

**MINUTES OF THE  
BOARD OF ADJUSTMENT MEETING  
CONFERENCE ROOM A  
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE  
PORTSMOUTH, NEW HAMPSHIRE**

**7:00 P.M.**

**April 18, 2023**

**MEMBERS PRESENT:** Phyllis Eldridge, Chair; Beth Margeson, Vice Chair; Paul Mannle; Thomas Rossi; David Rheaume; Jeffrey Mattson; Jody Record, Alternate; ML Geffert, Alternate

**MEMBERS EXCUSED:** None.

**ALSO PRESENT:** Stefanie Casella, Planning Department

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*Vice-Chair Margeson moved to split the agenda into two meetings. (Old Business item II. G and all New Business Items moved to the second meeting on **May 2, 2023** and Old Business item II. H moved to the May 16 meeting). Mr. Mannle seconded. The motion **passed** unanimously.*

Chair Eldridge noted it was suggested that the second meeting take place on May 2 instead of the following week due to several members that would be absent.

Chair Eldridge welcomed the two new alternates, Jody Record and M. L. Geffert. She said Mr. MacDonald resigned and that Mr. Mattson was a regular board member.

*Vice-Chair Margeson moved to **suspend** the rules to take items out of order for postponements, seconded by Mr. Mannle. The motion **passed** unanimously, 7-0.*

*Mr. Mannle moved to **postpone** Old Business Item G, 4 Sylvester Street, to the May 2 meeting. Mr. Rossi seconded. The motion **passed** unanimously, 7-0.*

*Per the request of the applicant's representative Attorney Tim Phoenix, Mr. Mannle moved to **postpone** Old Business Item H, 9 Kent Street, to the May 16 meeting. Mr. Rossi seconded. The motion **passed** unanimously, 7-0.*

*Mr. Mannle moved to **postpone** New Business Item III,A, 729-733 Middle Street Condominium Association, to the May 2 meeting, seconded by Mr. Rossi. The motion **passed** unanimously, 7-0.*

*Mr. Mannle moved to **postpone** New Business Item III.B, 170 Mechanic Street, to the May 2 meeting. Mr. Rossi seconded. The motion **passed** unanimously, 7-0.*

*Mr. Rossi moved to **postpone** New Business Item III. C, 250 Odiorne Point Road, to the May 2 meeting. Mr. Mannle seconded. The motion **passed** unanimously, 7-0.*

*Mr. Mannle moved to **postpone** New Business Item III.D, 45 Richmond Street, to the May 2 meeting. Mr. Rossi seconded. The motion **passed** unanimously, 7-0.*

*Mr. Rossi moved to **postpone** New Business Item III. E, 45 Rockingham Street, to the May 2 meeting. Mr. Mannle seconded. Mr. Rheume abstained. The motion **passed** unanimously, 7-0.*

*Mr. Mannle moved to **postpone** New Business Item III.F, 650 Maplewood Ave, to the May 2 meeting, seconded by Mr. Rossi. Mr. Mattson abstained. The motion **passed** unanimously, 7-0.*

*Mr. Rossi moved to **postpone** New Business Item III.G, 361 US Route One Bypass, to the May 2 meeting. Mr. Mannle seconded. The motion **passed** unanimously, 7-0.*

## **I. APPROVAL OF MINUTES**

### **A. Approval of the March 21, 2023 minutes.**

The Board requested amendments to the March 21 minutes (see timestamp 11:55).

*Mr. Mannle moved to **approve** the March 21 minutes as amended, seconded by Mr. Mattson. The motion **passed** unanimously, 5-0, with Mr. Rossi abstaining.*

### **B. Approval of the March 29, 2023 minutes.**

Mr. Mattson requested an amendment to the minutes (timestamp 14:00).

*Mr. Mannle moved to **approve** the March 29 minutes as amended, seconded by Vice-Chair Margeson. The motion **passed** unanimously, 4-0, with Mr. Rossi and Mr. Rheume abstaining.*

## **II. OLD BUSINESS**

- A.** The request of **635 Sagamore Development LLC (Owner)**, for property located at **635 Sagamore Avenue** whereas relief is needed to remove existing structures and construct 4 single family dwellings which requires the following: 1) A Variance from Section 10.513 to allow four free-standing dwellings where one is permitted. 2) A Variance from Section 10.521 to allow a lot area per dwelling unit of 21,198 square feet per dwelling where 43,560 square feet is required. Said property is located on Assessor Map 222 Lot 19 and lies within the Single Residence A (SRA) District. (LU-22-209)

Mr. Rossi and Mr. Rheume recused themselves from the petition.

## **SPEAKING TO THE PETITION**

Attorney Tim Phoenix was present on behalf of the applicant. He noted that the application was continued previously but that the applicant was requesting another continuance due to Mr. MacDonald's resignation and the two recusals. He said the project was an ambitious one with a lot of neighborhood opposition and his client wanted the best outcome. He said he notified the opposition that he would not present the petition that evening.

The Board discussed it and decided to allow the continuance (timestamp 19:53). There was no public hearing.

## **DECISION OF THE BOARD**

*Mr. Mannle moved to **postpone** the petition to the May 16 meeting, seconded by Mr. Mattson. The motion **passed** unanimously, 6-0.*

- B.** The rehearing of the request of **Jeffrey M. and Melissa Foy (Owners)**, for property located at **67 Ridges Court** whereas relief is needed for construction of a 518 square foot garage addition and expansion of front dormer which requires the following: 1) A variance from Section 10.521 to allow a 14-foot front yard where 19 feet is required per Section 10.516.10. 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. Said property is located on Assessor Map 207 Lot 59 and lies within the Single Residence B (SRB) District. (LU-22-199)

Mr. Rossi and Mr. Rheume resumed their voting seats, and Alternate Ms. Geffert took a voting seat.

## **SPEAKING TO THE PETITION**

The applicant's representative Attorney Tim Phoenix was present, along with the owner Jeffrey Foy and John Chagnon of Ambit Engineering. Attorney Phoenix reviewed the petition. He explained that the petition was denied by the board the previous summer and wasn't appealed, but then the applicant presented a new application with a reduced scope, which the board again denied. He said Mr. MacDonald voted on the Fisher v. Dover issue but that his vote should not have been counted, so the resulting vote was a tie of 3-3 and allowed a rehearing. Attorney Phoenix asked whether he should review the Fisher v. Dover analysis or the merits of the petition. The board discussed it and concluded that Fisher v. Dover should be addressed.

Attorney Phoenix discussed the changes made to the project to greatly reduce it and felt that they could go forward with the merits hearing. (Timestamp 32:15). He said the changes were significant enough under Fisher v. Dover and that it was unfair to the owners, who made the effort to address the board's and neighbors' concerns, especially by reducing the two-car garage to a one-car garage.

Vice-Chair Margeson said the revised application removed one garage bay, which accounted for the 200-ft reduction, but there was still the traditional living space with the master bedroom and so on. Attorney Phoenix agreed but said the deck and trellis were moved to the back, and the deck was on top of the portion that the neighbors couldn't see through before. In response to Mr. Mattson's question, Mr. Foy said the deck area was significantly smaller in the proposed addition than previously at 20 percent less square footage.

Vice-Chair Margeson said the current primary front yard was eight feet and would be enlarged by the addition. Attorney Phoenix said the front setback was currently 15'8". Vice-Chair Margeson said it would be an improvement in the primary front yard setback. Mr. Mannle said he still felt that *Fisher v. Dover* applied because of the diminution of surrounding home values and the wetlands issue. He said the applicant could have gone to the Conservation Commission. Attorney Phoenix said the wetland was not in the board's purview but was a Planning Board issue. He said they had a respected appraiser, Peter Stanhope, who opined that the neighbor's property would not be diminished in value, and that other appraisers and realtors verified it (timestamp 44:13). Mr. Foy said he was assured that no additional property tax would be paid by the neighbors who had a view across his property. Mr. Foy said he had a valuation for his property view because it was on the waterfront. He said that the farther they went back with the addition, the closer they would get to the 50-ft buffer zone and that it would be environmentally better to be closer to Ridges Court. Mr. Chagnon said the board first had to render a decision before the applicant went before the Conservation Commission because the board had to decide whether the building had to be farther back. He also noted that there was currently a paved area that would be taken up by the building, making less of an impact on the buffer. It was further discussed. Mr. Mannle said Mr. Stanhope evaluated his property and the value was two-thirds less than the city's assessment. Attorney Phoenix said people didn't have a right to a view over someone else's property, but that his applicant tried to address those concerns.

Mr. Rossi said the only thing that gave him pause when the case was first heard was the community's objection to the obstructed view. He said the revised plan was substantially different in that regard, so he felt that it wasn't prohibited from a rehearing based on *Fisher v. Dover*. In response to Ms. Geffert's question, Mr. Chagnon said the reduced proposal would result in the removal of more impervious surface. The issue of whether *Fisher v. Dover* applied was further discussed (timestamp 49:19). Mr. Rheume said the change in the front setback from 30 feet to 19 feet was a substantial one and sufficient enough that the board should hear the application on its revised merits.

*Ms. Geffert moved that the applicant provided a revised plan that reflects material changes in the circumstances affecting the merits of the application and therefore is entitled to a rehearing by the board under the standard articulated by Fisher v. Dover.*

Mr. Rossi declined to second the motion, noting that the board did that the last time and failed to get the votes to pass it and that Mr. Rheume had pointed out that it would be more typical to make a motion to invoke *Fisher v. Dover* than a motion to invoke a negative finding. Mr. Rheume clarified that historically it was the way the board treated it but it wasn't clear in the guidebook what the board was supposed to do in these instances. (Timestamp 1:06:50).

*Ms. Geffert amended her motion to move to rehear the application based on Fisher v. Dover. Mr. Rheaume seconded.*

Ms. Geffert said the basis for making the motion was what she considered material changes: the reduction in square footage, the increase in pervious surface, the limitation of setback incursion, the increase in viewsheds, and a change in the neighbors' response to the application.

Mr. Rheaume concurred and had nothing to add.

*The motion passed by a vote of 5-2, with Mr. Mannle and Vice-Chair Margeson voting in opposition.*

Attorney Phoenix then presented the merits portion of the petition. He said they added a dormer on the front of the house that would not be subject to Fisher v. Dover and was within the front setback. He said the addition was significantly smaller than previously proposed and that they would also remove the semi-circular driveway. He said they would go before the Planning Board for a Conditional Use Permit (CUP), which would also include comment from the Conservation Commission. He said the proposal addressed the concerns about viewsheds. He discussed the appraiser's figures and the city's tax assessment and said the neighbors did not pay more money for having a view. He reviewed the criteria and said they would be met.

Chair Eldridge opened the public hearing.

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

Owner Jeff Foy said his real estate appraiser and agent said an occasional view of the harbor was a lower evaluation than a property that would have a water view 24 hours a day.

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

Attorney Derek Durbin was present on behalf of his client Kathleen Thompson of 56 Ridges Court. He referred to a March 20 letter of opposition and said prior arguments were made to the board regarding the property, like the view sheds and the diminution of property values. He said the board should focus on the reason the prior application was denied, which was the hardship criteria. He said the setback relief applied for was the same as previously and the location was the same. He said the burden was on the applicant to measure the setbacks and was not for the city to determine. He said the impact would be the same, so the unnecessary hardship was not met. He said the property was not unfairly burdened because its situation was like the surrounding properties in regard to its size and wetland buffer protection, so there were no special conditions associated with the property that unfairly burdened it in comparison with surrounding properties. He said the addition would make the structure more sprawling and out of character with the other homes in the neighborhood. He said the reduction of impervious surface would be discussed at the Conservation Commission and was not in the board's purview to consider as a material change.

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

Attorney Phoenix noted that he mistakenly said at the first meeting that they needed variance of 15.5 feet instead of 30 feet and that the board considered it at that time, but now there was a significant change. He said the test was whether the property had distinguishing characteristics from its surroundings, which it did because it was on the water. He said the reduction in size was not slight. He said Attorney Durbin's points about the petition not meeting the character of the neighborhood and hardship failed. He said he read the minutes from the previous meetings and noted that there wasn't a great deal of explanation of how and why the hardship was satisfied, so they tried to flush it out now.

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

## **DISCUSSION OF THE BOARD**

Vice-Chair Margeson said she would not support the variance requests because she didn't feel that the application materially differed from the previous one. Mr. Mattson said the unnecessary hardship was the catching point because the combinations of factors on the property created special conditions. Mr. Rossi said the whole case had gotten complicated, and in the current proposal both the addition and the dormer were set farther back from the front road than the existing structure. He said typically it wasn't bringing the property farther back out of conformance, so he didn't have a problem with it and would support the application. Mr. Rheume said the only variance asked for was for a front yard setback of 16 feet where 19 feet was required. He said the applicant could get another 1400 square feet of additional building if he wanted to. He said the open space was only four percent and the applicant would improve it. He noted that there was no definition of view sheds or a requirement for it in the zoning ordinance, so the issue was really about an encroachment into the front yard setback. He said it was a further setback from the current rest of the home and that the addition was slightly smaller than the existing home, and the applicant moved the project farther away from the wetlands. He said the proposal met all the requirements.

The board further discussed the petition (timestamp 1:34:39).

## **DECISION OF THE BOARD**

*Mr. Rossi moved to **grant** the variances for the application as presented and advertised, seconded by Mr. Rheume.*

Mr. Rossi said granting the variances would not be contrary to the public interest or to the spirit of the ordinance because it was a residentially zoned area and the proposed project would continue the use of the property for residential purposes. He said substantial justice would be done, noting that no one claimed that there would be a general loss to the public of any kind if the variances were granted, so there would be no loss to the public that would outweigh the benefit to the applicant. He said granting the variances would not diminish the values of surrounding properties, noting that the board had contrary evidence presented by those for and against the proposal, and in weighing the facts and hearing the feedback from the tax assessment perspective, he didn't feel that there was adequate evidence to support the idea that the surrounding properties would be diminished in value should the variances be approved. He said literal enforcement of the provisions of the ordinance

would result in an unnecessary hardship due to the special condition of the property of the front of the existing structure already encroaching on the required 19-ft setback, so the board was starting with a nonconforming property and the proposed variance involved two structural elements that were set back farther than the existing structure and therefore did not increase the degree of nonconformance of the property. he said there was no obvious relationship between the provisions of the ordinance and a reason to deny the variances and that the hardship criterion were met.

Mr. Rheume concurred. He said the substantial justice criteria was the balancing act between the public's interest and the owner's interest. He said the issue was a slice of the proposed addition, which was roughly over three feet by the length of the addition that the applicant needed relief for. He said he didn't see enough that indicated that not allowing the applicant to have that would be outweighed by the public interest. He noted that a viewshed was not necessarily something in the zoning ordinance, but the applicant was trying to provide some additional benefit there. He said the applicant had additional square footage that he could utilize that was somewhat constrained by the wetland considerations, but he could reform the allowed square footage into a new shape that would be detrimental to the neighbors, so he felt that the balancing test was in favor of the applicant. He said Mr. Rossi's point about the hardship test was excellent. He also noted that there were variations in the property's height that could drive the proposed addition into a certain configuration, which were all aspects that made the applicant's request reasonable.

*The motion **passed** by a vote of 5-2, with Mr. Mannle and Vice-Chair Margeson voting in opposition.*

- C. The request of **Michael Knight (Owner)**, for property located at **55 Mangrove Street** whereas relief is needed to replace existing 6 foot chain link fence with 8 foot cedar fence which requires the following: 1) A Variance from Section 10.515.13 to allow an 8 foot fence on the rear and side lot lines where a 6 foot maximum is allowed. Said property is located on Assessor Map 219 Lot 7 and lies within the Single Residence B (SRB) District. (LU-23-15)

Alternate Ms. Record took a voting seat.

The owner/applicant Michael Knight was present and said he wanted to replace a dilapidated chain link fence with an 8-ft cedar one. He noted that he made it eight feet instead of six to match the height of the cedar fence on the front of the house. He said there were no houses beside or behind him. He reviewed the criteria and said they would be met.

In response to Mr. Rheume's questions, Mr. Knight said the maintenance building for the Spinnaker Way Condominiums was on one side of his property and that a paper street was on the other side, where his fence would run along his property line and would not intrude on that street.

Chair Eldridge opened the public hearing.

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

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

## **DECISION OF THE BOARD**

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

Mr. Rheume noted that the zoning ordinance used to have no restrictions on fence heights, but that it was tempered with the idea that many properties in Portsmouth were up against neighboring properties and streets and could create their own little gated communities, so the zoning ordinance was changed to try to limit the heights of fences. He said granting the variance would not be contrary to the public interest because the public interest was to prevent high fences from being placed near areas where the public would go by or that would create a hostile view for a close abutting neighboring property. He said it would observe the spirit of the ordinance because there would not be territorial border wars going on and he thought the request was reasonable due to all the nearby open areas. He said granting the variance would not diminish the values of surrounding properties because the condominium association's maintenance building and other nearby property values would not be negatively affected. He said the hardship was that there were unique factors about the property, including being up against a paper street and a protected piece of property and a generic use of a condo association that distinguished it from other similar properties. He said the request was a reasonable one. Mr. Mannle concurred and had nothing to add.

*The motion **passed** unanimously, 7-0.*

- D.** The request of **John T McDonald III and Mary R McDonald (Owners)**, for property located at **74 Sunset Road** whereas relief is needed for an addition of a chimney bump out which requires the following: 1) Variances from Section 10.521 to allow a) a 6.5 foot left yard where 10 feet is required; and b) 26.6% building coverage where 20% is required. 2) A Variance from Section 10.321 to allow a nonconforming building or structure to be expanded, reconstructed, or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 15 Lot 14 and lies within the Single Residence B (SRB) District. (LU-22-182)

Alternate Ms. Geffert took a voting seat and Ms. Record returned to alternate status.

## **SPEAKING TO THE PETITION**

Attorney Tim Phoenix was present on behalf of the applicant, along with contractor Butch Ricci. Attorney Phoenix said they were before the board in September and were granted a variance to expand the small home by adding a dormer on the roof and connecting a breezeway to the garage. He said there were a set of steps on the right side of the house at that time that was closer to the right side lot line than they were not proposing. He said they received a building permit for it and the bump out and believed that they were building the new chimney lawfully. He said he had four



letters from the abutters in approval. He reviewed the petition and noted that they added a chimney. He reviewed the dimensions, setbacks, and criteria.

Mr. Rossi confirmed that the structure would still be a single-family residence. He asked why the electric meters looked complicated for a single-family home. Mr. Ricci said there used to be three meters but that they would go down to one.

Chair Eldridge opened the public hearing.

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

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

### **DECISION OF THE BOARD**

*Mr. Mattson moved to **grant** the variances for the petition as presented and advertised, seconded by Mr. Rheume.*

Mr. Mattson said granting the variances would not be contrary to the public interest, and the spirit of the ordinance would be observed. He said it was a very small bump out for the fireplace that would not change the overall conditions of the property and was very similar in character to the other homes in the neighborhood, and there would be no harm to the public's health, safety, and welfare. He said substantial justice would be done because the benefit to the applicant would not be outweighed by any harm to the public and the project would have no detrimental effect on the public, and it would improve the applicant's quality of life. He said granting the variances would not diminish the values of surrounding properties because of the updated home and better layout. He said literal enforcement of the ordinance would result in an unnecessary hardship because the special conditions of the property were the location and layout of the current home on the property and the property was a smaller lot than the zoning put in after the property existed, so those were special conditions that distinguished it and there was no fair and substantial relationship between the general purposes of the ordinance regarding the setbacks and the specific application of that provision to the property. He said the proposed use was a reasonable one because the home would still be a single-family one with just a fireplace added.

Mr. Rheume concurred. He said it was unfortunate that the board ran into situations like this and thought the board should have previously granted relief to include the small bump out.

*The motion **passed** unanimously, 7-0.*

- E. The request of **Joshua Wyatt and Erin Hichman (Owners)**, for property located at **196 Aldrich Road** whereas relief is needed to demolish existing garage and construct new garage and construct new addition over existing side porch which requires the following: 1) Variances from Section 10.521 to allow a) a secondary front yard of 3 feet where 30 feet is required; b) a 6 foot rear setback where 10 feet 7

inches is required; c) 23% building coverage where 20% is the maximum allowed. 2) A Variance from Section 10.571 to allow and accessory structure to be 10 feet from the front lot line and located in the front yard. 3) A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed, or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 153 Lot 25 and lies within the Single Residence B (SRB) District. (LU-23-24)

Alternate Ms. Record took a voting seat and Ms. Geffert returned to alternate status.

### **SPEAKING TO THE PETITION**

Owner/applicant Joshua Wyatt was present, along with his designer Hubert Krah. Mr. Wyatt revised the petition and said they wanted to update the house to make it suitable for his family. He said the house was on two public roads and the lot was small and already nonconforming. He said they wanted to demolish the garage and rebuild it toward the rear property line and enclose the side porch. He said the three most affected abutters were not opposed to the project. He reviewed the criteria and said they would be met.

Mr. Rheume asked what the current dimensions for the garage were, and Mr. Krah said the garage was about 20'x12'. Mr. Rheume asked if the applicant considered the difficulties associated with backing the vehicle in and out of the new garage arrangement. Mr. Wyatt said they had discussed it and thought it be used more as a shed to store equipment rather than cars. Mr. Rheume said that being on a corner lot was a disadvantage because the secondary front yard imposed a 30-ft setback where 10 was required. He said the applicant was proposing a vertical expansion throughout the square footage of the home and that all that expansion would be subject to the board's purview. He said it would be going from a two-story home with a shallow attic space to an entire third story. Mr. Krah said the vertical expansion was the additional 30-ft setback and further explained it. Vice-Chair Margeson said the three feet for the primary structure was part of the variance request. Mr. Rheume said it was three feet where 30 feet was required, so the 27 feet of the new structure required the board's approval, and his concern was that it was really a new addition over the entire square footage of the home. Ms. Casella said it was covered in Variance 2. Mr. Rossi asked where the three feet for the primary structure came from. Ms. Casella said it was more nonconforming in the site plan. It was further discussed.

Mr. Rheume said the vertical expansion was within the purview of the board, so it was a two-story home but all the neighboring properties were also two-story ones. He said he had not observed any building in the neighborhood that had a full third floor. He asked why the proposal would fit in with the character of the neighborhood. Mr. Krah showed a photo of the house across the street and said they had a larger lot and had added on horizontally. He said his client was limited in expanding the his house by the lot, and the third floor would really be an attic. He said they discussed dormers but felt they would be troublesome with the extension of the front porch. He said they were raising the roof by a 7-ft stud. Mr. Rheume asked if the existing height of the building at 25'2" was a measurement to the top of the roof or one required by the ordinance. Mr. Krah said it was required by the ordinance.

Chair Eldridge opened the public hearing.

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

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

### **DISCUSSION OF THE COMMISSION**

Mr. Rheaume said they were looking at a third story across the whole exterior of the house, but it was the only way the applicant could expand. He said it created a situation in which the board had an obligation to preserve the neighborhood's look and feel. He said he didn't see anything else in the neighborhood that looked like what the applicant was asking for. He said the applicant was stuck with a small lot in a neighborhood of two-story homes and that the board had to be careful to not upset that balance. He said he thought the garage placement would be odd and his greatest concern was the relief for a very substantial vertical expansion that would stand out. Ms. Casella said the height restriction was 35 feet. Mr. Rossi said the public interest was less about the look of how many stories a house has in the neighborhood as compared to the ability of a neighborhood to sustain comfortable residences for families. Mr. Mattson said he had a few concerns about the height but thought the lot was a very small nonconforming one that could create some hardship.

### **DECISION OF THE COMMISSION**

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

Vice-Chair Margeson noted that there were four variance requests for the property, which she cited. She said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. She said those criteria were related to the property's dimensional variances and were to prevent overbulking and overcrowding of the primary building, and she didn't find it contrary to the spirit of the ordinance because the primary structure would go up and the garage would be moved from one part of the property to another. She said substantial justice would be done because there would be no loss to the public in that the overbulking of overcrowding of the lot wasn't an issue. She said granting the variances would not diminish the values of surrounding properties because any kind of improvement on a house almost automatically improved the values of surrounding properties. She said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because the property had special conditions in that it was substantially smaller than the required lot area per the zoning ordinance and it was a quarter property hemmed in by Joffre Terrace, so the provisions of the zoning ordinance couldn't really be fairly applied to the property. She said the proposed use was a reasonable one and noted that the applicant was moving the garage from one part of the property to another and extending the primary structure upwards by seven feet. She said she took Mr. Rheaume's comments in good faith but felt that the lot was so small that any kind of expansion of the property would have to go vertically. For those reasons, she found that the applicant met the conditions of the variance.

Mr. Rossi said that, relating to the placement of the garage and the 6-ft setback from the rear property line, there was a special condition of the property in that it had a substantial grade coming from the rear, so the garage would be partially under the grade, and considerations of overcrowding and encroaching on the open space of the property behind it were not relevant

Mr. Rheaume said he was opposed to granting the variances because he didn't see the small lot as a hardship and thought the desire to go up vertically could be done more in keeping with the neighborhood's character. He said the zoning ordinance was generic in building height due to the 35 feet and didn't think it reflected the character of the neighborhood. He said the board would see more applications coming in for requests for 35-ft structures. Chair Eldridge said she would support it because she didn't think the added height would make the building a hulking one on the street, and she thought it was appropriate because that particular side of the lot was plagued with issues.

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

- F.** The request of **Murdock Living Trust (Owner)**, for property located at **15 Lafayette Road** whereas relief is needed to subdivide one lot into two lots w requires the following: 1) A Variance from Section 10.521 to allow 73.8 feet of continuous street frontage where 100 feet is required for the remainder lot. Said property is located on Assessor Map 152 Lot 2 and lies within the General Residence A (GRA) and Historic District. (LU-23-26)

Alternate Ms. Geffert took a voting seat and Ms. Record returned to alternate status.

### **SPEAKING TO THE PETITION**

Attorney Justin Pasay was present on behalf of the applicant, along with the owner Jeff Murdock. Attorney Pasay reviewed the petition and noted that the property currently had a single-family dwelling but that it had two public roads of frontage, one with access and one without and one conforming and one nonconforming. He said the lot was twice the size of the average single lot in the area and that the variance was requested to maintain the status quo on the existing front portion of the lot. He reviewed the criteria and said they would be met.

Vice-Chair Margeson said the new lot fronting on the other road could contain a building within the building envelope without any further relief being sought, and she asked if the applicant would accept a condition that whatever building would be built on the lot would fit within the building envelope. Attorney Passay said he would but that he preferred that there not be a condition or stipulation that would sully the marketability of the property.

Chair Eldridge opened the public hearing.

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

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

## DISCUSSION AND DECISION OF THE BOARD

Mr. Rossi said he didn't think a stipulation was necessary. He said if there were a desire to be nonconforming on a lot, there may be good reasons to do so, and some future board would have the opportunity to weigh in. He said a stipulation would not prevent him from approving the application, however. Mr. Rheume said he agreed with Vice-Chair Margeson that the property should be within the zoning ordinance when it got developed. He said that a stipulation requiring this would unduly restrict future property owners, which could be a source of a possible lawsuit against the city.

Mr. Mannle said he would support the variance request because it was more of a question of the character of the neighborhood and not whether the applicant was outside the variances. He said he would support the stipulation that the building has to be inside the confines of the area, and let the buyer beware. It was further discussed (Timestamp 3:19:28).

*Ms. Geffert moved to **grant** the variance for the petition as requested and advertised, seconded by Mr. Rheume.*

Ms. Geffert said they didn't need a condition stating that the applicant would comply with the law because the applicant had to. She said granting the variance would not be contrary to the public interest because the lot that would be created would be a conforming one, and the public interest would be served by the lot conforming to the zoning ordinance. She said it would observe the spirit of the ordinance because the lot would conform to the ordinance. She said granting the variance would do substantial justice because there would be no injustice created by granting the variance by creating a conforming lot. She said granting the variance would not diminish the values of surrounding properties, noting that there was no evidence in the record of that, and having another lot that was conforming would likely retain if not enhance values around the lot. She said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. She said the property had special conditions of having frontage on two streets, so a fair and substantial condition did not exist between the general public purpose of the ordinance, which would be guaranteeing substantial frontage on the already used portion of the lot for public health, safety and welfare and also aesthetics. She said that ship had sailed because the current portion of the lot used was nonconforming in terms of street frontage on Lafayette Road.

Mr. Rheume concurred. He said the lot had remained undivided for a long time and was unique in the neighborhood. He said buildable lots were rare in Portsmouth and this would allow an opportunity for a fully conforming home to be a location for a future family. He said one of the things the applicant didn't mention was that both abutting properties on Lafayette Road also didn't conform with the 100-ft requirement. He said that the 100-ft frontage requirement not being met had not stuck out since 1942 when the house was built and allowing it to continue that way would meet the expectations of the neighborhood. As for not including the stipulation, he said the real concern was that the board had an obligation to the citizens of Portsmouth and should not overstep their boundaries and create a situation in which someone could consider it an illegal taking and set the city up for losing a lawsuit.

*The motion passed unanimously, 7-0.*

**THE BOARD VOTED TO POSTPONE CONSIDERATION OF THE FOLLOWING ITEMS TO THE MAY 2, 2023 BOARD OF ADJUSTMENT MEETING.**

- A.** The request of **Jared J Saulnier (Owner)**, for property located at **4 Sylvester Street** whereas relief is needed to subdivide one lot into two lots which requires the following: Proposed Lot 1: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling of 9,645 square feet where 15,000 is required for each; b) 80 feet of lot depth where 100 feet is required; and c) a 9 foot right side yard where 10 feet is required. Proposed Lot 2: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling unit of 6,421 square feet where 15,000 is required for each; b) 40 feet of street frontage where 100 feet is required; and c) 80 feet of lot depth where 100 feet is required. Said property is located on Assessor Map 232 Lot 36 and lies within the Single Residence B (SRB) District. (LU-23-27)

*The petition was postponed to the May 2 meeting.*

- B. REQUEST TO POSTPONE** The request of **Cynthia Austin Smith and Peter (Owners)**, for property located at **9 Kent Street** whereas relief is needed to demolish the existing two-family and construct a single-family dwelling which requires the following: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling of 5,000 square feet where 7,500 square feet is required for each; b) 53% building coverage where 25% is the maximum allowed; c) a 4.5 foot rear yard where 20' is required; d) a 0.5 foot side yard where 10 feet is required; e) a 0 foot front yard where 11 feet is allowed under Section 10.516.10; and f) a 9.5 foot secondary front yard where 13 feet is allowed under Section 10.516.10. 2) A Variance from Section 10.515.14 to allow a 1.5 foot setback for a mechanical unit where 10 feet is required. Said property is located on Assessor Map 113 Lot 42 and lies within the General Residence A (GRA) District. **REQUEST TO POSTPONE (LU-23-28)**

*The petition was postponed to the May 16 meeting.*

**NEW BUSINESS**

- A.** Petition of **729-733 Middle Street Condominium Association, Nicole M. Bodoh and Craig Crowell**, for Appeal of an Administrative Decision not to present to the Board of Adjustment the Motion for Rehearing of Variance Application of David Sinclair and Nicole Giusto for property located at **765 Middle Street** due to an untimely request. Said property is shown on Assessor Map 148 Lot 37 and lies within the General Residence A (GRA) and Historic Districts.

*The petition was postponed to the May 2 meeting.*

- B.** The request of **Peter G Morin Trust, Peter G Morin Trustee (Owner)**, for property located at **170 Mechanic Street** whereas relief is needed to install a generator which requires the following: 1) Variance from Section 10.515.14 to allow a) 4 foot rear yard where 10' is required and 5.5 foot rear yard where 10 feet is required; 2) 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. Said property is located on Assessor Map 102 Lot 7 and lies within the General Residence B (GRB) and Historic District. (LU-23-35)

*The petition was postponed to the May 2 meeting.*

- C.** The request of **RTM Trust, Ryan T Mullen and Heidi E K Trustees (Owners)**, for property located at **253 Odiorne Point Road** whereas relief is needed to construct a deck extension which requires a Variance from Section 10.521 to allow a 30 foot rear yard where 40 feet is required. Said property is located on Assessor Map 224 Lot 10-19 and lies within the Single Residence A (SRA) District. (LU-23-36)

*The petition was postponed to the May 2 meeting.*

- D.** The request of **Cherie A Holmes and Yvonne P Goldsberry (Owners)**, for property located at **45 Richmond Street** whereas relief is needed to construct a greenhouse which requires the following: 1) Variance from Section 10.521 to allow a 5.5 foot rear yard where 15 feet is required; 2) 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.... Said property is located on Assessor Map 108 Lot 18 and lies within the Mixed Residential Office (MRO) and Historic District. (LU-20-249)

*The petition was postponed to the May 2 meeting.*

- E.** The request of **45 Rockingham St LLC (Owner)**, for property located at **45 Rockingham Street** whereas relief is needed to construct a front porch and rear addition which requires the following: 1) Variance from Section 10.521 to allow a) .5 foot front yard where 5 feet is require, b) 1.5 foot side yard where 10 feet is required, c) 41% building coverage where 35% is allowed; 2) 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. Said property is located on Assessor Map 144 Lot 6 and lies within the General Residence C (GRC) District. (LU-23-41)

*The petition was postponed to the May 2 meeting.*

- F.** The request of **Bucephalus LLC (Owner)**, for property located at **650 Maplewood Avenue** whereas relief is needed to remove the outdoor fenced storage area and construct a 48 foot by 25.5 foot addition to the rear of the existing structure which requires a Variance from Section 10.592.20 to allow the expansion of space used for

motorcycle sales located adjacent to a Residential district where 200 feet is required. Said property is located on Assessor Map 220 Lot 88 and lies within the Business (B) District. (LU-21-111)

*The petition was **postponed** to the May 2 meeting.*

**G.** The request of **Cate Street Development LLC (Owner)**, for property located at **360 US Route 1 BYP** whereas relief is needed to install a sign on the northern façade of the building which requires a Variance from Section 10.1271 to allow a sign to be installed on a façade not facing the street or with a public entrance; 2) Variance from Section 10.1242 to allow more than one parapet sign above the ground floor per facade. Said property is located on Assessor Map 172 Lot 1 and lies within the Gateway Corridor (G1) District. (LU-23-44)

*The petition was **postponed** to the May 2 meeting.*

#### **H. OTHER BUSINESS**

There was no other business.

#### **I. ADJOURNMENT**

The meeting adjourned at 10:27 p.m.

Respectfully submitted,

Joann Breault  
BOA Recording Secretary