

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

7:00 P.M.

July 18, 2023

MEMBERS PRESENT: David Rheame; Paul Mannle; Thomas Rossi; Jeffrey Mattson; Jody Record, Alternate; ML Geffert, Alternate

MEMBERS EXCUSED: Phyllis Eldridge, Chair; Beth Margeson, Vice Chair

ALSO PRESENT: Stefanie Casella, Planning Department

I. VOTE TO APPOINT TEMPORARY CHAIR AND VICE-CHAIR

Chair Eldridge and Vice Chair Margeson were excused from the meeting.

*Mr. Mattson moved to nominate Mr. Rheame as Acting Chair, seconded by Ms. Geffert. The motion **passed** by a vote of 5-0, with Mr. Rossi abstaining.*

Note: There was no Acting Vice-Chair nominated.

II. APPROVAL OF MINUTES

- a. Approval of the **June 21, 2023** minutes.

*The June 21 minutes were **approved** as amended by unanimous vote, 6-0.*

The amendment was to change ‘Ms. Mattson’ on page 10, last paragraph, to ‘Mr. Mattson’.

- b. Approval of the **June 27, 2023** minutes.

*The June 27 minutes were **approved** as amended by a vote of 4-2, with Mr. Rossi and Ms. Geffert abstaining.*

The amendments were: On page 2, top paragraph, the phrase “Mr. Rheame said most of the neighbors had garages” was changed to “Mr. Rheame said the **applicant claimed** that most of the neighbors had garages.” On page 9, first paragraph, the sentence “He said the deck wasn’t a real

issue and hoped that additional relief would not be **requested.**” was changed to: “He said the deck wasn’t a real issue and hoped that additional relief would not be **required.**”

Acting Chair Rheume stated that New Business, Item D, Petition for 261 South Street was withdrawn by the applicant.

Note: Alternates Geffert and Record took voting seats for all petitions.

III. 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)

Acting Chair Rheume said the application was denied at the May 16, 2023 meeting. He said the applicant then appealed the Board’s decision and that there was an additional issue associated with the use of the property. Ms. Casella said it was brought to light after the Board’s decision that the applicant may be operating an Airbnb, which was not allowed under the zoning ordinance. She said a Notice of Violation was sent to the applicant but that the applicant said they were operating a long-term lease of 30 or more days, so the violation was resolved.

Mr. Mattson said he did not take Requests for Rehearing lightly and that the Board stood solid in their decisions, but he struggled with the Board’s decision for that application because the aspect of creating two nonconforming lots would seemingly not be in the spirit of the ordinance. He said, however, that lots of that size were in the neighborhood and would be in the essential character of the neighborhood, so it was a balancing act. Mr. Rossi said he would not support the Request for Rehearing because the request leaned heavily on *Malachy Glen Associates, Inc. v. Town of Chichester*, and he considered the wording, which was ‘one way’ and ‘another approach’ and so on. He said lawyers and judges choose their words carefully and he noted that ‘one way’ and ‘another way’ was not the English language equivalent of saying ‘*the way*’ and the ‘other way’ or the ‘only other way’. He said if he translated them into everyday use by saying that one way to get to North Church was to go up Junkins and turn on Pleasant, and another way was to go up South Street and turn right on Middle, that would not imply that those were the only two ways to get to the church. He said he also did not think that the wording of the decision implied that those were the only two criteria by which the Board could make an assessment. He said trained attorneys were careful with wording and he believed it was intentional that the Superior Court left the zoning

boards with some leeway as to how they would interpret and apply the spirit of the ordinance. He said he understood the Malachy Glen point that one is not to rely on the logic that states that if something is out of compliance with the zoning ordinance, it is therefore not necessarily in violation of the spirit of the ordinance. He said he did not believe that's what the wording of Mr. Mannle's motion implied and that Mr. Mannle gave a reason that was rooted in the stated purpose of the SRB zone, which is low-to-medium densities. He said that, based on the leeway the Board was given on Malachy Glen, it was valid for the Board to consider that as part of their understanding of the spirit of the ordinance, and he did not believe that the Board's decision was either unlawful or unreasonable. He said there were many places within the request where it stated that, because the Board was silent on the other aspects of the criteria that are required to achieve a variance, it was implied that those criteria were met. He said no such implication could be drawn and that it was the practice of the Board that once they found that an application failed to meet one criterion that was required out of the multiple criteria required for approval of a variance, it wasn't necessary for them to articulate whether the application met or failed the remaining criteria.

Mr. Mannle said he would stand by the Board's previous decision. He said he made the motion to deny because it should not be the purpose of the Board to create nonconforming lots. He said he also believed that plot maps from over 100 years ago were irrelevant to today's zoning. Acting Chair Rheume said it was a close vote (4-3) in favor of denying, so he felt the Board was torn in their consideration, but he believed that the Request for Rehearing should be denied. He said the Board had approved variances for nonconforming lots in the past, but the arguments made by the applicant that it wasn't necessarily characteristic of the neighborhood could be true and not true, and the Board felt that the argument that it was not true outweighed the argument that it would be true. He said there was enough variation in the neighborhood that one could make an argument that the nearby lots predominated over any other considerations about the neighborhood. He said in that sense it was a fair and appropriate decision by the Board. He said the applicant provided additional information regarding the fact that a house that formerly stood on the property might have been occupied, but he didn't think that was a significant factor that would make the Board feel that there was a need to reconsider the information that was put before them.

There was no public hearing.

DECISION OF THE BOARD

*Mr. Rossi moved to **deny** the Request for Rehearing, seconded by Ms. Geffert.*

Mr. Rossi said the Request for Rehearing in its content failed to demonstrate that the Board acted either unlawfully or unreasonably. He said that, despite the reliance of the request on Malachy Glen, he believed it was misapplied in this request to state that the Board's decision was unlawful. He said his reading of Malachy Glen allowed the Board to make the decision on the basis that they made it with regard to the spirit of the ordinance, particularly with the Board's latitude in referring to the stated purpose of the SRB zone, which was to maintain low-to-medium density, and that the Board was under no obligation to address other aspects of the criteria once they find that one criterion is not satisfied. Ms. Geffert concurred and said she agreed that finding that one criteria was not

satisfied was adequate to deny. She said the Board did that and didn't have to rehear the petition, but if they were to, they could find other criteria that were not satisfied.

The motion passed by a vote of 5-1, with Mr. Mattson voting in opposition.

- 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)

SPEAKING TO THE PETITION

The applicant Danielle Okula was present to review the application. She said her front door faced Sewall Rd, so she wanted to place the fence along what would be the backyard. She said there was very little setback between the sidewalk and her bedroom and the traffic noise from Spinney Road was an issue. She said a 6-ft fence was necessary to keep her dog in the yard and prevent other dogs from getting in. She said the neighbors supported the proposal. She reviewed the criteria.

In response to Mr. Rossi's question, Ms. Okula said she didn't intend to put the fence right up to the sidewalk because there had to be space to clear the sidewalk. Ms. Casella said the zero foot clearance was at the property line and that it looked like it might be 6-7 feet off Spinney Road. She said the City owned the property up to the property line and thought it would be somewhere in-between the first foot or so of the rock wall. She said the corner lot had two fronts and the setback went back 30 feet into the property, so technically that portion would be 30 feet from Spinney Road and wouldn't go along the entire back of the property.

Acting Chair Rheume opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one spoke, and Acting Chair Rheume closed the public hearing.

DECISION OF THE BOARD

*Mr. Rossi moved to **grant** the variance for the petition, seconded by Mr. Mannle.*

Mr. Rossi said granting the variance would not be contrary to the public interest or to the spirit of the ordinance. He said the spirit of the ordinance was to avoid encroachment by unsightly and tall fences right up against pedestrian and motoring areas and the fence would be sufficiently set back from the sidewalk and have enough clearance. He said granting the variance would do substantial justice because of the consideration of privacy, particularly regarding the location of the bedroom and the nuisance factor of aggravating the applicant's dog and the safety consideration of keeping the dog contained, justified the 6-ft fence, and there was no countervailing public interest to

sacrifice making that happen. He said granting the variance would not diminish the values of surrounding properties, noting that the abutters had adequate notice and if anyone felt that it would diminish the value of their properties, their failure to say so was good evidence that there would be no impact on the values of surrounding properties. He said literal enforcement of the provision of the ordinance would result in an unnecessary hardship due to the unique characteristics of the property, which were the terrain and the way it was below the road's grade level, which necessitated a taller fence to achieve the purposes of privacy and security.

Mr. Mannle concurred and said the hardship was due to a separate ordinance for corner lots. He said he didn't agree with that ordinance because it put an added layer of criteria that wasn't found in any lot that was not a corner lot, but he said he would support the ordinance.

The motion passed by unanimous vote, 6-0.

IV. NEW BUSINESS – PUBLIC HEARING

- 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)

SPEAKING TO THE PETITION

Acting Chair Rheume said the Board denied the item previously at the May 23, 2023 meeting and granted a Request for Rehearing at the June 21 meeting.

Attorney Christopher Fischer was present on behalf of the applicant Peter Gamble. He said he was there for a limited purpose that did not speak to the merits of the motion for rehearing. He said the abutters Adrian and Andrea DeGraffe via their lawyer Attorney John McGee Jr. said they were filing a Quiet Title Action claiming ownership of a portion of the 170 Aldrich Road property. He said it was not filed on time and that his clients intended to file their own Quiet Title Action in Rockingham County Superior Court to resolve the question of the lot's size for good. He said the significance was that the circumstances created the conditions where the Board could find that it lacked sufficient information to rule on the merits of the Request for Rehearing until a final decision on the merits was issued by Superior Court regarding who owned what at 170 Aldrich Road. He said his clients felt that they owned everything on the deed and map. He said the Board lacked sufficient information to rule on the merits, which implicated potential relief under RSA 674:33, Subsection 8, and allowed the Board to render a decision based on a lack of information to dismiss the variance request without prejudice and to allow his client's right to return the variance request.

Mr. Mannle asked why Attorney Fischer didn't simply submit a request to withdraw. Attorney Fischer said he did not think it was as clearcut as a dismissal without prejudice issued by the Board.

He said if he withdrew the motion for rehearing and tried to resubmit a variance request at a future date, his client could make the same argument then. He said it was in an abundance of caution to make sure they did not prejudice themselves when they resubmitted a variance request. Mr. Rossi asked how the dispute over the property impacted the application and if the right side property line was in question. Attorney Fischer said the DeGraffes intended to claim that they owned a portion of the lot, so it would affect the dimensions of the lot and the frontage requirements.

Assistant City Attorney Trevor McCourt was present and explained that the difference was that the dismissal without prejudice is specifically prescribed as one of the statutory powers available to the Board, and withdrawal was something prescribed by their rules. He said Attorney Fischer, out of an abundance of caution, wanted to avoid any perceived irregularity in the Board's decision-making and remove any chance that the Board's decision could be appealed.

Acting Chair Rheume opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING IN OPPOSITON TO THE PETITION

Attorney John McGee Jr. representing the abutters Adrian and Andrea DeGraffe was present. He said he had expected to engage in a discussion of the merits but was told by Attorney Fischer that there would be a formal dismissal. He said the Statute gave the Board the discretion to determine whether it was appropriate to dismiss it. He said the reason the petition wasn't filed on time was due to a medical incident he had over the weekend. He said he had not decided whether to let Attorney Fischer file a Quiet Title Action or not, but he was sure it was coming. He said there was an issue raised at the May meeting of a three percent coverage that would be increased if he was successful. He said if the Board wanted to dismiss, it was fine with him, and if they wanted to go forward, he was ready. He said if it was dismissed and the applicant sought a building permit in the future, it might cause things to be smaller than what was proposed now and the applicant might be required to notify the DeGraffes due to other variances needed.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one spoke, and Acting Chair Rheume closed the public hearing.

DISCUSSION OF THE BOARD

Acting Chair Rheume said he was disappointed because the applicant brought counsel on recently and the decision was made to change things around from what the Board was originally presented with. Ms. Geffert noted that the Statute cited 'If the Board determines that sufficient information is lacking in order to make a final decision on an application, and the applicant does not consent to an extension, then the Board may at its discretion deny without prejudice'. She emphasized the word 'and' and said the Board had to figure out whether there was a consent to an extension. Attorney

Fischer said they would agree to an extension as long as it coincides with the final decision issued by the Superior Court on the title dispute. Ms. Geffert said the extension she would like the applicant to consent to was a specific time period, and if the applicant could not do that now, she thought Attorney Fischer was saying that they would not consent to an extension of a specific duration. Attorney Fischer agreed.

DECISION OF THE BOARD

*Mr. Mannle moved to **deny** the application without prejudice, seconded by Mr. Rossi.*

Mr. Mannle said he was following the advice of City Attorney McCourt and concurring with the applicant's attorney that until the applicant and abutters solve their legal issues in Superior Court, the application would be dismissed without prejudice. Mr. Rossi said the motion was consistent with RSA 674.33, Section 8, which grants the Board the authority to make such a denial without prejudice when the underlying facts of the application are sufficiently unclear that the Board doesn't have enough information to make an informed judgment. He said there was a dispute over the size of the property and the lot lines and therefore the Board couldn't make an informed judgment about the variance request until those issues were clarified. Mr. Mattson said it didn't look as good for the applicant to withdraw their application and come back without any context, whereas the denial without prejudice was slightly different. He said if the applicant just withdrew, the abutter could indefinitely delay their action until the applicant came before the Board again and just start the process then in an attempt to delay. It was further discussed.

Acting Chair Rheume said he would support the motion. He said he understood that the applicant was under unusual circumstances but thought it would have been preferable that the Board had more time to absorb the written information. He said the Board gave the applicant a great deal of deference throughout the process but understood the nature of what was being asked for and the reasons for it and why it would be appropriate for the Board to approve the motion as specified.

*The motion to deny the application without prejudice **passed** by a unanimous vote of 6-0.*

- b. The request of **John C. Wallin 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)

SPEAKING TO THE PETITION

The applicants Jeanine Girgenti and John Wallin were present and reviewed the petition, noting that they wanted to put an inground pool in the backyard and needed permission to have a 6-ft fence for

privacy and security for the pool. Mr. Wallin said the property had two front yards and said the closest neighbors had no objection to the fence. He and Ms. Girgenti reviewed the criteria.

In response to Mr. Mattson's question, Mr. Wallin said he did several measurements and found that the fence would be set back about 12 feet from the road and about nine feet from his property line. Mr. Rossi asked for clarification that only the corner and not the entire length of the fence would encroach. Mr. Wallin said as the fence moved closer to the neighbor's property line at the far corner, it might not require a variance but he requested one for the whole fence just in case. He said the corner that really needed the variance had the stone wall and the shrubs.

Acting Chair Rheume opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one spoke, and Acting Chair Rheume closed the public hearing.

DECISION OF THE BOARD

*Mr. Mattson moved to **grant** the variance for the application, seconded by Mr. Mannle.*

Mr. Mattson said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance because the proposed use of adding the 6-ft fence does not conflict with the explicit or implicit purposes of the ordinance and does not alter the essential character of the neighborhood or threaten the public's health, safety, or welfare or otherwise injure public rights. He said it would do substantial justice because the benefit to the applicant would not be outweighed by any harm to the general public or other individuals, and the fence would clearly benefit the applicant. He said granting the variance would not diminish the values of surrounding properties, noting that there was no reason to see why adding the fence would do so. He said literal enforcement of the ordinance would result in an unnecessary hardship due to the special conditions of the property that distinguished it from others in the area, and there was no fair and substantial relationship between the public purpose of the ordinance's provision and the specific application of that provision to the property, and the proposed use was a reasonable one. He said it was a reasonable proposed use of a single-family home with a fence which, for all intents and purposes, would be in the applicant's backyard. He said the unique conditions of the property were that the lot was a corner one that surrounded the house on three sides, and the fence would still be set back further from the actual property line and would not inhibit any sight lines from the road or affect light, air, or privacy in a negative way on other properties.

Mr. Mannle concurred and said he appreciated that the fence would be placed directly behind the house and not on the promontory. Mr. Rossi said the factors that led him in support were the inground pool and the children in the neighborhood, and he thought having a 6-ft fence was an important safety feature.

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

- 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)

SPEAKING TO THE PETITION

The applicant Tom Rooney was present and said he wanted to install a heat pump mechanical unit on the left side of the house. He reviewed the petition and criteria and said the abutters on the left approved the proposal.

In response to Mr. Mattson's question, Mr. Rooney said the unit on the right would remain in place and the unit on the left would move to the side.

Acting Chair Rheume opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one spoke, and Acting Chair Rheume closed the public hearing.

DECISION OF THE BOARD

*Ms. Geffert moved to **grant** the variance for the petition, seconded by Mr. Mannle.*

Ms. Geffert referred to the discussion and analysis for the original variance request that was granted by the Board on May 23, 2023. She said granting the variance would not be contrary to the public interest, noting that the Board found then and found now that the public interest would not be disserved by placing the unit behind the fence on the side property line, and the abutting neighbor supported the application. She said granting the variance would observe the spirit of the ordinance because there was nothing in the ordinance that did not allow a single residence to continue with efficient heat. She said substantial justice would be done because a split condenser unit was more efficient than other heating and cooling systems that could be installed on the property. She said granting the variance would not diminish property values on surrounding properties because, as found in the first installation and in this installation, it would enhance the applicant's property value and would also enhance the values of surrounding ones. She said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. She said that, given where the Board stood with the first variance granted, denying this variance would mean that the applicant would go away with half of the heating and cooling system that he desired for his property, which would be a substantial hardship. She said there was no reason for it, particularly given that the modest incursion on the side lot line wasn't opposed by the abutting neighbor. Mr. Mannle concurred and had nothing to add.

Acting Chair Rheume said he would support the motion. He said he had a similar unit and it was very quiet. He said the applicant's house was tight up against the property line and making any kind

of improvement by placing a condenser that was a necessity for modern living required some kind of relief from the Board. He said the applicant came before the Board due to technical issues associated with the condenser's location.

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

- d. **WITHDRAWN** 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.
WITHDRAWN (LU-23-97)

The petition was withdrawn by the applicant.

V. OTHER BUSINESS

- a. Board of Adjustment Training on July 25, 2023 at 7:00 PM in Conference Room A

Ms. Casella said Attorney Stephen Buckley from the NH Municipal Association would give the training session and that it would be open to the public but there would be no public hearing. She said she could forward questions from the Board to Attorney Buckley before the session.

VI. ADJOURNMENT

The meeting adjourned at 8:28 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary