reviewed the petition, noting that it was an integrated development plan that included three parcels. He said the building had an old elevator and staircase that were not code compliant, and they would remove a portion on the rear property line to build a new addition for access. He said his client also owned 30 Penhallow Street and was willing to have an easement placed on it so that no construction could occur five feet to the rear of the Pleasant Street property in order to maintain the space between the two buildings. Attorney Schulte reviewed the criteria and said they would be met.

In response to the Board's questions, Attorney Schulte said there was no other way to remodel the building in its existing footprint and make the elevator and stairwell code compliant. He said the rear property line would be extended to the corner and that nothing would happen to the adjacent building, but they wanted the property to have a no-build easement. He explained the 5-foot clearance between the current building and the property line.

Mr. Hagaman noted that the plans for the second and third floors weren't included in the package. Mr. Mueller said the upper levels would be offices and that a small deck would be part of a different application. He said the other use on the ground floor would be a restaurant or public space and that the upper floors would have a different entrance on the rear of the building. In response to further questions, Mr. Mueller said the east elevation windows would bring more daylight in; the decks would be accessed from the public elevator lobby space; and most of the mechanical equipment would be located in an interior space on the ground floor. He said the existing elevator's configuration was obsolete, and they wanted an updated way to access the office environment. He said it would be a fully-enclosed fire stairway with a separate elevator lobby. Mr. Hagaman asked whether the top stories were available by right or incentive. Mr. Mueller said it was a combination of a larger project component and that additional office space would go on those floors. He said the proposed easement would be a 5-ft no-build easement. Mr. Hagaman asked whether it wouldn't be part of the property 5-ft setback requirement. Attorney Schulte said part of the corridor was ten feet wide, and restricting half of that space would protect the back entrance and allow the Penhallow Street building to comply with the 5-ft setback. Mr. Chagnon said the 5-ft setback was due to the building code, and they had to do the easement due to the number of windows.

Chairman Rheaume said there were 5-ft setbacks from the property line on 3 Pleasant Street and from any new structures on either property. He thought if the 10-ft corridor was shifted over by

five feet due to the fact that the applicant owned all those properties, there would probably be an open space area on the small corner of Penhallow and Daniel Streets. Attorney Schulte said there wasn't 10 feet between the buildings, and a 5-ft no-build easement on the Penhallow Street building was adequate. Chairman Rheame said the applicant was requesting that the Board ignore five feet of the setback corridor, and it was further discussed. Mr. McNabb said he owned all three parcels. He discussed the no-build easement and said it was reasonable to do the five feet as a restriction. Vice-Chair Johnson said it was a common approach because the easement allowed for more openings on a zero-lot line and would prevent future variances from being requested, and granting an easement from one property to another would allow for fenestration.

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.

DISCUSSION OF THE BOARD

Vice-Chair Johnson said it was a great solution to create accessibility to the building, that it was tastefully done and would create a nice secondary entrance, address the proposed courtyard in the back, and infill a corner that was already utilized for half the width of the building. Mr. Hagaman asked if a stipulation was necessary for the applicant to file an easement with the neighboring property. Chairman Rheame explained why it wasn't. He said he was in favor of the project, noting that the new zoning was trying to create some free space behind that type of building, and he thought open access on all three floors made sense.

DECISION OF THE BOARD

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

Vice-Chair Johnson said that accessibility to downtown retail buildings was important, and he thought it was a tasteful remedy to a currently somewhat inaccessible building. He said granting the variances would not be contrary to the public spirit and would observe the spirit of the ordinance because there were several zero-lot line buildings, and he thought the project would hide the current eyesore on the rear property line and be an extension of what already existed and was part of the building footprint. He said he appreciated the softness of the curved corner and thought the deck areas would provide some relief from the wall along the rear property line. He said granting the variances would not impact the public's health, safety, or welfare or alter the essential character of the neighborhood because it was an internal corner that had multiple other lots owned by the same applicant. He said it would do substantial justice because there was no benefit to the public that would outweigh the loss to the applicant by providing code-compliant and modern accessibility to all the floors, and the applicant would maintain the historic building and work around what existed there. He said granting the variances would not diminish the value of surrounding properties, noting that the applicant had a history of doing tasteful projects

downtown that could only bolster the values of surrounding properties. He said the hardship was that the property sat on or slightly over the rear property line, so the relief was a minimal extension of that already offending line. He said it wasn't the smallest lot around, noting that there were several larger lots and many of the buildings toward Market Square had open space behind them and not a building immediately to their rear, which was a special condition that distinguished the applicant's property. He said the use was an extension of the current use, which was reasonable, and the project would tastefully add a minimum amount of square footage to make the building more productive. He said for those reasons, he moved to approve.

Mr. Hagaman concurred and had nothing to add.

The motion passed by unanimous vote, 7-0.

4) Case 8-11. Petition of Dagny Taggart, LLC for property located at **0 (53) Daniel Street** for a five-story building with mixed commercial uses wherein variances from Section 10.5A41 & Figure 10.5A41.10C are required to allow the following: a) a building footprint up to 17,500 s.f. where 15,000 s.f. is the maximum allowed; and b) a 3' rear yard where 5' is required. Said property is shown on Assessor Plan 107, Lot 27 and lies within Character District 4 and the Downtown Overlay District.

Mr. Mulligan remained recused from the petition and both alternates assumed voting seats.

SPEAKING IN FAVOR OF THE PETITION

Attorney Jim Schulte representing the applicant was present, along with the project engineer John Chagnon and project architect Mark Mueller. Attorney Schulte said the property was the major focus of the total development. They proposed to replace the empty lot with a 4-story office retail building and replace the parking with a two-level underground garage. He said his client would lose 2,100 square feet of prime ground-story space for his Market concept due to the slope, which dictated the design. He said they needed the BOA's approval before going before the Planning Board or getting HDC approval. He discussed the reasons why the variances were needed and why the garage's design determined the size of the 4-story building. He reviewed the criteria in detail and said they would be met.

In response to Mr. Hagaman's questions, Attorney Schulte said the client couldn't abide by the 5-ft setback due to the foundation size, and a no-build easement was probably not necessary because the space between the two buildings was big enough. He said the rear setback if the building fronted Penhallow Street would be 15 feet from the property line. He said they could lose a lane of parking spaces if they were forced to stick with the 15,000- s.f. building. Mr. Mueller said the team was going through a series of design iterations for the parking and might not do parking at all if they were limited to the 15,000-s-f footprint. Mr. Hagaman noted that a smaller building could open up the open space design to a large gathering space or pocket park. Attorney Schulte said the design already included a pocket park in the corner as well as

landscaping, and if the building were smaller, the changes would be in the corner with the fountain or between 3 Penhallow Street. Mr. Parrott noted that BOA regulations required that adequate plans include dimensions and locations of parking spaces. He said the Board had the locations but no dimensions. Attorney Schulte said the garage was a concept plan and the spaces had to be 19 feet deep. Mr. Mueller said the parking space sizes and drive aisles were compliant.

Chairman Rheume asked for further explanation about the setback of three feet along Penhallow Street. Attorney Schulte said the term ‘vertical lead’ should have been ‘vertical load’. Chairman Rheume asked if there would be a traffic issue due to the ramp being so far over. Attorney Schulte said they needed to be on the corner and there were maximum setbacks, so it was better to have the access into the garage coming off Penhallow Street and to have the ramp in that portion of the building. After some discussion, Chairman Rheume asked if there was any reason why the building wouldn’t feel awkward in the neighborhood compared to other buildings, even though it would be larger than 15,000 feet. Mr. Mueller said the public would not see a difference between 15,000 square feet, or 16.5 or 17 square feet. He said it probably wouldn’t affect the design except where the building was adjacent to the old police station. He said the height and size wouldn’t change.

The community space was discussed. Chairman Rheume noted that the 30 percent would be just for one parcel, according to the ordinance, and he asked what the number for community space for the Daniel Street parcel alone would be and how close the applicant was to meeting that threshold. Mr. Chagnon said that everything beyond the building footprint was open space and that they would divide the building footprint by the lot size and subtract by 100 percent to get the open space figure. Chairman Rheume said more than just open space was allowed because it referred to community space. Attorney Schulte said the open space developable area could include more than one lot, which would result in 27 percent of space on the combined lots. Chairman Rheume said he thought the ordinance addressed just the specific lot in question. Mr. Stith said it could be a development and could cover both properties. After further discussion, Chairman Rheume said the applicant was only three percent short of what they needed and wouldn’t have to be before the Board if it weren’t for that three percent.

Mr. Hagaman asked why there was no parking along the ramp on the top level, noting that there were 10-12 parking spaces along the ramp on the next level down, and whether they could do the same layout but lose the 10-12 parking spaces if the building was 15,000 square feet. Mr. Mueller explained why it couldn’t be done and said the diagram was still in process as well as other alternatives. In response to further questions from Mr. Hagaman, Mr. Mueller said the purpose of the open core was for the ground-floor marketplace and that there were certain benefits for the size of the overall development.

SPEAKING IN OPPOSITION TO THE PETITION

Rick Becksted of 1395 Islington Street said the project would set a precedent in the heart of downtown. He said the Board would determine the development’s size and set the tone for the

other land boards in the newly-created character-based zoning. He said the project lacked a hardship and would alter the essential character of the District.

Attorney Derek Durbin said he represented two owners of three abutting properties, and he distributed letters of objection to the Board that included letters from local surveyor Paul Conley and a commercial architect. He said his clients had several concerns, including the lack of detail and dimensions on the plans and the fact that the 17,500-s.f. building footprint wasn't identified. He said their surveyor concluded that the project's goals could be accomplished within the 15,000 square feet. He said the 16 percent increase of requested relief was significant and unprecedented. He said the application was incomplete and that it shouldn't be left up to the Board to grant a hypothetical relief. He said the project failed the five criteria.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Derek Durbin stated that there was no parking hardship because parking was not a requirement in that district. He said the applicant's argument that he could develop the building footprint by providing three percent more community space was misleading because a community space was an incentive and specific to individual properties. He said the applicant's three properties could be aggregated together. He said the building's scale would change the character of the neighborhood and reduce the light and openness of 21 Daniel Street and hurt the property values. He said the 15,000-s.f. number was in the ordinance for a reason and there didn't appear to be any rationale why the applicant couldn't meet it, so it was a self-created hardship. He asked the Board to deny the petition.

Mr. Chagnon said the lot could be subdivided into two lots by creating a lot line doing down the middle, which would conform to the ordinance, and that 90 percent of the lot with the building would be covered to allow two 10,476-s.f. buildings that could butt up against each other due to the zero side lot line. He said the hardship was in trying to place the desired underground parking without chewing up the real estate with two sets of ramps. He said the bigger size allowed one underground parking configuration with more flexibility and more parking spaces.

Attorney Schulte said they met all the other setbacks except for the 3-ft one by Penhallow Street, and that changing the size of the building would not have any impact on the neighbors' light and air. He said the hardship addressed whether it was a reasonable request, including whether the lot was unique and the ordinance applied. He said the 15,000 square feet in the ordinance applied to any lot size, and that there was an interplay with the amount of open space, so it actually applied more to lots bigger than 17,000 square feet but at some point, the 15,000-s.f. limitation was arbitrary and didn't apply to a particular property. He said the question before the Board was not whether the building's size would have an impact on the neighborhood's character but whether the variance of 2,000-2,500 square feet by itself would change the essential character of the neighborhood or impact the public's health, safety, or welfare.

Mr. Hagaman verified that the property line for 53 Daniel went all the way up to the 14-16 Market Square building and that, no matter what, one could not build within the 9-ft easement.

Attorney Schulte said that was true, unless the front of the building was Daniel Street, in which case one could go right to the nine feet.

Chairman Rheame asked Mr. Stith whether the adjoining properties constituted a development. Mr. Stith said the three lots combined were at least an acre, so the developer would get an incentive for height on the Daniel Street building and a little on 3 Pleasant Street. He said a minimum of 20 percent would be improved community space. Chairman Rheame noted that the definition of developable area in the ordinance was the total area of a single development site, which might include one or more lots excluding open space, wetlands, etc. He asked whether the City was basing their concept on that, noting that the word ‘developable’ was much squishier.

Attorney Schulte said the definition of developable area was the total area of a single development site that could include one or more lots, excluding open space, wetlands, and so on.

Rick Becksted said the developer hadn’t asked for an incentive on height at the HDC work sessions but felt that they should state so if they wanted one.

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

*It was moved, seconded, and passed unanimously to **continue** past 10:00.*

DISCUSSION OF THE BOARD

Chairman Rheame said the Character-Zoning District was a new portion of the ordinance that had a lot of complexity, and that understanding the spirit of the ordinance was a key aspect. Mr. Hagaman said the Board was being asked to look at a package deal. Vice-Chair Johnson said the Board was asked to look at what was in front of them that night, noting that they already made a decision on the other property. Chairman Rheame agreed. Mr. Formella said there were good arguments on both sides and agreed that if the lot were subdivided, one could build two 10,000-s.f. buildings and be in compliance and it would feel like a 20,000-s.f. building with less open space. He said the applicant was asking for 17,000 square feet on one lot, which would give more space, and that the lot’s size would allow the building to fit into the neighborhood and not alter its essential character. He said the real effect on the abutters would be a large building, where before there was no building. Ms. Eldridge agreed. She said if the photo of the new building were inserted into the streetscape, one would see that it didn’t stand out and that it had the same rhythm as the other buildings. She said the 15,000 square feet was a number that didn’t indicate how the building should look. Mr. Lee said it wasn’t a hardship that the lot was big. He said the zoning was arbitrary and thought the applicant was vague about saying they may do this or they may not do that. Vice-Chair Johnson said he agreed that subdividing the lots was a good point. He said the ordinance was a bit in conflict because it didn’t really state that they had to defer to the lesser of maximum building coverage of 90% or the maximum building footprint of 15,000 square feet. He said the hardship was that the owner was being penalized for having a piece of property outside the ordinance. He said nothing implied that the 15,000 square feet would govern over the 90 percent, and he couldn’t think of many developable lots downtown

where 90 percent wouldn't necessarily exceed the 15,000 square feet. He said he didn't see how 2,500 square feet would alter the character of the actual building and thought most people wouldn't notice it.

Chairman Rheame said the Board had been given a great level of importance twice that evening by statements indicating that they offended the U.S. Constitution and controlled the destiny of a bunch of parking lots downtown. He said he didn't agree in either case. He thought the petition was not ready for a decision yet, even though there was good potential. He said the 15,000-s.f. limit was put into the ordinance for a good reason. He thought the design was just too 'squishy' and, although he understood the applicant's point about having to match three competing interests of three separate boards, he wanted to see the product cooked more so that the Board could have a more definite idea of what they were being asked to actually approve. He said he still had questions about the open space, and he noted that the ordinance had detailed allowances to encourage certain things and give some outs. He felt the applicant was close to meeting all those things. He said one sticking point was that the 50 percent of the ground floor's gross area should be dedicated to parking because he thought it should indicate that it should be the case if the applicant wanted ground floor parking. He said he'd be happier granting the variance for a small subsection like that instead of throwing the 15,000 square feet out the door. He said the design had to be more refined and that he wanted to see more input on it from the other land use boards so that the Board could get closer to a final product. Mr. Parrott agreed and said he didn't remember seeing anyone ask for up to an 'x' amount of relief. He said too many things were concepts and that the project was too important to have 'up to' and 'concept' as part of the approval process. He said the applicant could come up with a more definitive project that the Board could deal with. Mr. Lee said a criterion was the spirit of the ordinance being observed, and he agreed that the whole application was a little to 'squishy' for him to get behind.

Mr. Hagaman said he struggled with the application for reasons previously mentioned, noting that the three properties were being considered together for the multiple benefits of the combined property, but only one new building was being built and a minor addition added to another, with nothing happened to the third. He said he didn't know how it qualified as a development and wanted to see more detail. He said if the project was being presented for not just the benefits to the applicant for the building but for the community and community space, he thought the community space presented on that one lot didn't seem that significant, due to already-existing alleyways and the front corridor of another building. He noted that if all the properties were sold off and there wasn't unified ownership, the level of community space could be changed. Vice-Chair Johnson argued that if the same owner developed all the properties together to make a development, it could be changed because the owner could parcel off one of the properties and the buyer could chop up the holistic development, but he thought it was unlikely because the buyer would be purchasing a property that had only portions of a courtyard and an accessway.

DECISION OF THE BOARD

*Ms. Eldridge moved to **table** the petition, and Vice-Chair Johnson seconded.*

Ms. Eldridge said the Board needed the missing details, including the amount of open space, parking information, the building's exact square footage, and more information about the development as a whole. She noted that people were very concerned about how indefinite the project was, like where the entrance would be that could affect certain setbacks, the parking situation, and so on. Vice-Chair Johnson referred to his previous commentary about the conflicting 90 percent maximum buildout versus the 15,000-s.f. footprint, pointing out that there really was no decision-maker written into the ordinance.

Mr. Stith said there could be multiple buildings. Chairman Rheame agreed, noting that the ordinance indicated that big lots were a bad thing and should be subdivided and infilled more, which could be an unintended consequence of how the ordinance was put together. He said he would support the motion because he thought it was important to get it right for the City and thought the character-based zoning was also important. He said he wanted to make sure the incentives put into the ordinance were really working. He said the applicant seemed close to meeting one of the incentives but didn't think the proposal was quite ready for the Board to fully understand what they were being asked to grant.

The motion passed by unanimous vote, 7-0.

Mr. Mulligan resumed his voting seat and Mr. Hagaman took a voting seat.

5) Case 8-12. Petition of Hill Hanover Group LLC for property located at **0 Hanover Street (aka 181 Hill Street)** for construction of a six story 60' hotel with interior parking wherein the following variances are required: a) from Section 10.5A43.31 and Section 10.5A46.10 to allow a six-story 60-foot tall building where a five-story, 60-foot tall building is permitted; b) from Section 10.1114.21 to allow 54 valet-only parking spaces using a two-car lift system where 10 spaces do not meet the parking depth requirements; and c) from Section 10.1114.32(a) to permit a valet-only lift system which requires passing over another parking space or moving another vehicle where both requirements are prohibited. Said property is shown on Assessor Plan 138, Lot 62 and lies within Character District 5.

SPEAKING IN FAVOR OF THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant and introduced the owners Kim and Maya Rogers and the project engineer John Chagnon. He said they wanted to build a 6-story hotel with off-street parking and utilize the Foundry Place parking. He said the relief incentive was a wide sidewalk across from the garage and for parking because the ten parking spaces didn't meet the depth requirement. He said it was valet-only parking and the lifts and six stories were necessary to provide enough parking to meet code. He reviewed the criteria.

Vice-Chair Johnson asked if the Foundry Place garage had had similar issues. Attorney Phoenix said problems were found when they dug a deep hole and thought the City had hooked up to its stormwater system. Vice-Chair Johnson noted that 9'2" floor heights were typically undersized

and asked if the applicant was confident that the stories would fit. Mr. Rogers said the design was vetted by the franchise hotel, noting that the space was tight and they would have to be careful how they layered the structure between each floor to get as close as possible to 8-ft ceilings. In response Mr. Hagaman's questions, Mr. Rogers said they moved from a mixed-use development to a hotel because construction costs doubled in the last ten years and a mixed use wouldn't be economical. He said they might consider eliminating the parking garage in the hotel.

Chairman Rheume asked what the applicant's agreement with the City was for parking space for the garage. Mr. Rogers said they had a license for 68 spots and they assigned 32 to the Lot 3 development and that they had to go before the Planning Board. Chairman Rheume asked if the 68 spaces were physically separated. Mr. Rogers said they were not and would be general use. Chairman Rheume said there were 14 parking spots assigned on the Hill Street side and asked if they would be used by the hotel or the Hanover group or if the 86 spots would be used for hotel use. Attorney Phoenix said the ordinance was silent on who the parking spots would go to and whether they would be leased.

Chairman Rheume asked Mr. Stith what the basis for 86 parking spots was. Mr. Stith said the applicant did not have to provide parking on the lot and that the ordinance didn't specify how it was designated. Chairman Rheume said a 5-story, 60-ft building was different than a 6-story building due to the intensity of use, the number of people, and the amount of visible light and glass, and he was concerned about the south elevation, which would face the nearby apartment buildings. He asked the applicant why the Board should grant that variance. Mr. Rogers said the first floor was partially below grade but not enough to count as a basement. Chairman Rheume said it would drive the density up and affect the neighbors more, even though it was a permitted use. Mr. Mulligan said there was posted parking on Hill Street reserved for the residents and asked how the parking configuration for the fourteen spaces on Hill Street would affect it. Mr. Rogers said there were pull-in garage bays for the neighbors' use per their agreement.

SPEAKING IN OPPOSITION TO THE PETITION

Elizabeth Bratter, owner of 159 McDonough Street distributed a handout comparing the original and revised projects. She asked the Board to deny the request because the applicant proposed a 60-ft building on a 12-ft grade that would make the building 70 feet tall.

Mark DeLorenzo of 349 Hanover Street said the project was proposed as a 4-story building originally and kept changing. He said the mixed-use building turned into multiple hotels right next to the neighbors, and they were worried about their property values and lack of light.

Peter Happny of 66 Rock Street said he lived next to the parking garage. He said there was a difference between hard ledge and regular ledge, and that regular ledge was not as expensive to deal with. He asked that the originally-proposed residential building be kept instead of the hotel.

Robin Husslage of 27 Rock Street said she was opposed because it was a change of use from residential to a transient housing use and would change the neighborhood's character. She said

the perceived height from Hill Street would make for a looming building. She said everyone had ledge on their property and that it wasn't a hardship that justified the conversion.

Michael Lahan of 394 Hanover Street said the proposal astounded him because the applicant already had an approved site plan but now claimed a hardship because they could make more money with a hotel. He said if the hotel didn't work out, the applicant would have an extra floor for mixed use. He said the revised plan would be to the detriment of the neighborhood.

Paige Trace of 27 Hancock Street said there was no hardship. She asked where the stormwater and the contaminated runoff from the garage's open windows would go. She said the previous mixed-use proposal made sense but the new proposal would pose more density, greater profit, noise and light pollution, and a hardship to the City's residents.

Rick Becksted of 1395 Islington Street said it was a change of use at multiple levels that would encroach on the neighborhood. He said each one of the proposed buildings did not meet the parking requirements on site, so each covered a base for one or the other to act as a whole. He said the Board should ask what the usage of the current building's coverage would be required to fill the needs of the other properties.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Kim Rogers said the City didn't allow them to pump groundwater into the stormwater system. He said they were flowing surface water through an engineering system.

Elizabeth Bratter said Lot 6 should be treated as the intermediary zone to encourage reasonable growth that balanced the neighborhood. She said the applicant was previously approved for something different that fit into the neighborhood. She was concerned about parking being on the ground and first floors and more variances sought if the lifts didn't work.

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

DISCUSSION OF THE BOARD

Mr. Mulligan said it was a change in use but was a permitted use in the zone, and the property owner had the right to change his mind. He said the contrast with the previous design was striking, noting that one proposal looked like a tastefully designed large building and the other looked like a chain restaurant in a strip mall. He said the Board wasn't the 'design police' and thought the real issue was whether the applicant made a strong enough case for hardship to justify the height relief requested. Mr. Formella said the owner had the right to develop the property a different way but was uncomfortable with a completely different project pending before the Planning Board while the Board considered a variance for something totally different. Vice-Chair Johnson said he was torn because it was a transition zone between two areas and an allowed use but was also in the downtown overlay district, so it got bonuses that could be jacked up as much as possible in a CD5 zone, right next to a residential area. He said the proposal didn't

feel appropriate. Mr. Hagaman asked whether the Board was setting themselves up for a domino effect because if the hardship was ledge and groundwater issues and it was a similarly positioned project with the rest of the development, it could have a domino effect on the next project. Mr. Parrott said it was a transition zone but that the project must not alter the neighborhood's essential character, and a building of that height would be up against the residential buildings. He said there would be justice to the developer to do something allowed but thought it could do harm to the general public, and he didn't think the project made a transition from the pure residential on Hanover Street and parts of Hill Street to the commercial district. He said his concern was whether the purely-commercial project 50 feet from some of the houses across Hill Street would change the essential character of the neighborhood. Mr. Lee said the proposed building was another slap in the face to the neighborhood, like the glow from the Foundry Place garage, and he thought the application failed several criteria. Vice-Chair Johnson said the applicant by right could built a 60-ft building with five stories, and if they went underground, they could still have the same number of hotel rooms and could do so without coming before the Board, which meant they didn't really have a hardship.

Chairman Rheume said it was very late, and the Board was allowed to table the petition if they felt that they needed more time to think about the complexities. He wanted to make sure the Board got the criteria right. He said the application was a good example of where the zoning let the Board down, pointing out that the lot was screaming for the original project, a transition zone of a residential with some commercial. He discussed reverse hardship and said he was torn about the fact that a hotel was allowed. He said that all the issues the building had leaned toward not meeting the criteria, e.g. the height was allowed but there were too many stories, a parking system was jury-rigged by double-stacking cars, 14 parking spaces were taken from somewhere else because 86 spaces were needed, and so on. He said there were a lot of different things that had to happen to make the building come together and work as a functional hotel, and he wasn't ready to approve or deny without more thought on the legal implications.

DECISION OF THE BOARD

*Mr. Formella moved to **table** the application to the September 17, 2019 meeting, and Mr. Hagaman seconded.*

Mr. Formella said the application had a weird combination of factors that made him want to think about it more and thought it presented enough issues for the Board to think about as well. Mr. Lee said he would not support the motion because he felt it was a bad trend to table things just because the Board couldn't come to a decision. Mr. Hagaman agreed but noted that it was midnight and there were complexities to the case that were worth further consideration. He said he wanted to do a legitimate analysis because the case could be appealed. Chairman Rheume pointed out that the BOA handbook included taking the additional time necessary to get the motion right. He said he was hesitant to table the petition but felt that it was necessary.

*The motion **passed** by a vote of 5-2, with Mr. Lee and Mr. Mulligan voting in opposition.*

IV. OTHER BUSINESS

There was no other business.

V. ADJOURNMENT

*It was moved, seconded, and unanimously passed to **adjourn** the meeting at 12:10 a.m.*

Respectfully submitted,

Joann Breault
BOA Recording Secretary