



City of Portsmouth  
Planning Department  
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Portsmouth, NH  
(603)610-7216

## MEMORANDUM

TO: Zoning Board of Adjustment  
FROM: Stefanie Casella, Planner  
DATE: July 8, 2023  
RE: Zoning Board of Adjustment July 18, 2023

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The agenda items listed below can be found in the following analysis prepared by City Staff:

### II. Old Business

- A. 4 Sylvester Street – Request for Rehearing
- B. 2 Sewall Road

### III. New Business

- A. 170 Aldrich Road
- B. 5 Cleveland Drive
- C. 29 Spring Street
- D. 261 South Street

## II. OLD BUSINESS

- A. Request for rehearing by 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. Application was denied on May 16, 2023. (LU-23-27)

### Planning Department Comments

On Tuesday, May 16, 2023 the Board of Adjustment considered the request of Jared J Saulnier (Owner), for subdividing 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. A motion was made to deny the application because the request did not observe the spirit of the ordinance by creating 2 undersized lots with inadequate street access. The motion passed and the request was denied.

A request for rehearing has been filed within 30 days of the Board's decision and the Board must consider the request at the next scheduled meeting. The Board must vote to grant or deny the request or suspend the decision pending further consideration. If the Board votes to grant the request, a hearing will be scheduled for the next month's Board meeting or at another time to be determined by the Board.

It has been brought to the attention of Zoning enforcement that the property at 4 Sylvester has been operating a short-term rental and is currently in violation of the Zoning Ordinance. In light of the violation, Staff is recommending the Board suspend determination of the rehearing request until such time that the violation is absolved. The notice of violation is included in the meeting packet as provided to the Board and posted online.

The decision to grant or deny a rehearing request must occur at a public meeting, but this is not a public hearing. The Board should evaluate the information provided in the request and make its decision based upon that document. The Board should grant the rehearing request

if a majority of the Board is convinced that some error of procedure or law was committed during the original consideration of the case.

## II. OLD BUSINESS

- B. The request of **Danielle Okula, Dennis Okula, and Irinia Okula (Owners)**, for property located at **2 Sewall Road** whereas relief is needed to Install a 6 foot fence where along the front of the property which requires a Variance from Section 10.515.13 to allow a 6 foot fence where 4 feet is allowed. Said property is located on Assessor Map 170 Lot 22 and lies within the Single Residence B (SRB) District. (LU-23-71)

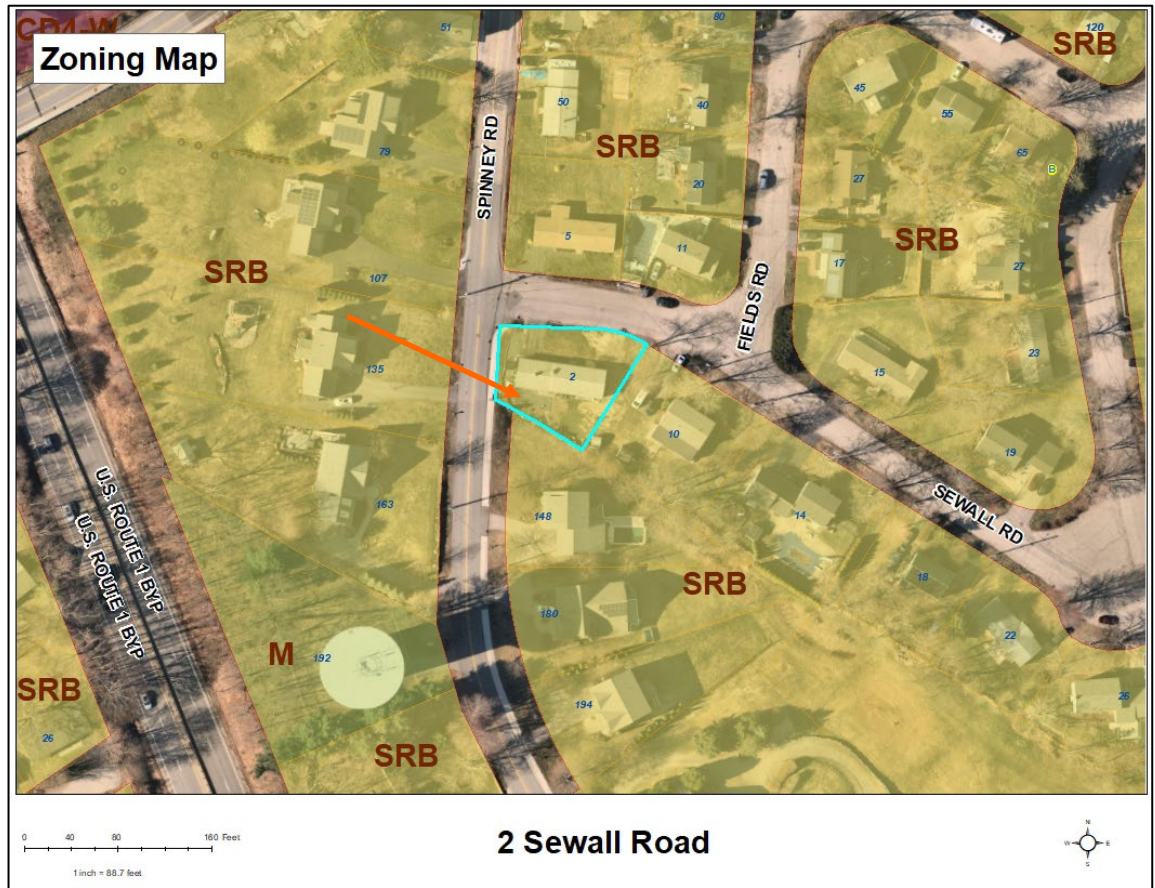
### Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use</u>	Single Living Unit	<b>6 Foot Fence</b>	Primarily residential
<u>Lot area (sq. ft.):</u>	9,603	9,603	15,000 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	9,603	9,603	15,000 min.
<u>Street Frontage (ft.):</u>	>100	>100	100 min.
<u>Lot depth (ft.):</u>	60	60	100 min.
<u>Primary Front Yard Sewall Rd (ft.):</u>	20	20	30 min.
<u>Secondary Front Yard (Spinney Rd) (ft.):</u>	15	0 - Fence	30 min.
<u>Left Yard (ft.):</u>	10	10/0 - Fence	10 min.
<u>Rear Yard (ft.):</u>	15	15/0 - Fence	30 min.
<u>Height (ft.):</u>	<35	<35	35 max.
<u>Building Coverage (%):</u>	21.6	21.6	20 max.
<u>Open Space Coverage (%):</u>	40	40	40 min.
<u>Parking:</u>	2	2	2
<u>Estimated Age of Structure:</u>	1960	<b>Variance request(s) shown in red.</b>	

### Other Permits/Approvals Required

- Building Permit

### Neighborhood Context



## Previous Board of Adjustment Actions

September 27, 1966 – **Granted** the variance to allow construction of an addition to an existing dwelling that affects the maximum percentage of building coverage for the lot as allowed within the SR II District relative to the proposed structure.

## Planning Department Comments

Applicant is requesting a variance to install a 6 foot fence within the secondary front yard setback area where a maximum height of 4 feet is allowed.

## Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The “unnecessary hardship” test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*

**AND**

  - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

**OR**

  - (c) *Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

## 10.235 Certain Representations Deemed Conditions

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.

**III. NEW BUSINESS**

**A.** The request of **Peter Gamble (Owner)**, for property located at **170 Aldrich Road** whereas relief is needed to demolish the existing garage and construct a new garage which requires the following: 1) Variance from Section 10.521 to allow a) 7 foot right side yard where 10 feet is required; and b) 23% building coverage where 20% is allowed. Said property is located on Assessor Map 153 Lot 21 and lies within the Single Residence B (SRB) District. (LU-23-47)

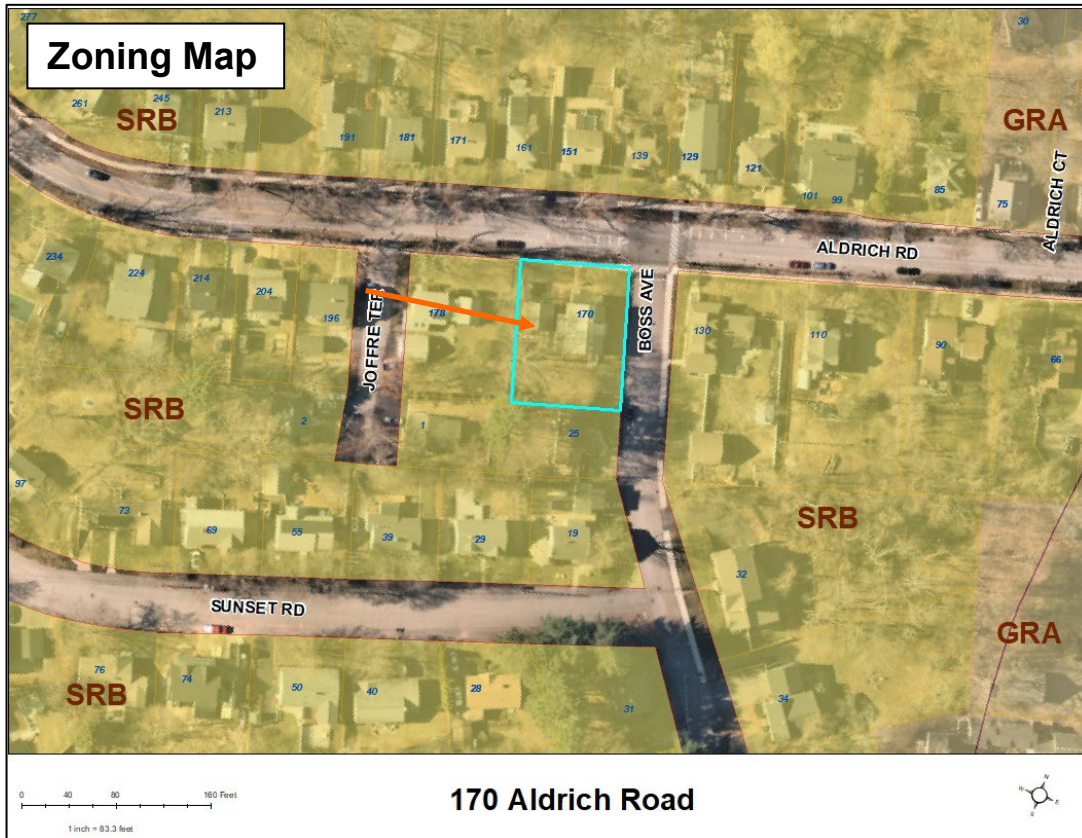
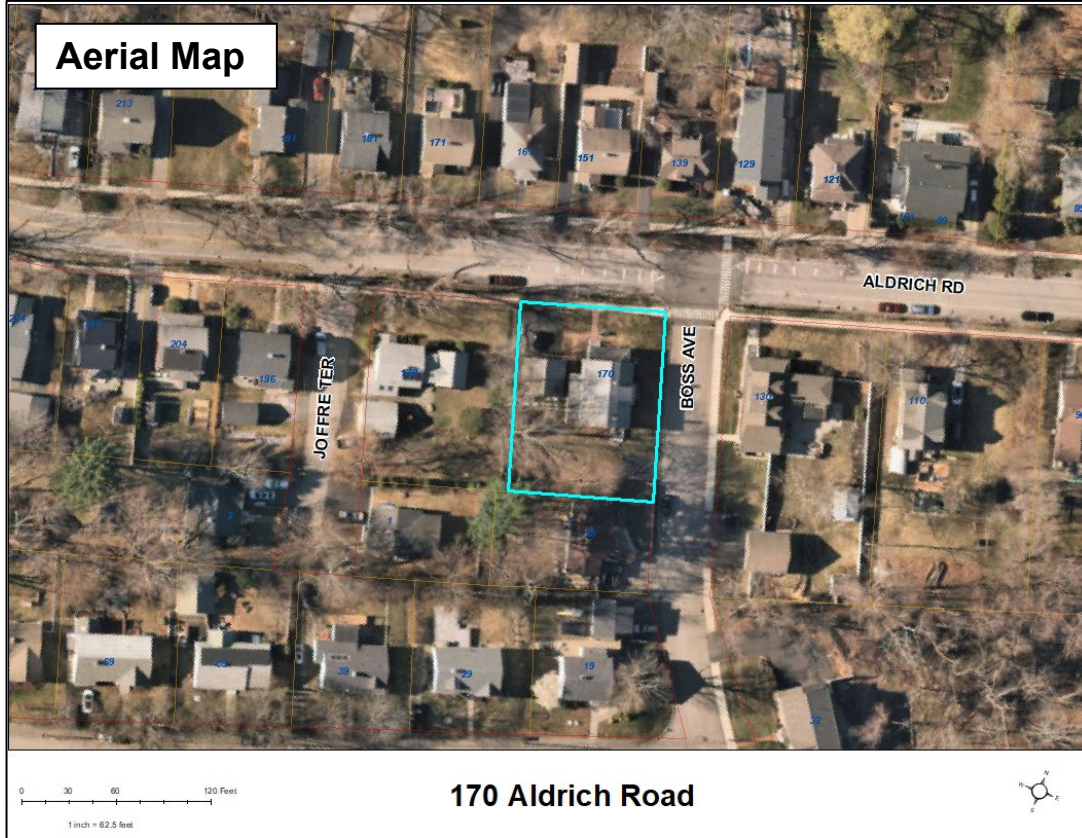
**Existing & Proposed Conditions**

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Two-family	Demo garage and construct new	Primarily residential
<u>Lot area (sq. ft.):</u>	10,912.5	10,912.5	1,500 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	10,912.5	10,912.5	1,500 min.
<u>Lot depth (ft.):</u>	120	120	100 min.
<u>Street Frontage (ft.)</u>	215	215	100 min.
<u>Primary Front Yard (ft.):</u>	22	22	30) min.
<u>Left Yard (ft.):</u>	15	15	10 min.
<u>Right Yard (ft.):</u>	7	<b>7</b>	10 min.
<u>Rear Yard (ft.):</u>	46	46	30 min.
<u>Height (ft.):</u>	<24	24	35 max.
<u>Building Coverage (%):</u>	20.6	<b>23</b>	20 max.
<u>Open Space Coverage (%):</u>	>40	>40	40 min.
<u>Parking</u>	2	2	2
<u>Estimated Age of Structure:</u>	1930	<b>Variance request(s) shown in red.</b>	

**Other Permits/Approvals Required**

- Building Permit

### Neighborhood Context





## Previous Board of Adjustment Actions

September 5, 1978 – The Board of Adjustment **granted** the application to construct a garage on a lot whose frontage is 50' where 100' is required and whose area is 6,000 s.f. where 20,000 s.f. is required.

May 23, 2023 – The Board of Adjustment **denied** application for demolishing the existing garage and constructing a new garage which requires the following: 1) Variance from Section 10.521 to allow a) 7 foot right side yard where 10 feet is required; and b) 23% building coverage where 20% is allowed. The Board voted to deny the request because the proposal failed to observe the spirit of the ordinance and would be contrary to the public interest because the home is in an area of single-family dwellings and the design isn't consistent with continuing to use the property as a single-family dwelling one.

June 21, 2023 - The Board of Adjustment **granted the rehearing request** for the application which was **denied on May 23, 2023** to demolish the existing garage and constructing a new garage which requires the following: 1) Variance from Section 10.521 to allow a) 7 foot right side yard where 10 feet is required; and b) 23% building coverage where 20% is allowed.

## Planning Department Comments

The applicant is requesting relief to demolish the existing garage and construct a new garage with a slightly larger footprint. The existing garage received variances for construction in 1978 when there were two separate lots. The properties have since been merged to create one lot which explains the discrepancy in the sought dimensional relief.

This application was denied at the May 23, 2023 Board of Adjustment meeting and subsequently granted a rehearing because *“the applicant did not have an effective opportunity to rebut the information presented by the abutter due to technical issues, with the stipulation that the applicant be required to attend in person.”*

## Variance Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
  2. *Granting the variance would observe the spirit of the Ordinance.*
  3. *Granting the variance would do substantial justice.*
  4. *Granting the variance would not diminish the values of surrounding properties.*
  5. *The “unnecessary hardship” test:*
    - (a) *The property has special conditions that distinguish it from other properties in the area.*
    - AND**
    - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*
- OR**

*Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

### **10.235 Certain Representations Deemed Conditions**

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.

### III. NEW BUSINESS

- B. The request of **John C. Wallen and Jeanine M. Girgenti (Owners)**, for property located at **5 Cleveland Drive** whereas relief is needed to install a 6 foot fence along the primary and secondary front of the property which requires a Variance from Section 10.515.13 to allow a 6 foot fence where 4 feet is allowed. Said property is located on Assessor Map 247 Lot 74 and lies within the Single Residence B (SRB) District. (LU-23-92)

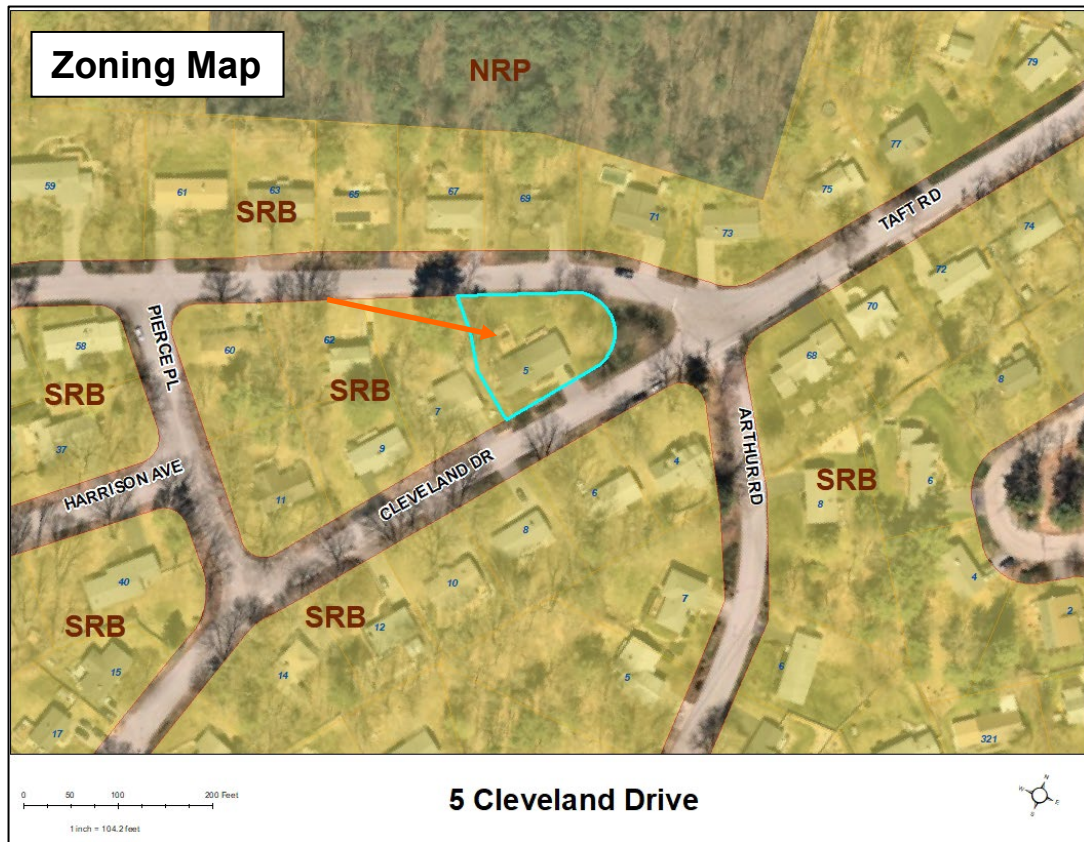
#### Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Single-family	Installation of 6 foot fence	Primarily residential
<u>Lot area (sq. ft.):</u>	13,095	13,095	15,000 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	13,095	13,095	15,000 min.
<u>Lot depth (ft.):</u>	105	105	100 min.
<u>Street Frontage (ft.)</u>	>200	>200	100 min.
<u>Primary Front Yard (Cleveland Dr) (ft.):</u>	20	20	30 min.
<u>Left Yard (ft.):</u>	15	15	10 min.
<u>Secondary Front Yard (Taft Rd) (ft.):</u>	30 (Primary Structure)	12 (Fence) 30 (Primary Structure)	30 min.
<u>Height (ft.):</u>	<35	<35	35 max.
<u>Building Coverage (%):</u>	18	18	20 max.
<u>Open Space Coverage (%):</u>	>30	>30	30 min.
<u>Parking</u>	2	2	2
<u>Estimated Age of Structure:</u>	1962	Variance request(s) shown in red.	

#### Other Permits/Approvals Required

- Building Permit

### Neighborhood Context



## Previous Board of Adjustment Actions

February 20, 2001 – The Board **denied** the application for a Variance from Article II, Section 10-206(12) and Article XII, Section 10-1201(A)(3)(a)(3&4) to allow 200+ s.f. in an existing single family dwelling to be used for a nail salon with the existing driveway being provided for parking, having vehicles park one behind another and back out onto the street.

## Planning Department Comments

The applicant is requesting the installation of a 6 foot fence in the secondary front yard of the property. The desired fence location is to the rear of the primary structure and would front on Taft Road. Other site improvements as part of this project include the installation of a patio and inground pool within the confines of the fenced area.

## Variance Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The “unnecessary hardship” test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*

**AND**

  - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

**OR**

  - (c) *Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

## 10.235 Certain Representations Deemed Conditions

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.

### III. NEW BUSINESS

- C. The request of **Thomas P. Rooney (Owner)**, for property located at **29 Spring Street** whereas relief is needed to install one mechanical unit on the left side of the primary structure which require a Variance from Section 10.515.14 to allow a 4-foot left side yard where 10 feet is required. Said property is located on Assessor Map 130 Lot 21 and lies within the General Residence A (GRA) District. (LU-23-93)

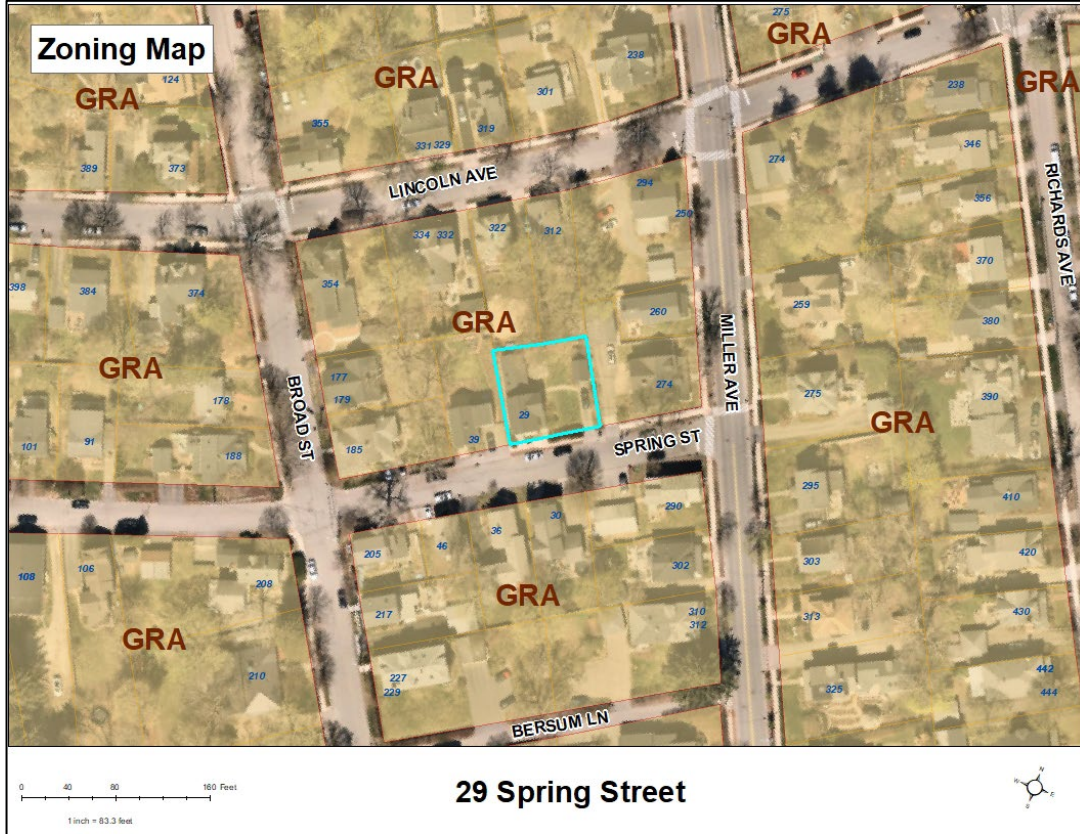
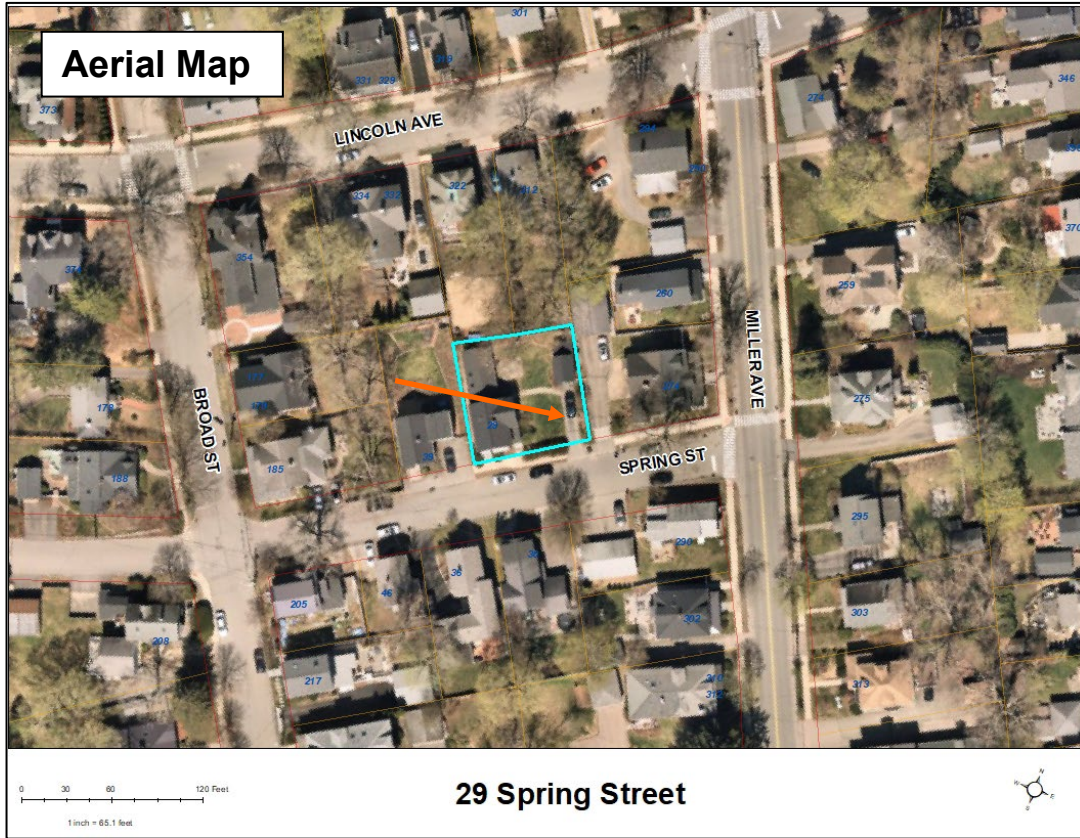
#### Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Single-family	Installation of 1 mechanical unit	Primarily residential
<u>Lot area (sq. ft.):</u>	6,547.5	6,547.5	7,500 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	6,547.5	6,547.5	7,500 min.
<u>Lot depth (ft.):</u>	80	80	70 min.
<u>Street Frontage (ft.)</u>	79	79	100 min.
<u>Primary Front Yard (ft.):</u>	5	5	15 min.
<u>Left Yard (ft.):</u>	6 (primary structure)	4 (mechanical unit)	10 min.
<u>Right Yard (ft.):</u>	2	2	10 min.
<u>Rear Yard (ft.):</u>	6	4 (previously approved unit)	10 min.
<u>Height (ft.):</u>	35	35	35 max.
<u>Building Coverage (%):</u>	28	28	25 max.
<u>Open Space Coverage (%):</u>	>30	>30	30 min.
<u>Parking</u>	2	2	2
<u>Estimated Age of Structure:</u>	1910	Variance request(s) shown in red.	

#### Other Permits/Approvals Required

- Building Permit

### Neighborhood Context



## Previous Board of Adjustment Actions

April 21, 1974 – The Board **granted** a variance to construct a porch approximately 13' x 13' onto the existing building.

August 30, 2002 – The Board **granted** a variance to allow a 4' x 17' addition to the right side of the dwelling creating 25.7% building coverage where 25% is the maximum allowed.

April 29, 2003 – The Board **granted** a variance to allow a 5' x 14' porch to the right side of dwelling and expand the front entry to 5' x 7' creating 28.8% building coverage where 25% was the maximum allowed.

May 23, 2023 – The Board **granted** a variance to allow two mechanical units in the rear of the primary structure which require the following 1) Variance from Section 10.515.14 to allow a) 7-foot side yard where 10 feet is required; and b) 4 foot rear yard where 10 is required with the following condition:

- 1) Both mechanical units shall be located in the rear of the primary structure as Indicated in the applicant's submission materials.

## Planning Department Comments

The applicant was previously before the Board in May and was granted variance approvals for two mechanical units. Upon further consultation from the installation company, it was discovered that one of the units should be moved to the new proposed location. The reason for moving locations is detailed in the applicant's submission materials.

This request is before the Board because of the change in location. The new proposed location is in a more non-conforming location that Staff believe was not contemplated in the first review by the Board. Therefore, Staff have determined that the new location will need approval from the Board in order to complete the installation.

If the Board wishes to grant the request, staff suggest the addition of the following or similar condition:

- 1) *This approval would replace the mechanical unit which required relief for a 7-foot side yard setback from the prior approval (LU-23-55) granted on May 23, 2023.*

## Variance Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The "unnecessary hardship" test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*
  - AND**
  - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*



**OR**

*Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

### **10.235 Certain Representations Deemed Conditions**

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.

**III. NEW BUSINESS**

- D. The request of **Project No. 9, LLC (Owner)**, for property located at **261 South Street** whereas relief is needed to extend the hours of operation to 7:00 PM and expand the existing restaurant use to include the sale and consumption of wine and beer which requires a Variance from section 10.440 Use #9.41 to allow a restaurant where one is not allowed. Said property is located on Assessor Map 111 Lot 34-2 and lies within the General Residence B (GRB) and Historic Districts. (LU-23-97)

**Existing & Proposed Conditions**

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use</u>	Flower Shop and Cafe	Flower Shop and Café with <b>beer and wine service available until 7:00 PM</b>	Primarily residential
<u>Lot area (sq. ft.):</u>	8,293.5	8,293.5	5,000 min.
<u>Lot Dimensions</u>	No change is lot of building dimensions proposed		
<u>Parking:</u>	0	0	0 (Variance Granted)
<u>Estimated Age of Structure:</u>	1950	<b>Variance request(s) shown in red.</b>	

**Other Permits/Approvals Required**

- Liquor Committee – Conditional Review Approval Granted
- Permit of Assemble – Fire Department

### Neighborhood Context



## Previous Board of Adjustment Actions

September 30, 1969 – the Board **granted** a Variance to extend a non-conforming use to cook and sell cooked foods at an existing grocery store, with the stipulation that the time was limited to Thursday, Friday and Saturday and that efforts be made to eliminate offensive odors or nuisance.

November 25, 1969 – the Board voted to change the approved days of operation to Wednesday, Thursday and Friday.

August 20, 1991 – the Board **granted** a Variance to permit the attachment of 6 s.f. of signage to an existing canvas valance, creating a total of 30 s.f. signage in a district where signage is not allowed.

May 16, 1995 – the Board **granted** Variances 1) to allow the existing kitchen to be used for a catering business in addition to its existing use as a convenience store; and 2) to eliminate one required parking space.

June 20, 1995 – the Board **denied** an abutter's request for rehearing on the above decision.

May 15, 2007 – a request to allow a skin care business in the rear portion of the building and an office/gallery in the front portion, both operating 6 days a week from 9AM to 8PM, was withdrawn by the owner.

June 19, 2007 – the Board **denied** Variances to allow the building to be used during specified hours as a catering kitchen in the rear and for retail sales of food products, beer and wine in the front, the prepared food prepared to be sold and consumed on the premises (counter with 5 stools); and to allow no parking to be provided where conforming onsite parking spaces are required.

August 28, 2007 – the Board **failed** to pass a motion to grant a petition to allow the building to be used as office space for the applicants and to allow the office without parking being provided where 5 parking spaces are required.

November 27, 2007 – the Board **granted** a special exception to restore the prior use of the property for sale of milk, bread, eggs, cheese, wine, soft drinks, newspapers, dry goods, canned goods and some prepared foods with no food cooked or prepared to order, with hours of operation from 7:00 a.m. to 7:00 p.m. seven days a week.

April 15, 2008 – The Board **granted** a Variance to allow a 14.25± s.f. free-standing sign in a district where business signs are not allowed.

October 16, 2012 – The Board of Adjustment **granted** the application to Amend the Special Exception granted November 27, 2007 to permit the sale under Section 10.335, of food and beverages cooked or prepared to order. The Board voted to **grant** the petition as presented and advertised with the addition of amending the request for a Special Exception, granted November 27, 2007, to clarify that the kitchen area may be used for catering. The petition was granted with the following stipulations.

- 1) That the principal use of the property is Convenience Goods 2, "A convenience goods establishment that sells food prepared on the premises (excluding fried food) for consumption off the premises."
- 2) That the catering of products is permitted under this use as an accessory use of the property.

- 3) That no more than 40% of the gross floor area of the existing structure shall be used for an accessory use.
- 4) That no on-street truck parking shall be permitted other than allowing 30 minutes for loading purposes.

### **Planning Department Comments**

The applicant is proposing to extend the current hours of operation to 7:00 pm and include the consumption of beer and wine on site. The property has a history of commercial uses and was granted a variance to operate from 7:00 AM to 7:00 PM, seven days a week in 2007, however Staff thought it was important to include the hours as part of the request to ensure the proposed use was covered under any new approval granted by the Board.

### **Review Criteria**

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The “unnecessary hardship” test:*
  - (a) *The property has special conditions that distinguish it from other properties in the area.*  
**AND**
  - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*  
**OR**  
*Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

### **10.235 Certain Representations Deemed Conditions**

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.