

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

**7:00 P.M.**

**September 26, 2023**

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

**MEMBERS EXCUSED:** None.

**ALSO PRESENT:** Jillian Harris, Planning Department

---

**PLEASE NOTE: ITEMS (III.) D. THROUGH F. WERE POSTPONED  
AT THE SEPTEMBER 19, 2023 BOARD OF ADJUSTMENT MEETING.**

**Note:** the timestamp denotes the time of the meeting video.

**I. NEW BUSINESS – PUBLIC HEARING**

- A.** The request of **Marcella F. Hoekstra (Owner)**, for property located at **35 Whipple Court** whereas relief is needed in the form of an equitable waiver for 1) an accessory structure with an 8.5-foot right yard where 10 feet was permitted and an 8-foot rear yard where 17 feet was permitted; or in the alternative 2.a) Variance from Section 10.521 to allow an 8,324 SF lot area/dwelling unit where 15,000 SF is required; b) to allow a frontage of 45.83 feet where 100 feet is required; c) to allow an accessory structure with an 8.5 foot right yard where 10 feet is required; d) to allow an accessory structure with an 8 foot rear yard where 9 feet is required; and e) to allow a building coverage of 26% where 20% is allowed. Said property is located on Assessor Map 260 Lot 98 and lies within the Single Residence B (SRB) District. (LU-23-147)

Alternate Ms. Geffert was seated for voting.

**SPEAKING TO THE PETITION**

[Timestamp 3:30] Attorney Monica Kaiser was present on behalf of the applicant and addressed the equitable waiver first. She said the proposal was to convert the garage structure to an Accessory

Dwelling Unit (ADU) to be used for rental income or to house the applicant's father in the future if necessary. She explained that someone filed a request for a variance in 1968 to place a garage ten feet from the right side lot line and 17 feet from the rear lot line, but what they built seemed to be larger and closer the right side lot line. She said the front corner of the garage is closer than was intended and that the garage was enlarged so that it now includes a shed. She said the applicant had to establish the legality of the existing detached accessory structure that had existed for 10 years or more and that they were asking for approval for what was already there. She reviewed the requirements for the equitable waiver.

Mr. Rheume said the shed was shown off the back of the garage about 6-8 feet and that it looked like the garage might have been shifted. He asked if the proposed ADU shown in the packet was just in the area that would be considered to be the garage or if it would include the area with the shorter roof shed. Attorney Kaiser said it was just the original garage and that the shed flat roof area would remain a shed for storage. Mr. Rheume then verified the basis for the distance for an accessory structure height dimension. Ms. Geffert asked about the prior owners and whether Attorney Kaiser knew the intention of the person who built the garage in a way that didn't conform to the variance granted in 1968. Attorney Kaiser said she did not know if the person who got the 1968 approval decided to build something bigger or if someone tagged on something else later. She said she checked the building permit file and only saw the variance information and no subsequent request for a building permit. She said she inferred from the diagram that the violating right side setback was a mistake and that it looked like it had been there for a long time.

The Board discussed whether the petition should be heard as an equitable waiver or a variance. [Timestamp 15:17]

Chair Eldridge opened the public hearing.

### **SPEAKING TO FOR, OR AGAINST THE EQUITABLE WAIVER**

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

### **DECISION OF THE BOARD**

Mr. Rossi said he would prefer to move forward with the equitable waiver. Chair Eldridge said she felt that Part 2 of the equitable waiver information in lieu of the findings required by the Board demonstrated that the violation existed for ten years or more and said she was also in favor of moving forward with the waiver. [Timestamp 19:36]

*Ms. Geffert moved that the Board grant an equitable waiver for the existing garage at 35 Whipple Court, seconded by Mr. Mannle.*

Ms. Harris recommended that Ms. Geffert amend her motion to reflect what was in the Notice, and Ms. Geffert agreed. [Timestamp 21:20]

*Ms. Geffert amended her motion to move that the Board grant an equitable waiver for the property located at 35 Whipple Court for the accessory structure, with an 8-1/2 foot right yard where 10 feet was permitted and an 8-ft rear yard where 17 feet was permitted.*

*Mr. Mannle seconded the amended motion.*

Ms. Geffert said it had been demonstrated that the violation has existed for more than 10 years and no enforcement action was taken. The physical and dimensional violation does not constitute a public nuisance or diminish the value of the other property in the area or interfere or adversely affect with any present or permissible uses of such property, as demonstrated by the uniform support of the neighbors. She said due to the degree of past construction or investment made in ignorance of the facts constituting the violation of the cause of correction so far outweighs any public benefit to be gained, it would be inequitable to require the violation to be corrected. She said the violation came forward in 2021 for a variance and the issue didn't come up. Mr. Mannle concurred and had nothing to add.

*The motion passed unanimously, 7-0.*

There was further discussion about the attached ADU being permitted vs. a detached ADU.  
[Timestamp 25:27]

- B.** The request of **Lawrence Brewer (Owner)**, for property located at **253 Broad Street** whereas relief is needed to construct an attached garage and add a second driveway, which requires the following: 1) Variance from Section 10.521 to allow a 7 foot side setback where 10 feet is required; and 2) Variance from Section 10.1114.31 to allow more than one driveway per lot. Said property is located on Assessor Map 131 Lot 16 and lies within the General Residence A (GRA) District (LU-23-148)

Ms. Record was seated for voting and Ms. Geffert resumed alternate status.

## **SPEAKING TO THE PETITION**

The applicant Lawrence Brewer was present to speak to the petition. He said he wanted to modernize the house with the addition of a two-car garage and also wanted to explore the possibility of adding an ADU in the addition's basement. He said they received positive feedback from the neighbors. He said the second driveway was to accommodate parking for the potential ADU. He reviewed the petition and criteria in detail. [Timestamp 27:10]

Ms. Record asked where the existing driveway was. Mr. Brewer said it was at the north side of the house. Mr. Rheume verified that four parking spots were requested, two for the garage and two in front of the garage, and that it would meet the need for parking if the ADU was added. He asked what Mr. Brewer's concern was for the second driveway. Mr. Brewer said he would want to put the driveway on the right side of the house down below for the ADU. He said there was a curb cut on either side, so it wouldn't make any sense to do it any other way. Mr. Rheume asked if Mr. Brewer

thought his property was unique by having the double lot size compared to the neighbors. Mr. Brewer agreed and said the house was in the center of the lot. He said it was deep enough to maintain the setbacks except in that area. He said he didn't know if an ADU but was advised by the City Staff to include the ADU in the petition.

Mr. Rossi said when the Board was asked to approve a setback variance, the situation was an existing structure being remodeled that already encroached upon the setback, but in this case it was new construction. He said it was a bigger ask than what the Board typically saw. He asked if a setback would still be needed if the garage were placed on the right side and the proposed ADU on the left, or if there was another more conforming configuration that would work within the constraints of the property. Mr. Brewer explained that the slope went down from the front of house and there was a 6-ft difference on the back of the house. He said the driveway was not at grade halfway to the house so it wouldn't be as far back on the left side of the house. He agreed that it was new construction and that he considered putting it in the back yard but there were drainage issues. He said it was the most logical path because that's where the existing driveway was. Mr. Rossi asked if the potential ADU floor level would be the same as the house, and Mr. Brewer said it would be the level of the basement.

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 BOARD**

[Timestamp 41:00] Mr. Rossi asked if the applicant would have to get an extension if the driveway were approved and the driveway or the ADU wasn't built in the two-year time frame. Ms. Harris agreed. Mr. Rossi said the applicant would then be eligible for a maximum of a one-year extension. Mr. Rheame said he was okay with the setback variance and what drove the need to put the addition in that location but he had concerns about the driveway. He said the second curb cut probably gave the applicant justification, but he noted the concerns brought forward by Mr. Rossi and said that part of the hardship would be if the applicant actually built the ADU, which would drive the need for a driveway in that location, but if the ADU didn't get built, he could not see a hardship for a driveway being in that location. Mr. Mattson said the double lot was a special condition and that two driveways would be consistent with the streetscape. Vice-Chair Margeson said she had no problem with the dimensional relief but was concerned with the second driveway. She said the zoning ordinance was amended to allow for ADUs that would be nestled or fit in well with the neighborhood. She said a second structure with a second driveway would violate that because it would basically be two houses and two driveways on one lot. Mr. Mattson said he didn't think it was that big of an ask because it was in the GRA District where two-family homes are allowed. Mr. Mannle said the setback for the two-car garage was minimal and the ADU was proposed as a Phase 2 scenario and would be in the basement of the addition, and the addition would have no need for variances. He said the applicant was trying to take care of everything now.

He said the lot was wide enough and he had no problem with the second driveway. Chair Eldridge said the driveway would not be built until the ADU was, but she felt that the problem was time running out and the applicant having to come back.

## **DECISION OF THE BOARD**

*Mr. Rheume moved to **grant** the first variance to allow a 7-ft side setback. Vice-Chair Margeson seconded.*

Mr. Rheume said it was a modest structure that would be positioned in a way that would avoid the outcropping of the neighbor's property that looked like it was close to the existing property line, so there's a small separation there on the neighbor's part. He said granting the variance would not be contrary to the public interest because the main public interest was for the abutter's light and air. He said it would be a small infringement on it but that it was a modest-sized structure in a neighborhood of homes that were very tight to the property lines, so it wasn't like there would be an unusual change in the character of the neighborhood. He said it would observe the spirit of the ordinance because a small encroachment was being asked for. He said substantial justice would be done because the applicant's ability to enjoy a two-car garage attached to his property and make improvements to the driveway in front of it would cause no public purposes that would outweigh the enjoyment it would bring to the applicant. He said granting the variance would not diminish the values of surrounding properties and would likely add value to the current home, with no negative impact to any of the surrounding properties. He said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship, noting that one of the special conditions of the property was that it's a double lot in which the applicant has more room to add on an addition than his neighbors would. He said it was a logical location due to topography issues in other potential locations. He said those were unique characteristics and it was a reasonable request to create the modest addition within the setback. Vice-Chair Margeson concurred and had nothing to add.

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

## **DISCUSSION OF THE BOARD FOR THE SECOND VARIANCE**

[Timestamp 52:29] The Board discussed the options for the second requested variance and whether it would invoke Fisher v. Dover if denied. Ms. Harris said the options were to approve, deny, deny without prejudice, or postpone with justification. Mr. Rossi said he would move to deny without prejudice, but Vice-Chair Margeson said she never heard of a denial without prejudice. Mr. Mattson suggested reopening the public hearing to ask the applicant a question.

*Mr. Mannle moved to **suspend the rules** and re-open the public hearing, seconded by Mr. Mattson.*

Mr. Mannle asked the applicant what his timeframe for the ADU was. Mr. Brewer said he preferred to do it at the same time as the addition but didn't know the regulations for ADUs. He said if the garage were approved, he could hopefully start construction on the ADU a year from now. He said

he would need plumbing and utilities and would like to have it all done at the same time, within a year or two. He noted that the curb cut already existed.

Mr. Mannle said he had no problem with the driveway because of the ADU, which would be Phase 2. He said the applicant would not have to return for any variances for the ADU. He asked if the Board could approve the second driveway contingent upon the applicant getting approval for the ADU in the next two years. Ms. Harris agreed.

## **DECISION OF THE BOARD**

*Mr. Mannle moved to **grant** the second variance to allow more than one driveway per lot, with the following condition:*

- 1. Contingent that the applicant shall get an approved ADU within two years.*

*Mr. Mattson seconded.*

Mr. Mannle said granting the variance would not be contrary to the public interest because a curb cut already existed. He said it would observe the spirit of the ordinance and do substantial justice as well. He said the driveway was requested because the applicant wanted to have a separate private entrance to a potential ADU, and the ADU would be on the lower level of the addition at the right hand side of the house in the back yard. He said granting the variance would not diminish the values of surrounding properties. He said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship, noting that it was a double lot and the home was built in the middle of it, so there was room on either side.. Owing to those special conditions, he said the applicant had a hardship, especially if he wanted to put the ADU in the back. Mr. Mattson concurred and said it was a reasonable use.

Mr. Rheume said he would not support the motion because he thought the applicant should readvertise so that the Board would have a better idea of the ADU and the need for it, with some justification and a clearer hardship. He said he wasn't seeing it at this point.

*The motion **passed** by a vote of 4-3, with Vice-Chair Margeson, Mr. Rheume, and Mr. Rossi voting in opposition to the motion.*

- C.** The request of **Prospect North (Owner)**, for property located at **815 Lafayette Road** whereas relief is needed for the demolition of the existing building and tower and the construction of three 4-story, 24-unit multi-family buildings (72 total units) with first floor parking and associated site improvements, which requires the following: 1) Variance from Section 10.5B33.20 (Front Build-out) to permit a front build out of less than 50% of the total front yard width; and 2) Variance from Section 10.5B33.30 (Façade Orientation) to permit a façade orientation that is not parallel with the front property line. Said property is located on Assessor Map 245 Lot 3 and

lies within the Gateway Corridor (G1) District and the FEMA 100yr flood and extended flood hazard area. (LU-23-149)

Ms. Geffert was seating for voting and Ms. Record resumed her alternate status.

### **SPEAKING TO THE PETITION**

Attorney F. X. Bruton was present on behalf of the applicant and reviewed the petition and criteria. [Timestamp 1:06:20]

Mr. Rheaume noted that the Staff Memo about the 21 percent buildout was different from the applicant's packet. Ms. Harris said it may have been a different interpretation of the front lot line buildout, and it was further discussed. [Timestamp 1:18:24]

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**

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

Vice-Chair Margeson said the spirit and intent of Sections 10.233.21 and .22 of the ordinance were that granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. She said it was the Gateway District that was meant to be mixed use, walkable , and provide housing stock for the changing demographics of the area, which presumably meant having a façade along the street to invite people in. She said there were differences of opinion as to whether it was a zero percent buildout or a 21 percent building, but if it was 21 percent, that was more than what was advertised and it was fine. She found that the proposal did meet the spirit and intent of the ordinance for those reasons because there will be buildings visible to Lafayette Road that are not presently visible. In terms of protection of natural resources, she said one of the public purposes of the ordinance was to protect wetlands. She said the buildings would be situated outside of the wetlands for the creek, which is a valuable natural resource, so the proposal meets the public interest and the spirit of the ordinance. Referring to Section 10.233.23, she said granting the variances would do substantial justice because there would be no detriment to the public if the variances were denied that would outweigh the benefit to the applicant. Referring to Section 10.233.24, she said granting the variances would not diminish the values of surrounding properties because it was a commercial area with some residential, and it was all zoned Gateway One, so there would be no diminution of values to surrounding properties by building the multi-family dwelling. Referring to Section 10.233.25, she said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. She said the property has special conditions that

distinguish it from others in the area, and owing to those special conditions, a fair and substantial relationship does not exist between the general public purposes of the ordinance's provisions and their specific application to the property. She said the property has special conditions of having a drainage easement on the front of the property as well as the wetland buffers that make it impossible to comply with the provisions of the zoning ordinance as it applies to the property. She said the proposed use is a reasonable one, a multi-family dwelling in the Gateway District, which is one of the purposes of the Gateway District.

Mr. Mannle concurred. He said the ordinance supported having more walkable streets, so it was anticipated having large frontages on a major road so that the building is close to the major road which was the 50 percent requirement. He said the parking would in the rear was so that people will want to walk down the streets and drive around the back. He said the applicant's parcel was not the ideal Gateway parcel because it's restricted by the drainage easement and wetland buffers, but the applicant did a great job for the area that's now cleared to the present radio station. He said it would be impossible to move the buildings 90 degrees to justify the provisions of the ordinance.

Mr. Rossi said he would not support the motion. He agreed that the special conditions of the property did speak to the percentage of use for the front of the property, but he did not agree that a building like the first one could not be placed perpendicular to the road as specified in the ordinance, so he didn't think a hardship exists for the non-parallel placement of the front of the building that borders the road. He said it might be a smaller building but he didn't think it was possible to put a building there that complied with the ordinance, despite the special conditions of the property. Mr. Rheume noted that the zero percent buildout was only in the Staff Report and not what was advertised for and it referenced less than 50 percent, so he had wanted to ensure that he understood any concerns that the Planning Department might have before moving forward.

*The motion **passed** by a vote of 6-1, with Mr. Rossi voting in opposition to the motion.*

## **II. OTHER BUSINESS**

The ability to deny an application without prejudice was briefly discussed.

## **III. ADJOURNMENT**

The meeting adjourned at 8:30 p.m.

Respectfully submitted,

Joann Breault  
BOA Recording Secretary