



City of Portsmouth
 Planning Department
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 Portsmouth, NH
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MEMORANDUM

TO: Zoning Board of Adjustment
 FROM: Stefanie Casella, Planner
 DATE: August 13, 2023
 RE: Zoning Board of Adjustment September 19, 2023

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

II. Old Business

- A. 30 Parker Street – Request to Postpone
- B. 9 Kent Street
- C. 303 Barlett Street

III. New Business

- A. 459 Islington Street
- B. 100 Islington Street Unit #6
- C. 70 Court Street

Due to the large number of applications submitted for September, staff is requesting the following items be postponed to the September 26, 2023 meeting:

- D. 35 Whipple Court*
- E. 253 Broad Street*
- F. 815 Lafayette Road*

II. OLD BUSINESS

- A. REQUEST TO POSTPONE** The request of **Kathryn Waldwick and Bryn Waldwick (Owners)**, for property located at **30 Parker Street** whereas relief is needed to demolish and remove the existing shed and covered porch and construct a new attached shed with a covered porch which requires the following: 1) Variance from section 10.521 to permit a) 45% building coverage where 35% is allowed, b) one and a half (1.5) foot right side yard where 10 feet is required, and c) two (2) foot rear yard where 20 feet is required; and 2) Variance from Section 10.321 to allow a nonconforming structure or building to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 126 Lot 27 and lies within the General Residence C (GRC) District. REQUEST TO POSTPONE (LU-23-117)

Planning Department Comments

The applicant has requested the postponement of this item to further collaborate with the abutting property. Please see the letter from the applicant's representative as provided in the meeting packet.

II. OLD BUSINESS

- B.** The request of **Cynthia Austin Smith and Peter Smith (Owners)**, for property located at **9 Kent Street** whereas relief is needed to demolish the existing two (2) living unit structure and construct a one (1) living unit structure which requires a Variance from Section 10.521 to allow a) 5,000 square feet of lot area where 7,500 square feet are required and b) 5,000 square feet of lot area per dwelling unit where 7,500 square feet are required. Said property is located on Assessor Map 113 Lot 42 and lies within the General Residence A (GRA) District. (LU-23-119) *This item was continued from the August 22, 2023 meeting to request more information from the applicant.*

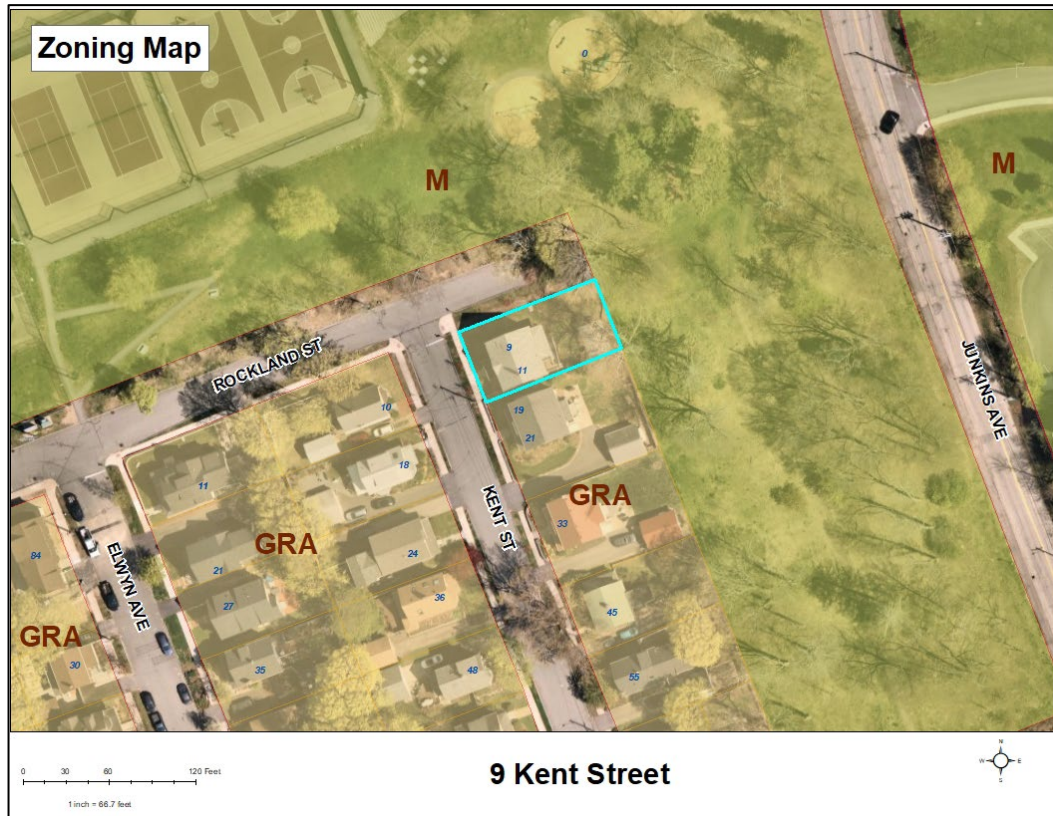
Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Two-family	Demo structure and construct new single unit	Primarily residential
<u>Lot area (sq. ft.):</u>	5,000	5,000	7,500 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	5,000	5,000	7,500 min.
<u>Street Frontage (ft.):</u>	50'+	50' +	100 min.
<u>Lot depth (ft.)</u>	100	100	70 min.
<u>Primary Front Yard (ft.):</u>	7	11	10 (using front yard averaging) min.
<u>Secondary Front Yard (ft.):</u>	16	16	13 (using front yard averaging) min.
<u>Right Yard (ft.):</u>	0.5	12	10 min.
<u>Rear Yard (ft.):</u>	6	>20	20 min.
<u>Height (ft.):</u>	<35	34.5	35 max.
<u>Building Coverage (%):</u>	35	25	25 max.
<u>Open Space Coverage (%):</u>	63.5	42	30 min.
<u>Parking</u>	0	2 (2 car garage)	2
<u>Estimated Age of Structure:</u>	1900	Variance request(s) shown in red.	

Other Permits/Approvals Required

- Building Permit

Neighborhood Context



Previous Board of Adjustment Actions

July 19, 1988 – Relief from Zoning Ordinance including: Variance from Article III, Section 10-302 are requested: a) construction of 4' x 20' rear egress stairs from the second floor to rear yard with 33% building lot coverage in a district where the maximum building lot coverage allowed is 20% and b) construction of said stairs with a 2 ½' right yard where a 10' side yard is the minimum in this district. The Board voted to **grant** the request as advertised.

March 29, 2023 – The Board considered the application for demolishing the existing two-family and constructing 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. The Board voted to **postpone** to the April 18, 2023, meeting.

April 18, 2023 - The Board voted to **postpone** the March 29, 2023, petition to the May 16, 2023, meeting.

May 16, 2023 – The Board voted to **deny** the March 29, 2023, request.

Planning Department Comments

At the August 22, 2023 Board of Adjustment meeting, the Board made the following decisions:

- 1) The application was substantially different from the previous submission and Fisher vs. Dover was not invoked.
- 2) The public hearing was closed.
- 3) A voted to deny the application failed.
- 4) The Board voted to continue the application to the September 19, 2023 meeting with the request for the following information:
 - What is the height, as defined by the Zoning Ordinance, of the structure to be demolished relative to the calculated average grade (elevation 28.92)?
 - Dimensions for the existing and proposed house including square footage
 - A streetscape rendering
 - Will there be City property used to a higher degree than anyone else when they pull out of the garage?
 - A survey plan that just shows the building envelope (without landscaping)
 - Why is the spa exempt from yard requirements and does it qualify as a temporary structure?
 - How is the ground level parking going to be built and what will the change in elevation be?

The applicant has presented the requested information in their updated submission package. Staff have readvertised the application in anticipation of the Boards vote to re-open the public hearing.

For the Board to consider the presented information from the applicant and make a decision, staff recommend the following procedure:

- 1) The Board votes to suspend the rules and reopen the public hearing.
- 2) The applicant gives a brief summary of the new information.
- 3) The Board asks questions of the applicant and project team.
- 4) The Board receives public comment to, for, or against the application.
- 5) The Chair closes the public hearing.
- 6) The Board discusses the application.
- 7) A Board member makes a motion
- 8) The motion is discussed, supported by findings of fact, and voted on.

For this project, the complete demolition of the existing structure creates a vacant lot and will require relief for the non-conforming dimensions of the lot. See Section 10.311 copied below for reference.

10.311 *Any lot that has less than the minimum lot area or street frontage required by this Ordinance shall be considered to be nonconforming, and no use or structure shall be established on such lot unless the Board of Adjustment has granted a variance from the applicable requirements of this Ordinance.*

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.

II. OLD BUSINESS

- C. The request of **Caleb E. Ginsberg and Samantha L. Ginsberg (Owners)**, for property located at **303 Bartlett Street** whereas relief is needed to demolish the existing detached garage and construct an addition with attached garage which requires a Variance from Section 10.521 to allow a) seven (7) foot left yard where ten (10) feet is required; b) a two (2) foot right yard where ten (10) feet is required; c) building coverage of 27.5% where 25% is allowed; and 2) Variance from Section 10.321 to allow a nonconforming structure or building to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 162 Lot 13 and lies within the General Residence A (GRA) District. (LU-23-120)

Existing & Proposed Conditions

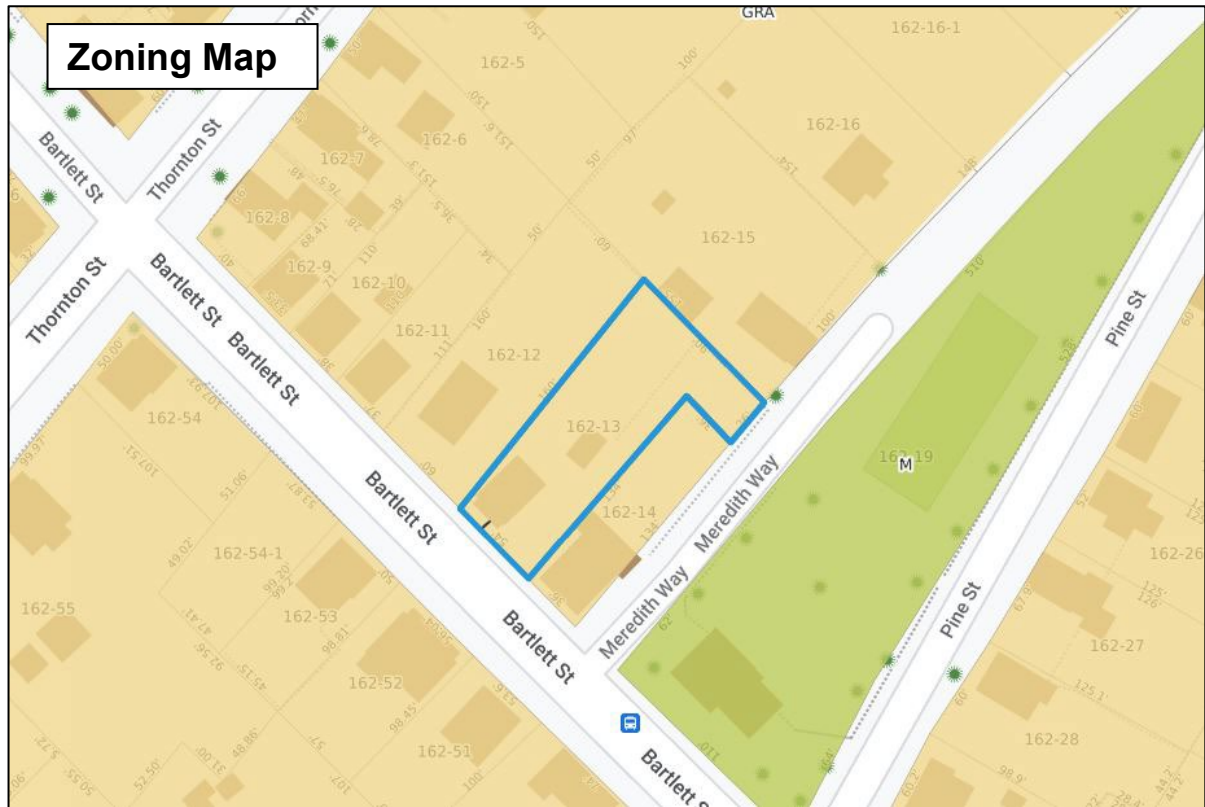
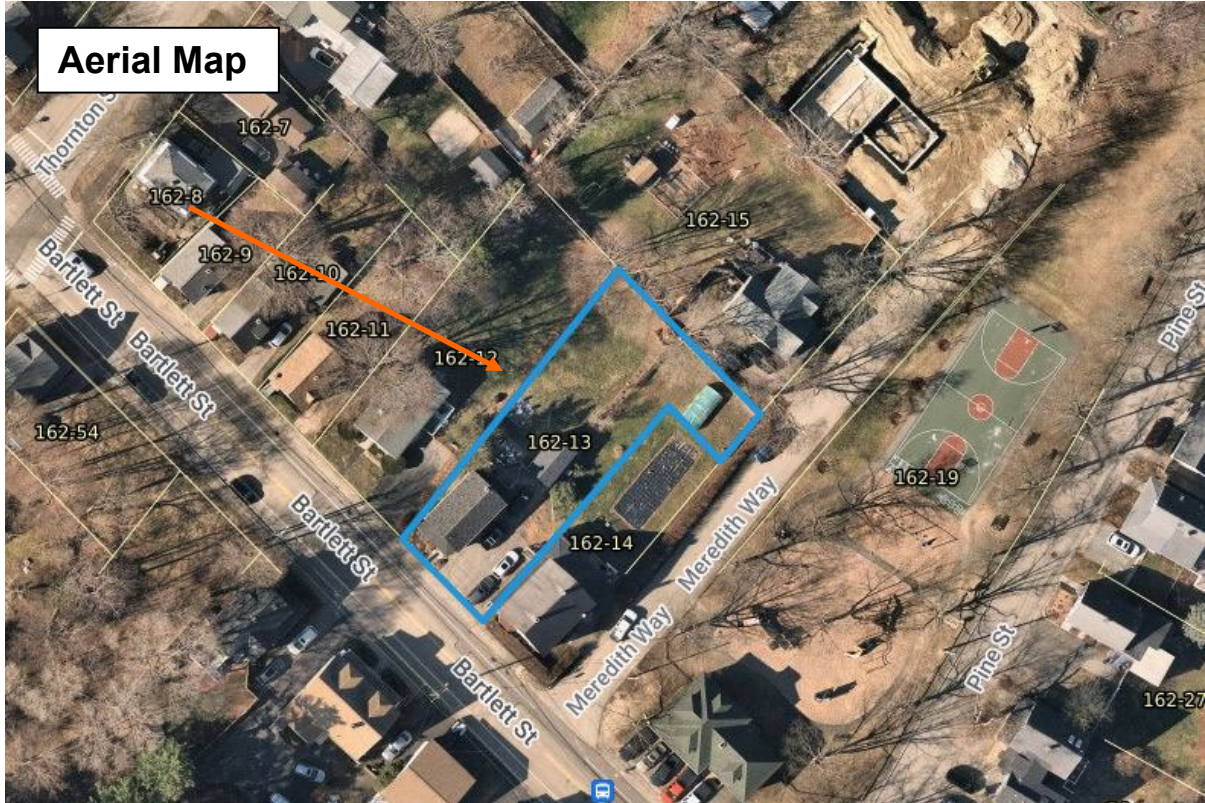
	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Single family dwelling	Demo detached garage & addition	Primarily residential
<u>Lot area (sq. ft.):</u>	4,906	6,665	7,500 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	4,906	6,665	7,500 min.
<u>Street Frontage (ft.):</u>	36	37	100 min.
<u>Lot depth (ft.)</u>	160	160	70 min.
<u>Front Yard (ft.):</u>	5	5	15 min.
<u>Secondary Front Yard (ft)</u>	NA	NA	NA
<u>Left Yard (ft.):</u>	7	7	10 min.
<u>Right Yard (ft.):</u>	0.6	2	10 min.
<u>Rear Yard (ft.):</u>	>20	>20	20 min.
<u>Height (ft.):</u>	<35	<35	35 max.
<u>Building Coverage (%):</u>	28.5	27.5*	25 max.
<u>Open Space Coverage (%):</u>	51.8	57.9	30 min.
<u>Parking</u>	>2	2	2
<u>Estimated Age of Structure:</u>	1930	Variance request(s) shown in red.	

***Proposed Building Coverage exceeds the maximum permitted due to proposed addition**

Other Permits/Approvals Required

- Planning Board - LLA
- Building Permit

Neighborhood Context



Previous Board of Adjustment Actions

No previous BOA history found.

Planning Department Comments

The applicants request includes a lot line adjustment that will transfer 1,759 SF from Parcel A to Map 162, Lot 13 for a proposed lot size of 6,665 SF and 3,838 SF from Parcel A to Map 162, Lot 14 for a total lot size of 8,640 SF, as outlined on sheet 2 of the Lot Line Adjustment Plan. This project will require subdivision review and approval from the Planning Board for the proposed lot line adjustment. The overall building coverage will be reduced with the proposed conditions however the applicant will be increasing the overall building coverage on the lot and will continue to exceed the 25% maximum permitted in the GRA District and therefore requires a variance. The applicant requested relief for a left side setback of 7 feet and a right side setback of 2 feet, but did not include the building coverage variance in their original application materials. The application was re-noticed with the inclusion of the building coverage variance. If the Board wishes to approve this additional variance request, staff recommends the motion and condition as listed below or similar language:

Sample Motion: Approve the variance requests with the following conditions:

- 1) Subdivision review and approval by the Planning Board is required for the proposed lot line adjustment.***

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

- A.** The request of **J & J's Drop and Drive LLC (Owner)**, for property located at **459 Islington Street** whereas relief is needed to install a 54 square foot mural which requires the following: 1) Variance from Section 10.1251.10 to allow 54 square feet of aggregate sign area where 48.5 is allowed; and 2) Variance from Section 10.1251.20 to allow 54 square feet of individual sign area where 16 square feet is allowed. Said property is located on Assessor Map 157 Lot 7 and lies within the Character District 4-L2 (CD4-L2) and Historic District. (LU-23-129)

Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Commercial	Add 54 square foot mural to the exterior or the building*	Mixed Uses
<u>Aggregate Sign Area (sq. ft.):</u>	0	54	48.5 max.
<u>Individual Sign Area (sq. ft.):</u>	n/a	54	16 max.
<u>Free Standing Sign Area (sq. ft) (Does not count toward aggregate area)</u>	20	20	20
<u>Estimated Age of Structure:</u>	1880	Variance request(s) shown in red.	

Other Permits/Approvals Required

- Sign Permit
- Historic District Commission Review

Neighborhood Context



Previous Board of Adjustment Actions

November 26, 1968 – The Board of Adjustment **granted** the request to construct a one and two story addition to the existing office and warehouse with the following condition:

- 1) The drainage facilities receive the approval of the City Engineer.

Planning Department Comments

The applicant is requesting to install a six foot by 9 foot mural to the side of the existing structure. This mural is considered a wall sign and is located in Sign District 2. There is one existing freestanding sign on the property which equals 20 square feet of sign area, however, freestanding signs do not count towards aggregate sign area on a site. For the complete set of sign requirements, please see Article 12 of the [Zoning Ordinance](#).

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

- A. The request of **Wayne G. Clough (Owner) and Sophary Sar (Applicant)**, for property located at **100 Islington Street Unit 6** whereas relief is needed to allow an esthetician business which requires a special exception from Section 10.440, Use # 7.20 where it is permitted by Special Exception. Said property is located on Assessor Map 137 Lot 25-6 and lies within the Character District 4-L2 (CD4-L2) and Historic District. (LU-23-122)

Existing & Proposed Conditions

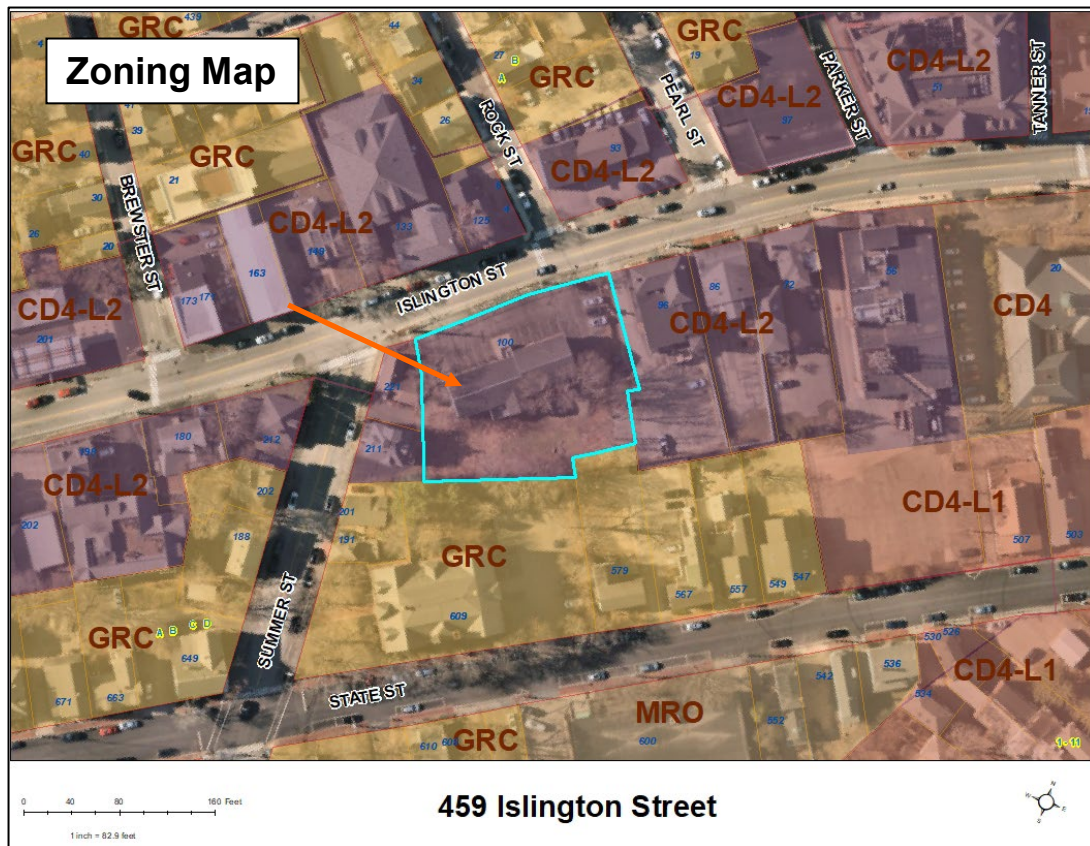
	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	5 Residential Units, 2 Commercial Units	* Esthetician Business (Allowed by Special Exception)	Mixed residential and commercial uses
<u>Unit #6 Area (sq. ft.)</u>	1195	1195	1195
<u>Parking</u>	16	16	10 Spaces for Commercial Uses 5 Spaces for Residential Uses
<u>Estimated Age of Structure:</u>	1984	Special Exception request(s) shown in red.	

- **Esthetician Business is considered a “personal services” use that is allowed by Special Exception in the CD4-L2**

Other Permits/Approvals Required

- Building Permit (Tenant Fit-Up)

Neighborhood Context



Previous Board of Adjustment Actions

April 29, 1983 – The Board **granted** a Special Exception to allow conversion of an existing building to 5 apartments and 2 retail business uses with the following condition:

1) Site Review was required.

December 6, 1983 – The Board **granted** a Special Exception to permit a 12% reduction in parking spaces for 16 spaces where 18 parking spaces were required and a parking reduction up to 25% was allowed by Special Exception.

April 18, 1995 – The Board **denied** a Special Exception for a 75% reduction in the amount of required parking from 29.43 spaces to 22.07 spaces required by Special Exception.

November 19, 2019 – The Board **denied** the request for the demolition of existing building and construct a 14,582 square foot building with 24 dwelling units that requires the following Variances from Section 10.5A41.10A: a) to allow a building footprint of 14,582 square feet where 2,500 square feet is the maximum allowed; b) to allow a lot area per dwelling unit of 1,015 square feet where 3,000 square feet per dwelling unit is required; and c) to allow a front lot line buildout of 37% where 60% is the minimum required.

Planning Department Comments

The applicant is requesting to establish her esthetician business in Unit #6 at 100 Islington Street. Esthetician businesses are considered a “personal service” under the [Zoning Ordinance](#) and are allowed by Special Exception in the CD4-L2 district. There are currently 16 total parking spaces on site 10 of which are designated for commercial units #6 and #7.

Special Exception Review Criteria

The application must meet all of the standards for a **special exception** (see Section 10.232 of the Zoning Ordinance).

1. *Standards as provided by this Ordinance for the particular use permitted by special exception;*
2. *No hazard to the public or adjacent property on account of potential fire, explosion or release of toxic materials;*
3. *No detriment to property values in the vicinity or change in the essential characteristics of any area including residential neighborhoods or business and industrial districts on account of the location or scale of buildings and other structures, parking areas, accessways, odor, smoke, gas, dust, or other pollutant, noise, glare, heat, vibration, or unsightly outdoor storage of equipment, vehicles or other materials;*
4. *No creation of a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity;*
5. *No excessive demand on municipal services, including, but not limited to, water, sewer, waste disposal, police and fire protection and schools; and*
6. *No significant increase of stormwater runoff onto adjacent property or streets.*

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 **Davenport Inn LLC (Owner)**, for property located at **70 Court Street** whereas relief is needed for the following: 1) An after-the-fact Variance from Section 10.515.14 for six (6) existing permitted mechanical units with a setback of 0.5 feet from the property line; 2) Variance from Section 10.515.14 to install a seventh mechanical unit with a setback of 0.5 feet from the property line whereas 10 feet is required; and, in the alternative; 3) Equitable Waiver from Section 10.515.14 for the installation of six mechanical units with a 0.5 side yard setback. Said property is located on Assessor Map 116 Lot 49 and lies within the Character District 4-L1 (CD4-L1) and Historic District. (LU-22-10)

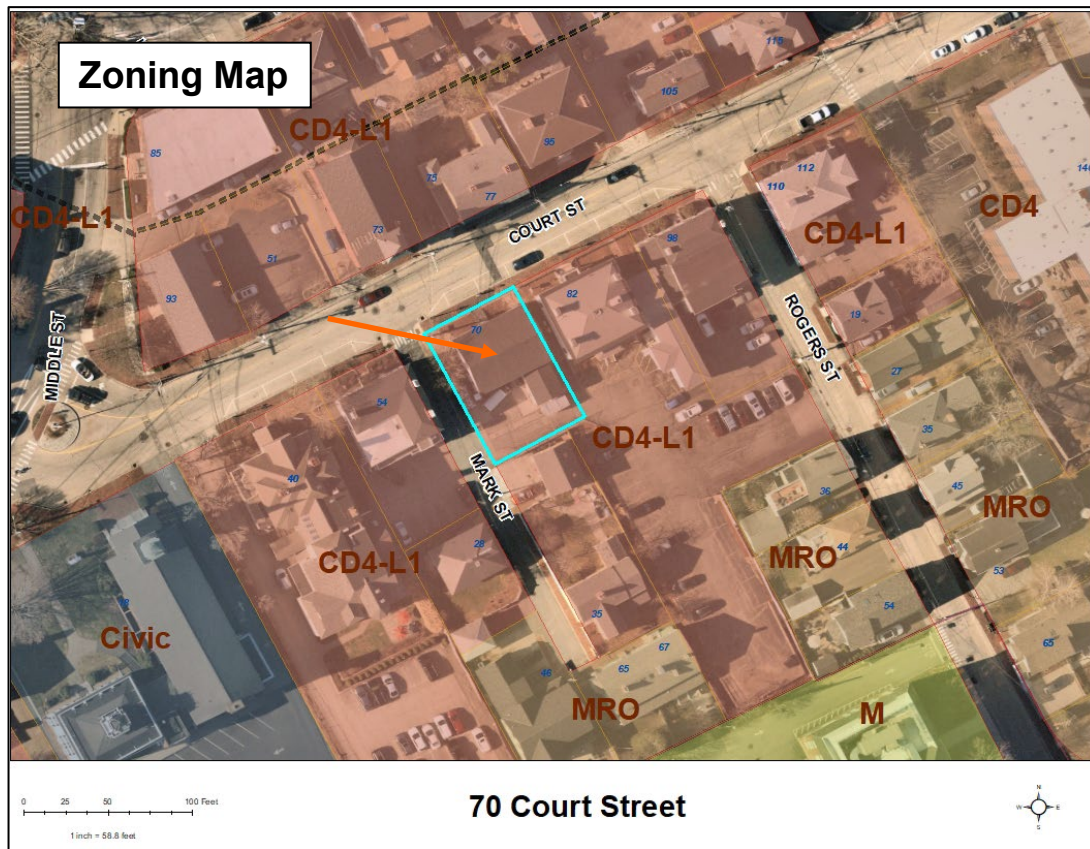
Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Inn	Inn	Mixed Uses
<u>Lot area (sq. ft.):</u>	5,238	5,238	3,000 min.
<u>Left Yard (ft.):</u>	0.5	0.5	10 min.
<u>Parking</u>	5	5	5 (CUP granted for parking)
<u>Estimated Age of Structure:</u>	1758	Variance request(s) shown in red.	

Other Permits/Approvals Required

- Electrical Permit
- Mechanical Permit
- Historic District Commission Review

Neighborhood Context



Previous Board of Adjustment Actions

February 15, 2022 – The Board voted to **grant** the request to convert the building into an 8 room inn with caretaker residence which requires the following: 1) A Variance from Section 10.440 Use #10.30 to allow an Inn where the use is not permitted. 2) A Variance from Section 10.114.21 to allow a 13' maneuvering aisle where 24' is required.

Planning Department Comments

The applicant is requesting an after the fact variance for six mechanical units that have already been installed; and a variance to add a seventh mechanical unit. If the Board finds the variance request does not qualify for approval, the applicant is requesting an equitable waiver of dimensional requirement in the alternative (please see reference to RSA 674:33-a below for more information).

Staff believe it is not the fault of the owner that the first six mechanical units were installed without a variance. Those mechanical units were reviewed by the Historic District Commission and should have been flagged by staff at that time. Staff believe that this was missed due to an internal error.

Staff recommend the Board consider this application as a whole and vote on the two requests separately. Example motions can be found below.

- 1) To grant the requested after the fact variance for the six mechanical units as presented.
- 2) To grant the requested variance for the seventh mechanical unit as presented.

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.*

Equitable Waiver of Dimensional Requirement ([RSA 674:33-a](#))

I. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted

pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:

- (a) *That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;*
- (b) *That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;*
- (c) *That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and*
- (d) *That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.*

II. In lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.

III. Application and hearing procedures for equitable waivers under this section shall be governed by RSA 676:5 through 7. Rehearings and appeals shall be governed by RSA 677:2 through 14.

IV. Waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions. An equitable waiver granted under this section shall not be construed as a nonconforming use, and shall not exempt future use, construction, reconstruction, or additions on the property from full compliance with the ordinance. This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them.

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.