

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

7:00 P.M.

JANUARY 22, 2020

MEMBERS PRESENT: Vice-Chairman Jeremiah Johnson, Jim Lee, Peter McDonell, Arthur Parrott, Alternate Phyllis Eldridge, Alternate Chase Hagaman

MEMBERS EXCUSED: Chairman David Rheume, Christopher Mulligan, John Formella

ALSO PRESENT: Peter Stith, Planning Department

Chairman Rheume was absent, and Vice-Chair Johnson assumed a seat as the Acting-Chair. Alternates Ms. Eldridge and Mr. Hagaman assumed voting seats for all petitions.

I. APPROVAL OF MINUTES

A) December 17, 2019

*It was moved, seconded, and passed unanimously to **approve** the December 17, 2019 minutes as submitted.*

II. PUBLIC HEARINGS – OLD BUSINESS

A) Case 12-6. Petition of Nickerson Home Improvement Company, Inc. and James S. Remick, Trustee of James S. Remick Revocable Trust of 2000 and Linette S. Remick, Trustee of Linette S. Remick Revocable Trust of 2000, owners and Perley Lane LLC, applicant for properties located at **95 Brewster Street and 49 Sudbury Street** wherein relief was required from the Zoning Ordinance to demolish existing structures, merge two lots into one and construct 3 dwelling units which requires the following Variances from Section 10.521: a) to allow 42% building coverage where 35% is the maximum allowed; and b) to allow a 6' rear yard where 20' is required; and c) to allow a 17' rear yard where 20' is required.) Said properties are shown on Plan 138, Lots 57 and 58 and lie within the General Residence C District. *(This petition was postponed from the December meeting and the required relief has been revised.)*

SPEAKING IN FAVOR OF THE PETITION

Attorney Derek Durbin was present on behalf of the applicant and introduced Joe Caldarola of Perley Lane LLC. He reviewed the petition, noting that there would be three single-family condominium units on the merged lot. Mr. Hagaman asked what the building coverage and setbacks would be if the lots weren't merged. Mr. Caldarola said there would be 40 percent lot coverage. Attorney Durbin reviewed the floor plans and the criteria.

Mr. Hagaman asked what the motivation for the building size and location was, and what drove three condominiums versus simply redrawing the lot lines. Mr. Caldarola said they would require more setback variances. He discussed the unique rear yard setbacks. Mr. McDonell asked whether the bulkhead on the side yard setback would also require relief. Mr. Stith said it didn't have to meet the setbacks if it was less than 18 inches. Mr. McDonell said the side yard was proposed at six feet. Mr. Stith said it was most likely a typographical error. In response to further questions from Mr. McDonell, Attorney Durbin said the majority of the neighboring lots exceeded building coverage. Mr. Caldarola said they were requesting a 6-ft rear yard setback on the Brewster Street side so that the units would be spread out more and be more in keeping.

Acting-Chair Johnson opened the public hearing.

Matt Wirth of 439 Hanover Street said he lived across from proposed Unit 3 and had suggested that the applicant move the building closer so that their driveways lined up, which might prevent the new owners from changing the parking. He said the applicant wasn't doing anything out of character with the neighborhood by requesting a 17-ft side yard setback, even though the neighborhood had mostly multi-family homes.

SPEAKING IN OPPOSITION TO THE PETITION

Peter Happny said he owned a business and residence at the end of Rock Street and that he hated to see the historic 18th-century homes demolished. He suggested that they be converted to condominiums, which wouldn't require setback variances, instead of building new ones.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Durbin said an adaptive re-use of the historic homes would require a lot of zoning relief and that the main issues with the existing buildings were structural and encroachments.

No one else rose to speak, and Acting-Chair Johnson closed the public hearing.

DECISION OF THE BOARD

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

Mr. McDonell said he was initially concerned because it looked like the factors driving the relief were things that could be alleviated by having two units, but he thought there was enough that was unique about the lot that it made sense to put a reasonable number of uses and lot coverage, on the lot. He said that what drove the rear yard setback relief request were the two rear yards of the lot that looked like side yards and would reasonably be treated as so, and the request for three feet was reasonable; he said the request for substantially more was less reasonable but made sense, seeing that side of the lot was fronting on the park and would replace something that was far more imposing and closer to the lot line. He said what drove the building coverage relief were the two structures that were going to be more in keeping with the neighborhood than they would if they were 3-story boxes that didn't need setback, height, or building coverage relief and that they would fit into the neighborhood just fine. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said they would not alter the essential character of the neighborhood and would fit in well with the neighborhood. He said substantial justice would be done because he didn't see any harm to the public or other individuals. He realized that some changes were less welcome, but quite a few people would welcome the change to have the large commercial building gone and replaced by smaller units that imposed less of a burden on the neighborhood. He said there was nothing indicating that granting the variances would diminish the values of surrounding properties, noting that the project looked like it would be tastefully done. He said literal enforcement of the ordinance would result in unnecessary hardship because there were special conditions of the property that distinguished it from others in the area, including the park to the side and back of the two lots that offset the rear yard request that was more substantial where 20 ft was required, and the building coverage because it opened up that space a bit more. He said the other special condition was the shape of the property that drove the rear yard relief request. He said he saw no fair and substantial relationship between the general purposes of the ordinance and the proposed use, and that the proposed use was a reasonable one, a residential use in a residential neighborhood.

Mr. Hagaman concurred and had nothing to add.

Mr. Parrott said Mr. Happy's comments were important because he knew the area well and his comments were useful with respect to the house, but unfortunately it was a package deal in a residential neighborhood, and getting rid of a large corner structure in the middle of a neighborhood and right up against the property lines was very desirable. He said the biggest plus was that the project would replace a commercial structure in a tight residential neighborhood with a tastefully designed project in scale with the other homes in the neighborhood.

The motion passed unanimously, 6-0.

III. PUBLIC HEARINGS – NEW BUSINESS

1) Case 1-1. Petition of Argeris & Eloise Karabelas, owners, for property located at **11 Meeting House Hill Road** wherein relief was required from the Zoning Ordinance to remove and reconstruct garage roof and convert the second floor into a studio apartment which includes the

following: 1) A Variance to increase the height of the garage to 20' 1" where a prior Board stipulated the height not exceed 18'. 2) A Variance from Section 10.521 to allow an 8' rear yard where 20' is required. Said property is shown on Assessor Plan 103, Lot 59 and lies within the General Residence B District.

SPEAKING IN FAVOR OF THE PETITION

Attorney John Bosen was present on behalf of the applicant and introduced the architect Jennifer Ramsey. He reviewed the petition, noting that the house would become a single-family structure and that the garage would have a studio above it. He said the main house had already received approval from the Historic District Commission and that the garage portion approval was pending the Board's approval. He reviewed the criteria and said they would be met.

In response to Mr. Hagaman's questions, Ms. Ramsey said they pushed the height increase as far as they could to make a code-compliant stairway and that the space above the garage would be used for storage. In response to Acting-Chair Johnson's question, she said the garage would be peak-to-peak with the main house.

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

No one rose to speak, and Acting-Chair Johnson closed the public hearing.

DISCUSSION OF THE BOARD

Mr. Hagaman asked whether the addition would qualify as an Accessory Dwelling Unit (ADU). Mr. Stith said it would be a separate dwelling and not an ADU and that it was allowed, noting that it was an existing use that would be converted to a studio.

DECISION OF THE BOARD

*Mr. Lee moved to **grant** the variances as presented, and Ms. Eldridge seconded.*

Mr. Lee said it was a benign application because the applicant was only asking for the increase in the garage, which was to make the ingress and egress stairs code compliant. He said granting the variances would not be contrary to the public interest or the spirit of the ordinance. He said the proposed use would not threaten the public's health, safety, or welfare. Substantial justice would be done because the benefit to the applicant would not be outweighed by any harm to the public. He said granting the variances would not diminish the value of surrounding properties, and that literal enforcement of the ordinance would result in unnecessary hardship. He said there was no fair and substantial relationship between the purpose of the ordinance provisions and their specific application to the property and that the proposed use was a reasonable one.

Ms. Eldridge concurred and had nothing to add.

Mr. McDonnell said Mr. Hagaman had made a good point because the second floor of the garage would not be habitable unless the height was increased, so it seemed to him a little less straightforward, but he thought the petition still met all the criteria. Acting-Chair Johnson said the previous version of the garage made it more dominant in footprint, but the new version maintained the footprint and the difference in height wouldn't be perceived from the ground.

The motion passed unanimously, 6-0.

2) Case 1-2. Petition of Christopher Hudson Morrow, owner, for property located at **36 Richmond Street** wherein relief was required from the Zoning Ordinance which requires the following to construct a 2-story bay addition, third floor dormer and new heat pump which requires the following: 1) Variances from Section 10.521 to allow the following: a) a 9' right side yard where 10' is required; b) a 12.5' rear yard where 15' is required; and c) 41% building coverage where 40% is the maximum allowed. 2) A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. 3) A Variance from Section 10.515.14 to allow a 7' right side yard where 10' is required. Said property is shown on Assessor Plan 108, Lot 5 and lies within the Mixed Residential Office District.

SPEAKING IN FAVOR OF THE PETITION

Architect Anne Whitney was present on behalf of the applicant. She said the small lot had a good-sized house on it and that they proposed to reduce the fenestration and create a second story within the existing envelope. She noted that the heat pump's location would not cause any piping to be on the building's exterior. She reviewed the criteria and said they would be met.

Mr. Hagaman asked if the neighbors were concerned about the dormer looking down at them. Ms. Whitney said they hadn't mentioned it and were happy that the big bank of windows would be eliminated. She said the dormer addition was actually set back.

Acting-Chair Johnson opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one rose to speak, and Acting-Chair Johnson closed the public hearing.

DECISION OF THE BOARD

*Mr. Hagaman moved to **grant** the variances as presented, and Mr. McDonnell seconded.*

Mr. Hagaman said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said the modest addition and renovation would not alter

the essential character of the neighborhood or threaten the public's health, safety, or welfare and in fact would improve how domineering the property appeared to be with its neighbors. He said granting the variances would do substantial justice because there was no gain to the public that would outweigh the loss to the applicant if the petition were denied. He said the value of surrounding properties would not be diminished and would likely be increased by the renovations. He said the hardship was that the lot was very small, so anything done on the property would require variances. He said there was no fair and substantial relationship between the general purposes of the ordinance and their specific application to the variance request. He said the use was a reasonable one, a residential property in a residential neighborhood, and was a very modest renovation of that property.

Mr. McDonnell concurred and had nothing to add.

The motion passed unanimously, 6-0.

3) Case 1-3 Petition of James & Mallory Parkington, owners, for property located at **592 Dennett Street** wherein relief was required from the Zoning Ordinance to add an accessory dwelling unit above an attached garage which requires the following: 1) A Variance from Section 10.521 to allow a 4' secondary front yard where 15' is required. 2) A Variance from Section 10.321 to allow a nonconforming structure or building to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on Assessor Plan 161, Lot 18 and lies within the General Residence A District.

SPEAKING IN FAVOR OF THE PETITION

Attorney Derek Durbin was present on behalf of the applicant and introduced the applicant Mr. Parkington and the project designer Brendan Tescher. Attorney Durbin reviewed the petition, noting that the garage would be within the front yard setback and consistent with others on the street, and that Whipple Street was narrow and had a right-of-way that was wider than normal.

In response to Mr. Hagaman's question, Attorney Durbin said the 4-ft front yard setback relief was necessary to make the garage blend in with everything on the street and keep the light and usable yard space. He reviewed the criteria and said they would be met. Mr. McDonnell said the other three lots on that block all had garages in similar places and looked like they could support an ADU. Attorney Durbin said the street had low traffic and didn't think the other properties could support an ADU because of the way they were built out. He said they were all corner lots in a sense, and that the lots had different circumstances. He said the applicant's property was pushed up from the street and didn't have the space to fit the ADU. He said one of the reasons they applied for extension of a non-conforming use in addition to the front yard setback relief was because they were attaching the garage and that it was almost like an inset development.

Acting-Chair Johnson noted that the property lacked one required parking space. Mr. Tescher said they would reduce the parking spots from three to two. He also said they would have to go before the Planning Board if the variance requests were approved.

Acting-Chair Johnson opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Patrick Crimmins said he was in support of the project because it was very well thought-out and fit in with the streetscape.

No one else rose to speak, and Acting-Chair Johnson closed the public hearing.

DECISION OF THE BOARD

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

Mr. Parrott said it was a bit unusual, but the amount of relief requested was very small and the street was different from other streets. He said the proposal to set the new structure back and not exactly in line with the main house would be an aesthetic plus to the property and to the street. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance because the use as proposed would fit in with the essential character of the neighborhood and be the same as the others on the other corners. He said it would pose no threat to the public's health, safety, or welfare because the proposed garage was a residential use in a residential district. He said substantial justice would be done, noting that he couldn't see public interest involved in any way, and there was no justification to deny it. He said granting the variances would not diminish the value of surrounding properties, noting that it was an unusual street in a long-established neighborhood and that the value of surrounding properties would not be hurt and may actually be enhanced. He said the hardship was the peculiar property on a corner, set way back from the street pavement, but it was consistent with other similarly-situated properties. He said the petition met all the criteria.

Mr. McDonell concurred and had nothing to add.

Acting-Chair Johnson said the Board would normally frown upon a 4-ft setback relief request where 15 feet were required, but he said the applicant benefited from an unusual street and the purpose of the setback would be met, even though the number itself was very low. He said he'd prefer to see the ADU sited a bit further back from the street, but he understood that the lot was narrow and that being back any further from the ADU would continue to create a less beneficial backyard for the applicant and could infringe upon the light, air, and privacy of the main house.

*The motion **passed** unanimously, 6-0.*

4) Case 1-4. Petition of SAI Builders, LLC, owner, for property located at **21 Elwyn Avenue** wherein relief was required from the Zoning Ordinance for the renovation of existing home including front porch reconstruction, kitchen expansion and second floor addition which requires the following: 1) A Variance from Section 10.521 to allow a) a 3’6” right side yard where 10’ is required; and b) to allow 32% building coverage where 25% is the maximum allowed. 2) A Variance from Section 10.321 to allow a nonconforming structure or building to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on Assessor Plan 113, Lot 28 and lies within the General Residence A District.

SPEAKING IN FAVOR OF THE PETITION

Attorney Derek Durbin was present on behalf of the applicant. He distributed a letter from Visuluxe Real Estate to the Board. He introduced Patrick Nyson of SAI Builders. He reviewed the petition. Mr. Nyson reviewed the proposed interior and exterior renovations. He said all the windows would be replaced and the second story would be rebuilt with a vertical expansion, which was the only setback issue. He said most of the rear wing with the lower roof would be demolished to the decking and rebuilt to expand the kitchen and add space above it.

In response to the Board’s questions. Mr. Nyson said nothing from the portion of the house with the higher ridge would be removed except for the triangular bump-out window on the front façade. He said he owned the adjacent lot and had plans to build a house on it. Attorney Durbin reviewed the criteria and said they would be met.

Acting-Chair Johnson opened the public hearing.

Cliff Hudson of Kent Street said he was an abutter. He said the house was said to be built in 1850 but that the neighborhood didn’t exist until 1899.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Durbin said the original recorded subdivision was from 1899 and that it showed a structure on the abutting lot that indicated 1850 but may not have been the applicant’s structure.

No one rose to speak, and Acting-Chair Durbin closed the public hearing.

DECISION OF THE BOARD

*Ms. Eldridge moved to **grant** the variances as presented, and Mr. Lee seconded.*

Ms. Eldridge said granting the variances would not be contrary to the public interest because the house could use some love, and it would fit in well with the neighborhood. She said the spirit of the ordinance would be observed because the project was a good one for the area, and substantial justice would be done because the area would benefit by the project. She said granting the

variances would not diminish the value of surrounding properties. Regarding hardship, she said that one could barely fit a shutter on the house without going over the property line situated at the end. She said the request was reasonable for such a minor change to coverage.

Mr. Lee concurred and had nothing to add.

The motion passed unanimously, 6-0.

5) Case 1-5. Petition of Clipper Traders LLC and Portsmouth Lumber & Hardware, LLC, owners, Iron Horse Properties, LLC, owner and applicant for property located at **105 Bartlett Street (aka 0 Bartlett Street)** wherein relief was required from the Zoning Ordinance for the relocation of existing structure and construction of 178 unit mixed-use development which includes the following: 1) A Variance from Section 10.516.20 to allow a 6' setback from a railroad right of way where 15 feet is required. 2) A Variance from Section 10.5A42.40 to allow a new building to encroach into the Dover Street view corridor. 3) A Variance from Sections 10.5A43.31 & 10.5A46.10 to allow a portion of two buildings to be five-stories, 60 feet where a four-story, 50 foot building maximum is permitted with incentives in the CD4-W zone. Said property is shown on Assessor Plan 157, Lots 1 & 2 and Assessor Plan 164, Lot 4-2 and lies within Character District 4-W (CD 4-W) and Character District 4-L1 (CD4-L1).

SPEAKING IN FAVOR OF THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant and introduced Attorney Kevin Baum, the principal developers Doug Pinciario and Ed Hayes of Iron Horse Properties and Jeff Johnston of Cathartes, project engineer Patrick Crimmins, and landscape architect Robbie Woodburn. He reviewed the petition and said the goal was to transform a blighted property into a beautiful mixed-use one. He noted that 220 units were informally proposed but then decreased to 178 units. He also reviewed the landscaping plan, bike path, view corridors, and open space. He said the requested variances were to relocate the two Ricci Lumber buildings, realign the Dover Street view corridor, and add 10 feet of height and a story. He reviewed the criteria.

Mr. Hagaman asked if the original proposal to extend the height of the other buildings already qualified for the West End incentives. Attorney Phoenix said he believed they did because the project provided the bike path. In response to further questions from Mr. Hagaman, Attorney Phoenix said the unnecessary hardship created by adding a new story and additional feet was due to the lot's shape and all the constrictions on the lot. He said the storage buildings were for Ricci's Lumber only; that four or five units would be lost because part of the building had to be chopped off to maintain the view corridor; and that the buildings were designed to meet the current flood plain requirements. In response to Mr. McDonell's questions, Attorney Phoenix said the wooded end of the Salem Street corridor would be cleared for the construction. He said that, depending on where one was, less than half of one view corridor would be seen, but view corridors would be provided. Mr. Hagaman asked why the applicant wouldn't maintain a lower height on the surrounding buildings, seeing that there were higher units behind the Great Rhythm

Brewery. Attorney Phoenix said the buildings would provide a step back from the water so that people could enjoy the view and the path.

Mr. Parrott asked if the building heights would be measured from the railroad tracks area or the present ground. Mr. Crimmins said the first floor would be in line with the railroad. Mr. Parrott asked if there would be full-depth basements for the buildings. Mr. Crimmins said it would go down five feet and would be screened to look like a full-depth basement. Mr. Parrott said the buildings could be built in the favored configuration and meet city code, eliminating the need for the variance. Attorney Phoenix said it could be done but they didn't think it made sense because it would take all that extra room and put it back into the open space.

Acting-Chair Johnson asked what measures were needed to account for a portion of the building being in the 100-ft buffer zone. Attorney Phoenix said the Conservation Commission and neighbors wanted more open space and didn't want the applicant to do any more than necessary in the 100-ft buffer. Acting-Chair Johnson asked whether mitigations had to be made. Mr. Crimmins said it was regulated by the Conditional Use Permit (CUP) and that they would have to provide appropriate stormwater treatment and improvements to the buffer. He said that giving the first 50 feet for the bike path would be an improvement. Ms. Eldridge said the tradeoff between horizontal and vertical was only necessary due to the number of units, and she asked whether that many units were necessary. Attorney Phoenix said the developers analyzed the lot and restrictions and were allowed by right to do what they did. Ms. Eldridge said she wasn't sure the view corridor was actually a view corridor if one had to turn a corner to see out of it.

Mr. Hagaman asked if the City would develop and maintain the path and the applicant would provide the access. Attorney Phoenix said an easement in favor of the City would be done. In response to further questions from Mr. Hagaman, Mr. Crimmins said there were visitor parking spaces on the cul-de-sac and that additional visitor parking would be allowed during off-hours. He said they would seek a CUP to provide necessary parking. He said modifications to the intersection were currently being done for another project that would help alleviate the traffic from the development. Mr. Lee asked how far back the ell-shaped building closest to the pond would be. Attorney Phoenix said it would be 30 feet or so.

Acting-Chair Johnson asked if there were floor plans or descriptions of the unit sizes. Mr. Johnston said there were no floor plans, and he described the unit sizes. He said they would be market-rate apartment rentals and not a high-density project because there would be only 36 units per each of the five acres. In response to further questions from Acting-Chair Johnson, Attorney Phoenix said the traffic count did not match the current unit amount but that there would be about 217 cars during peak hours.

Acting-Chair Johnson opened the public hearing.

Jonathan Sandberg of 160 Bartlett Street said the project would transform the wasteland into homes as well as meaningful outdoor space that the public could access. He said it was the best

neighborhood to add density to because it was walkable. He said many of the structures in the area were bigger and felt that the relief sought met the spirit of the ordinance.

Tabitha McElroy of 47 Langdon Street said the project would provide more walking space and that she was excited about the bike path because it could be used to sponsor road races. She thought the extra floor was in step with everything else happening in Portsmouth.

Jeff Demers said he owned an abutting business at 187 McDonough Street and also owned 178 McDonough Street. He said the applicant moved the density around positively, and he felt that going vertically was a good way to open up space.

Neil Cohen of 21 Langdon Street said he was a cyclist and thought the bike path would add to the neighborhood. He said there wasn't enough open space in Portsmouth and liked that it would be available to neighborhood residents.

Anna Leijon-Guth of 137 Bartlett Street said the property was in her backyard and would be a great improvement. She said she was in complete favor of the project and the bike path.

Melissa Doren of Barrett Street said she was 85 percent in support but thought there would be an intensity of use. She said the Dover Street view corridor would be better than the Salem Street corridor because it would be a permanent one and consistent with the other view corridors.

Brandon Terry of 209 McDonough Street said one of the buildings would be right behind his house and thought the requested variances were the best-case scenario.

Susan Frohn of 86 Meadow Road said that the natural beauty of the pond would be highlighted by the development and the bike path would be a great feature for present and future generations.

Elizabeth Bratter of 159 McDonough Street distributed a letter to the Board from the Planning Department about the previous rezoning. She said she would speak in more detail later.

SPEAKING IN OPPOSITION TO THE PETITION

Lisa Hewitt of 169 McDonough Street said the custom-designed zoning for the property had significant opposition from neighbors, so it was rezoned, and now the applicant had a new plan with new requested variances. She said the buildings would be significantly higher than surrounding homes and would block the view corridor.

Melissa Doren said the project would not preserve the surrounding neighbors' quality of life. She said the 178 units were between 11 and 37 percent over the total spirit of the original count, and she was concerned about the intensity of the large Building B.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Jennifer Nealon of 149 Sparhawk Street said she lived on the other side of the pond and had an issue with the heights of the buildings. She said she heard no hardship for the fifth floor and thought the height seemed to be level with the new Foundry Garage.

Edward Rice of Cass Street said he was against the petition because of the building heights. He said the land sloped from the North Mill Pond, which would make the buildings look enormous. He said it wasn't fair to allow someone to rezone because the variances were there for a reason.

Elizabeth Bratter read from a 3-page list of concerns that highlighted why she thought the three variance requests did not meet all the criteria and were only to increase the building revenue. She also thought the traffic implications were very worrisome.

Attorney Phoenix asked the Board to consider the neighbors who were in favor. He said the project was a result of processes with the Conservation Commission, City staff, and neighbors, and that the tradeoff to get the additional height was well worth what the applicant was giving -- 40 percent open space, not building in the buffer, and utilizing the area for a park. He said the nearest houses on McDonough Street were about 100 feet away. He said the applicant couldn't change the requested variances in the locations they requested them for, and he thought it was a win-win situation due to all the positive things they were providing.

Eddie Hayes owner of Ricci's Lumber, said the site was burdened with many problems. He said they could build 4-story buildings if they had to, but thought the best plan was the one presented.

No one else rose to speak, and Acting-Chair Johnson closed the public hearing.

DISCUSSION OF THE BOARD

Mr. Lee said the word 'massive' kept jumping out from listening to all the speakers, and he thought the project looked like a different world. He said the petition failed several criteria and that he wouldn't support it. Mr. Hagaman said he was torn. He liked the project and thought it was in a good location, but he said he wouldn't support a motion for the Dover Street corridor variance because he thought it should be maintained. He said the 6-ft setback didn't give him as much heartburn because it was for storage facilities. He said the biggest request was adding a fifth story and going up to 60 feet on two of the buildings in an area where there was already an incentive to get to the fourth story and 50 feet. He said the tradeoffs didn't speak to some of the criteria. Ms. Eldridge said she hadn't liked the Dover Street view corridor but was then convinced that she could live with it, and it was further discussed.

Mr. Parrott said that the rezoning took place for that part of town, after lots of effort, input, and approvals. He said 'the applicant's very significant project comes along, and the first thing they want to do is take a significant additional privilege in terms of bonuses on what has already been declared, and trash the new ordinance and request premiums up and beyond the one that's already been granted'. He said he otherwise liked the project because the property was in dire condition and that the property deserved to be developed, but he had problems with the specifics.

He said the view corridor issue was interesting but didn't strike him as very significant. He said it could be a better project if it were redesigned.

Mr. Hagaman asked how far the Technical Advisory Committee (TAC) could go to require safety mechanisms for traffic and public parking, noting that the tight area was a big concern. Acting-Chair Johnson said TAC could require several measures for the applicant to get approval. Mr. Stith pointed out that the whole intersection would be redesigned. Mr. Hagaman said there were a lot of people living in that small area and that not all of them would walk instead of drive.

Mr. McDonell said he was concerned about the argument that 'you can do X if you don't get approval to do Y'. He noted that the Board got smacked down by the Court for that very reason because they made that assumption and were told not to do that. He said he didn't think it was really true, in the applicant's case, and didn't think that the alternatives scenario was a checkbox thing. He said he couldn't envision the Board denying the petition and then having the applicant turn around and do what they proposed to do before, or something similar. He said there were issues with that that prompted the revisions, and that a lot of the neighbors approved the petition because they thought the new proposal was much better than the original one and probably the best thing they would get. He said he understood that but didn't think it was reasonable for the Board to say that they should let it go, otherwise it could be worse. He said he didn't have concerns with granting the variance for the two storage buildings to be moved because they would be moved in line with similar buildings and it would open the space up, but he would not support the request to grant the view corridor relief because he didn't think there was a hardship. As for the height request, he said the site was constrained by a lot of things, like its irregular shape, the pond, the railroad, the view corridors, but he didn't think those constraints that made the property unique were the thing causing a hardship and would deserve relief from the height requirement. He agreed with the neighbor who said that it would violate the spirit of the ordinance because the applicant was already getting a height incentive by giving up what frankly was an unbuildable piece of property but now wanted additional height relief. He also thought that allowing the buildings to be even higher than allowed by right would change the character of the neighborhood for the people behind the site and on the other side of the pond.

Acting-Chair Johnson said he agreed with the comments and that for him, it came down to the height. He said he could justify the other requests, but felt that the applicant asking to be granted the CUP and then wanting to exceed another 10 feet was a challenge for him to get over. He said it was a challenge to find a hardship, and he agreed with Mr. McDonell that there was an issue with meeting the spirit of the ordinance. He said the Board heard an economic argument but that he didn't hear any good reason why 178 units had to be the number of units built. He said the alternative didn't have to be something that further impeded on the 100-ft buffer. He noted that granting CUPs was rare and only done so for certain areas. He said the project location was appropriate for that because it was an ideal spot to have larger buildings close to services to minimize traffic and encourage bicycle use, and the site certainly had many challenges, but he had a hard time arguing his way through the hardship when the alternative would be to alter the number of units. Mr. Lee agreed that the height variance was the big one and if the applicant didn't get that, then everything else was irrelevant.

DECISION OF THE BOARD

*Mr. McDonell moved to **grant** Variance 1 to allow a 6-ft setback from the railroad right-of-way where 15 feet was required, and to **deny** the other two requests (Variances 2 and 3). Mr. Hagaman seconded.*

Mr. McDonell said granting Variance 1 would not be contrary to the public interest and would observe the spirit of the ordinance. He said he didn't see any conflict with the purpose of the ordinance for typical setback purposes and thought there were additional safety purposes that would be in line with the other Ricci Lumber buildings right next to the two structures, so he saw no threat to the public's health, safety, or welfare or alteration of the essential character of the neighborhood. He said substantial justice would be done because the benefit to the applicant would not be outweighed by harm to the general public or other individuals; the buildings would get moved to allow the applicant to have a bigger open space in which to build. He said it could be a potential harm to the public but would be far outweighed by the benefit to the applicant to be able to build something in that space. He said granting Variance 1 would not diminish the value of surrounding properties, noting that he couldn't see how they would be. He said literal enforcement of the ordinance would result in unnecessary hardship, seeing that the special conditions of the property were that the main buildable part of it was burdened by two structures that the applicant wanted to continue and put them in a reasonable place that happened to encroach on the railroad right-of- setback. He said he saw no fair and substantial relationship between the purposes of the ordinance and their application in that case, noting that the use was reasonable and that the variance should be granted.

Mr. McDonell addressed the two denied variances. He said that jogging the Dover Street view corridor southward was driven by the applicant wanting to fit a little more in the relatively small buildable portion of the area, and that not getting the variance would cause the loss of several units. He said he did not think that was enough for him to see the hardship and that there were special conditions of the property that related to that, but he didn't think they went far enough to warrant that particular request being granted. He didn't think the spirit of the ordinance was met either, noting that the applicant's representative said that, in exchange for 'taking one away, they would give another one, but we only do that if all the variances are granted'. He said that wouldn't really work. He said the intent of the spirit of the ordinance specified that views would be provided down those corridors. As for the height request, Mr. McDonell said they were already talking about a height incentive by giving up that piece of property, and adding onto that with additional relief had always been a concern from the time the zone was being contemplated. He thought it violated the spirit of the ordinance and that it also wasn't in keeping with the neighborhood's character because it would be a substantial change, both on the McDonough Street side and on the north side of the pond. Regarding the hardship, he said if the 5-acre or 6-acre lot wasn't bordered by the pond or the railroad or wasn't encumbered by a sewer easement or view corridors and was a normal-shaped square lot, then that kind of square footage could be put on that lot without requiring zoning relief, but he didn't think the fact that the lot was unique

due to those conditions meant that there was an unnecessary hardship. For those reasons, he said the Board should approve the first variance request and deny the other two.

Mr. Hagaman concurred with Mr. McDonell regarding granting Variance 1 and had nothing to add. He addressed the denial of Variance 2 and stated that Criterion 2, the spirit of the ordinance, was specifically carved out within the ordinance to go directly to a public benefit for the view corridor, so he believed it should be maintained and that it did not meet that criterion. Regarding the third variance, Mr. Hagaman said he agreed with everything Mr. McDonell said but would specify that it failed on Criteria 1, 2, 3 and 5. He said he questioned the public benefit proposed, even though he understood that a lot of land was being offered to the City, but he thought it sounded like the City was on the hook for a lot of the related costs and there wasn't a significant or adequate amount of parking for the public to even enjoy it. He said those issues could be resolved by other boards, but he still questioned it greatly. He said he was also concerned about public safety due to the intensity of the use, noting that even though the density was appropriate, it wasn't a good answer to what would happen with all the traffic. Regarding the hardship criteria, he underscored what Mr. McDonell said, adding that although there were issues with the property, they didn't seem connected to the requested variance for additional height. For those reasons, he said he concurred with Mr. McDonell.

*The motion to **grant** Variance 1 passed by unanimous vote, 6-0.*

*The motion to **deny** Variances 2 and 3 passed by unanimous vote, 6-0.*

IV. OTHER BUSINESS

There was no other business discussed.

V. ADJOURNMENT

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

Respectfully submitted,

Joann Breault
BOA Recording Secretary