

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

7:00 P.M.

October 17, 2023

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

MEMBERS EXCUSED: ML Geffert, Alternate

ALSO PRESENT: Stefanie Casella, Planning Department

Note: The timestamp denotes the time of the recording. Chair Eldridge called the meeting to order at 7:00 p.m. Ms. Record was seated for voting on all items in the excused absence of Ms. Geffert.

I. APPROVAL OF MINUTES

A. Approval of the September 19, 2023 minutes.

*Mr. Mannle moved to **approve** the September 19 minutes as **amended**, seconded by Mr. Mattson. The motion **passed** by unanimous vote, 7-0.*

The following amendments were made:

On page 3, top of the page, the word “clarify” was changed to “clarity” and the word “postponed” was changed to “postponement”, so the sentence reads as follows: Mr. Rheame said ... it was a complicated case and there was some lack of **clarity**, so the **postponement** was made to give the application the opportunity to get more information. On page 5, second to last line, unnecessary “change” was changed to “hardship”, so the sentence reads as follows: Mr. Mattson said there were more variances requested before and he had not seen an unnecessary hardship within the side yard setback, but since it was no longer asked for, the only thing left was whether the lot size was an unnecessary **hardship**. On page 10, last line, the word “district” was changed to “distract”, so the sentence reads as follows: He said the mural was a reasonably-sized piece of art work and in a parking lot that would not **distract** drivers.

B. Approval of the September 26, 2023 minutes.

*Mr. Mannle moved to **approve** the September 26 minutes as submitted, seconded by Vice-Chair Margeson. The motion **passed** by a unanimous vote of 7-0.*

Note: the agenda was not followed in sequence. Item III.C, the request of **Frances E. Mouflouze Revocable Trust of 2015 (Owner)**, for property located at **550 Sagamore Road**, was heard first.

*Mr. Rossi moved to **take Item III.C out of order**, seconded by Ms. Record. The motion **passed** by a unanimous vote of 7-0.*

II. OLD BUSINESS

- A.** 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) two (2) 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. (LU-23-117)

SPEAKING TO THE PETITION

Project architect Anne Whitney was present on behalf of the applicant and reviewed the petition. She reviewed the criteria and said they would be met. [Timestamp 1:15:57]

Mr. Rossi asked if the existing shed was on a foundation. Ms. Whitney said it was on cement blocks and that the new shed would have just four cement footings that would tie into the existing house.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING IN OPPOSITION TO THE PETITION

Daphne Chiavaras of 40 Parker Street said she was a direct abutter. She said the proposed shed's height appeared to be four inches higher than her property fence and two feet away from the property line. She said the mass of the proposed structure concerned her because of its potential impact of making her feel boxed in and was also concerned about water runoff onto her property.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Ms. Whitney explained the profile of both elevations of the existing shed. She said she was projecting the height from the top of the 8-ft fence to the eave line of the hip, which was two feet and would not exceed that and would be no higher than 12 feet. She said they could do more of a deeper drip edge so that it would come out 18 inches from the perimeter of the footprint to the shed portion. She said they would also on the drainage.

Owner Bryn Waldwick said he collaborated with the neighbors and that he was making an effort to not have the roof much taller than the existing structure.

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

DECISION OF THE BOARD

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

Mr. Rossi referred to Sections 10.233.21 and .22 of the ordinance and said there was no public interest in preventing the replacement of the shed because the current shed was in disrepair and unsightly and replacing it would not diminish any aspect of the public interest. He said substantial justice would be done because there would be no loss to the public that would outweigh the loss to the applicant should the variance be denied. He said granting the variances would not diminish the values of surrounding properties, based on the comments made by the abutter. He said he did think that, because of the hip roof design and the way it slopes away from the fence, the part of the shed closest to the fence will not be that much higher than what exists now. He said he could not see it having a substantive impact on the value of the neighboring property. He said the hardship was due to the property being oddly shaped and having a corner missing at that portion of the lot, such that the setback would be close to ten feet if the lot were a regular shape and didn't have the corner taken out of it, so there was a hardship with the property in putting the shed where it made sense and connected to the doorway to the house, which allowed for a setback variance. He said the other setback to the side yard was no different than what was currently in place and therefore constituted a hardship for the property as it exists today relative to the proposal. Mr. Mattson concurred and said the lot was extremely small and was the size of some of the homes themselves. He said the owner made a good faith effort to maintain the light, air, and privacy of the abutter.

Mr. Rheaume said he would support the motion because the setbacks were small and the proposal would improve the right side yard, which was the most negatively impacting on one of the abutters. He said it was a reasonable request [Timestamp 1:34:30]. Mr. Mattson noted that permitted work was not allowed to increase any stormwater runoff onto neighboring properties, which was an important factor, and the applicant would try to improve it.

*The motion **passed** by a unanimous vote of 7-0.*

III. NEW BUSINESS – PUBLIC HEARING

- A. The request of **2422 Lafayette Road Assoc LLC c/o Waterstone Retail (Owner)**, for property located at **2454 Lafayette Road** whereas relief is needed conduct a motor vehicle sales storefront which requires the following: 1) A Special Exception from Section 10.440 Use # 11.10 to allow motor vehicle sales which is permitted by Special Exception. Said property is located on Assessor Map 273 Lot 3 and lies within the Gateway Corridor (G1) District. (LU-23-160)

SPEAKING TO THE PETITION

Attorney John Bosen was present on behalf of the applicant, along with Michael Siegler, General Manager for Tesla, and property manager Kelli Burke of Wilder Companies. Attorney Bosen reviewed the petition and special exception criteria in detail. [Timestamp 1:37:53]

Mr. Rheume said gasoline was a concern and asked if there would be barriers between the section of the building proposed and the other non-motor vehicle uses. Ms. Burke said it was a business classification and would not require additional provisions at the dividing or exterior walls. Mr. Rheume asked if indoor storage of vehicles at other Tesla dealerships had any issues and was told that they did not. He asked if the applicant would have a concern if the Board limited to the total square footage for the showroom to prevent it from being converted into something more significant than proposed. Attorney Bosen said the five sales galleries in New England were small and only had four cars on site, two inside and two outside. Mr. Rheume said his concern was that someone using the special exception, if it were granted, would do something different in the future. Attorney Bosen said it could be stipulated that the applicant would seek the Board's permission to expand.

Mr. Rossi said fire hazards were known to happen with Teslas and that a criterion for approving a special exception was that the proposed use would pose no hazard to the public and no fire hazard. Attorney Bosen said Tesla vehicles were safer than regular combustion vehicles. He said under normal usage, there were lithium-ion cells that did not involve gases, so it wasn't likely to happen in a showroom and was a rare occurrence on the road. Mr. Siegler said they were in many Boston shopping centers and had never experienced an event like that. He said it was extremely safe to have a store at the proposed location. Mr. Rossi said a lithium battery did catch on fire and he asked if the facility would be equipped with Halon or other safeguards. Mr. Siegler said the locations he was familiar with had standard sprinkler systems but he wasn't sure about the buildout of the proposed location. Mr. Rossi asked if the vehicles would be charged in the facility. Mr. Siegler said they could be charged on a regular 110 outlet overnight.

Vice-Chair Margeson said it was unique that the cars would be swapped out a few times a year, coming out of the storefront and going into the parking lot, because it would go out in a roadway. She asked Ms. Casella whether the fact that cars were parked outside in the lot was considered outdoor storage. Ms. Casella said it would be an update to the site plan and would go before City Staff and TAC. She said it was a car in a parking space and didn't know if it was outdoor storage. Vice-Chair Margeson said the issue was that it wasn't a strip mall and it was next to a supermarket

and a pet store, so it was hard for her to conceptualize it in that space. Chair Eldridge noted that the Newington Mall had a car showroom inside.

Chair Eldridge opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

*Mr. Rheume moved to **grant** the special exception with the following **conditions**:*

- 1. The showroom shall be no greater than 3,500 square feet; and*
- 2. The site plan amendment shall be routed through both TAC and the Planning Board.*

Mr. Mattson seconded the motion.

Mr. Rheume said his reasons for the two conditions were because it was a new concept of a small sales room area where the car was bought separately elsewhere. He said he wanted to make sure that someone would not take the approval and do something very different with it. He thought there were legitimate questions about the nature of the safety associated with this type of use in this location with it being kind of different, and having the opportunity of going through the process with TAC, City Staff, etc. about building codes and the potential for fire could bring that expertise into the review to ensure that a new danger wouldn't be presented. He reviewed the special exception criteria. He said there would be no hazard to the public or adjacent properties on account of potential fire, explosion, or release of toxic materials. He noted that it was important to run it through TAC to ensure that it was validated by experts. He said there would be no detriment to property values in the vicinity or change in the essential characteristics of the neighborhood. He said it was still in a plaza but with a unique use that was relatively small and wouldn't be greatly expanded upon. He said the two parking spots in front could be looked at through the site plan amendment process to make sure it was not considered storage. He said granting the special exception would pose no creation of a traffic safety hazard because the nature of the business would be less than other potential tenants in the spot. He said it was already a big plaza and had good traffic control within it. He said it would pose no excessive demand on municipal services because the particular use was a small overnight charge of a 110 outlet that would not tax any of the listed municipal services. He said it would pose no significant increase of stormwater runoff because there would be no external change to the property. He said the proposal met all the special exception criteria, with the required conditions. Mr. Mattson concurred and said motor vehicle sales were allowed as a special exception and the project was done as modestly as motor vehicles one could be. Vice-Chair Margeson said she would support the motion and appreciated the conditions as to TAC and Planning Board review about the storage issue.

Mr. Rossi said he would feel more comfortable if there was a third condition about it being a permit for EV vehicle sales only because there were very different hazard characteristics between EV

vehicles and internal combustion vehicles. Mr. Rheume said he would accept the third condition that it be for the sale of electric vehicles, and Mr. Mattson agreed.

The **amended** motion was as follows:

*Mr. Rheume moved to **grant** the special exception with the following **conditions**:*

- 1. The showroom shall be no greater than 3,500 square feet;*
- 2. The site plan amendment shall be routed through both TAC and the Planning Board; and*
- 3. There shall be only EV vehicles.*

*Mr. Mattson seconded the motion. The motion **passed** by a unanimous vote of 7-0.*

- B.** The request of **EIGHTKPH LLC (Owner)**, for property located at **70 Maplewood Avenue** whereas relief is needed to install a free-standing sign which requires the following: 1) Variance from Section 10.1251.20 to allow 48 square feet of sign area where 20 square feet is allowed; and 2) Variance from Section 10.1253.10 to allow a freestanding sign to be setback two and a half (2.5) feet from the lot line where five (5) feet is required. Said property is located on Assessor Map 125 Lot 17-3 and lies within the Character District 5 (CD5), Downtown Overlay District, North End Incentive Overlay District, and Historic District (LU-23-141)

SPEAKING TO THE PETITION

Landscape architect Terrence Parker was present on behalf of the applicant. Also present was the owner Tom Balon of 233 Vaughan Mall. Mr. Parker reviewed the petition and noted that the fence for the transformers was approved by the Historic District Commission (HDC). He reviewed the criteria and said they would be met. [Timestamp 2:02:07]

Mr. Rheume said the photo showed two transformer enclosures instead of one and asked if those two enclosures would be removed. Mr. Parker said they chose to screen the one that was closest to the public right-of-way with the hope that they could have additional mural fences in the future. Mr. Balen said the small unit was a transformer and the larger box was the switch and that there was an additional transforming coming. Mr. Rheume concluded that there would be a third item on that corner. Mr. Balen said the new transformer was already done and that he was talking about the screen that would hide all three transformers. Mr. Rheume said it appeared that the orientation of the mural was parallel to the travel way of Maplewood Avenue and he was concerned that it would be distracting to passing vehicles but thought it was more oriented toward a pedestrian experience. Mr. Parker said it would not be lit and that it was near the railroad tracks where drivers slowed down. He said there was also a traffic light there.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

Elizabeth Bratter of 159 McDonough Street said the screening would be positive because it would cover up the transformers and would also be a nice accent, especially because it would filter across to the other side of the street where there was a parking lot screen and a North End-related mural.

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

DECISION OF THE BOARD

*Mr. Mannle moved to **grant** the variances as presented, seconded by Mr. Rossi.*

Mr. Mannle referred to Sections 10.233.21 and .22 of the ordinance and said the project would not be contrary to the public interest and would observe the spirit of the ordinance. Referring to Section 10.233.23, he said granting the variances would do substantial justice because it was a mural and there was no ordinance for murals. He said the mural was clearly not a sign and was approved by the HDC, and the applicant just needed the setbacks for where the transformers would be covered up. Referring to Section 10.233.24, he said granting the variances would not diminish the values of surrounding properties. Referring to Section 233.25, he said literal enforcement of the provision of the ordinance would result in unnecessary hardship because 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 provision and the specific application of that provision to the property, and the proposed use is a reasonable one. He said the mural will cover up the transformer boxes and it was only before the Board because it was slightly closer to the sidewalk and was a mural, not a sign, which was a hardship. Mr. Rossi concurred and said there was published documentation of the historical significance of the woman presented on the mural, which was important because as the Board approved those types of murals, it would be important to be sure of the historical accuracy and relevance of the murals and the fact that the murals did not migrate into other territories of various things that could be on them.

Vice-Chair Margeson said she would not support the motion and wondered why the mural wouldn't face the pocket park so that people could actually read it. She said it would be distracting to drivers. She said if something was not in the zoning ordinance, which a mural wasn't, the Board was not supposed to be approving variances for it. She noted that the Board had a similar situation with an applicant who wanted to open an art studio in her home but there was no art studio in the ordinance, so the Board did not approve it. She said she would not support the motion for those reasons.

*The motion **passed** by a vote of 6-1, with Vice-Chair Margeson voting in opposition to the motion.*

- C. The request of **Frances E. Mouflouze Revocable Trust of 2015 (Owner)**, for property located at **550 Sagamore Road** whereas relief is needed to demolish the existing structure and construct two duplexes (creating a total of 4 living units) which requires the following: 1) Variance from Section 10.513 to allow more than one free-standing dwelling unit on a lot; and 2) Variance from Section 10.440 Use #1.30 to allow the construction of duplexes where they are not permitted. Said property is located on

Assessor Map 222 Lot 11 and lies within the Single Residence B (SRB) District. (LU-23-164)

Mr. Rossi recused himself from the following petition.

SPEAKING TO THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant, along with project engineer Eric Weinrieb and Brian White, who prepared the Analysis Property Value Impact Report. Attorney Phoenix reviewed the petition and criteria in detail. [Timestamp 5:06]

Vice-Chair Margeson asked what the hardship was in not being able to building another single-family dwelling on the lot. Attorney Phoenix said it was due to the lot's special conditions of being the largest property in the area, four times the size of the minimum required lot size for a single family home. He said most of the lots in the vicinity were that large and noted that the Board granted multi-family units at the Luster King site. He said, given the lot's location compared to other lots and densities in the area and considering the area where the zoning areas met, the lot had special conditions. Mr. Mannle asked how the current house was nonconforming, noting that the Staff Report said everything about the existing house was conforming. Attorney Phoenix said the front porch and steps went over the front setback line slightly. Ms. Casella said the City went by the survey information. Mr. Rheaume said it was apparent from the existing home photos that the current home was elevated relative to the street level, and he asked if the intent was to have the new structures also elevated or if there would be excavation. Mr. Weinrieb said the grade went up substantially behind the house and the new structures would be up a bit higher than the street, with stormwater draining back toward the front. He said they would not overly excavate the site but would work with its natural contours, which he further explained.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING IN OPPOSITION TO THE PETITION

Sue Harding of 594 Sagamore Avenue said she was an abutter and thought the zoning would not change when she bought her home in 1997. She said her property had a buffer where there was a lot of wildlife that had to be protected and that she couldn't see why the Board would want to change the privacy, land, and nature behind the abutters' homes that had been that way for decades. She said allowing four dwellings in a unit where only one was allowed was spot rezoning and that the project did not meet any of the criteria and might set a precedent if approved.

Rick Hayes of 40 Walker Bungalow said he was an abutter to 550 Sagamore Road. He said the area was zoned SRB for a reason and that the proposal violated the zoning. He said the applicant wanted to maximize profits and that it would accelerate the exit of longtime residents.

Linda Brown of 650 Sagamore Avenue said adding more dwellings than zoned for would be detrimental and would add more traffic to an already busy road as well as pose safety concerns. She said changing zoning for financial gain did not pose a hardship.

Richard Wilder of 58 Walker Bungalow Road said he had lived there for 54 years and was an abutter. He said the requested variances went against the character and nature of the community and that the applicant's attempt to relate the zoning of areas across the street as justification for the project was irrelevant. He said the project did not meet any of the criteria and that the ordinance for single-residence zones was a covenant to protect the homeowners and their land.

Alden Sweet of 72 Walker Bungalow Road said he abutted the property in the back corner. He said the variance requests should be rejected because the SRB District zoning did not allow duplexes. He said the anticipated market values of the duplex units would be in the range of one million dollars or more each, which wasn't a hardship. He said Portsmouth had a shortage of workforce housing and the applicant's proposal was not affordable housing. He said it would not improve the surrounding area and noted that what went on in Dover and Durham had no bearing on Portsmouth.

Eric McKnight of 546 Sagamore Avenue said if the project was approved, the duplexes would look into his side of the house where the kitchen, bedrooms and living room were. He said he thought he and his family were moving into a single-family dwelling zone when he bought the house a few months ago, and the project would change his home and his investment. He said he would not have bought his home if there were four dwellings looking into a side of it.

Joan Christy of 576 Sagamore Avenue said she had lived in her home since the 1980s and that the development would affect her because instead of looking out at the land that had stayed the same for about 150 years, she would now look out at a wall. She said the proposal would pave the way for the condoization of the neighborhood. She said the Board's decision had important implications.

Jim Lee of 520 Sagamore Avenue said he was a real estate broker of 43 years and thought cramming four housing units on one lot would alter the character of the neighborhood and injure public rights. He said there was no hardship to allow the project to take place in a neighborhood of single-family homes. He said the project did not meet any of the criteria.

Tim McNamara of 575 Sagamore Avenue, Unit 19, said three of the criteria – the public interest, spirit of the ordinance, and hardship – were not met. He said the reference to other zones as well as a recent approval for 635 Sagamore Avenue wasn't relevant. He said the applicant wanted a permit for four dwellings where one was allowed and for two duplexes were none were allowed.

Paige Trace of 27 Hancock Street said there was no hardship with the land but there was a question with the zoning, otherwise the applicant wouldn't be there. She said the entire neighborhood was opposed to the project and that the only hardship was for the neighborhood and not the amount of money the applicant stood to make or not make.

Petra Huda of 280 South Street said the proposal did not meet the criteria and that the zoning across and down the street and what had been previously approved were irrelevant.

Esther Kennedy of 41 Pickering Avenue said the community members were all abutters and it was up to the Board to decide whether they agreed with the zoning set by their predecessors and whether the five criteria were met. She asked the Board to reflect upon what had happened to some of Portsmouth's neighborhoods and to think about what's right for Portsmouth's future.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Christana McKnight of 546 Sagamore Avenue (via Zoom) said she and her husband chose her home because it was in a Single Residence Home District and said she was against the proposal.

Attorney Phoenix said they would agree to a condition that the rear area would be left in its current condition. He said the Board, when looking at the consideration for variances, looks at the overall neighborhood and can't just look at the five or six house lots in that particular strip, one of which didn't meet the density requirements. He said the applicant tried to do something consistent with the area and the prices of the condos would be more affordable than three houses. He said they never said it was affordable housing and that there were no other examples in Portsmouth to draw from except in Dover and Durham. He said the duplexes made sense in that area.

Jim Lee said the proposal was contrary to the public interest, did not observe the spirit of the ordinance, and did not provide substantial justice. He said it would also diminish the values of surrounding properties and that the hardship had to be with the land and not anything else, so there was no hardship with that lot because it was the same as every lot on the street.

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

DECISION OF THE BOARD

[Timestamp 1:02:38] Vice-Chair Margeson said she would not support the application, noting that it was an eclectic mix of zoning but the Sagamore Court was garden apartment manufactured housing, the Tide Watch Condos was a planned unit development allowed by zoning because it was over ten acres, and the recent application for the Luster King site had more units on the lot than allowed but was a commercial use that brought the lot into compliance with surrounding areas. She said an argument for the hardship was that the lot was bigger than most of the surrounding lots but that it wasn't by much. She said in a sea of single-residence homes, it would be the only duplex and that it looked like a complex with a lot of parking. Mr. Rheume said there were arguments to be made that relief could be had for having multiple units on a single-family lot if it was large enough and that there was a potential for hardship because the lot was four times larger than required in the zoning ordinance, but he wasn't sure if that meant there could be four units on it. He said he saw the petition failing on two other criteria and perhaps a third. He said the applicant admitted that the proposed structures were out of character with the neighborhood so they wanted to put plenty of screening in front of them so that they would not be seen, which was the Board's first indication that the project was not in keeping with the spirit of the overall neighborhood. He said the

property's shape drove a lot of that but wasn't sure that the Planning Board would accept the two structures at an angle to the street. He said it wasn't in keeping with the spirit of the ordinance because the structures were significantly big. He said there were significant hurdles when the applicant went before TAC and the Planning Board.

*Mr. Mannle moved to **deny** the petition, seconded by Vice-Chair Margeson.*

Mr. Mannle said he did not see the hardship or any special conditions to the lot relative to the other lots. He said it was bigger than some lots and smaller than others and thought that the 140-ft width was plenty of room for the applicant to put a 3-house subdivision and not even move the first house. He said there was a quirk in the zoning relating to the fact that any land use board approving an application request that requires demolition nixes any abutter's right to appeal that demolition, and that he would not support any application that involved demolishing a single-family home because of that. Vice-Chair Margeson said she didn't think the property had any hardship because it could be reasonably used in the way it was zoned and there was currently a single-family home on it now. She said it was presently in conformity with the zoning ordinance and granting the variance would make it out of conformity. She said it had a spirit and intent problem also.

Mr. Rheume said he would support the motion, although he disagreed with some of the arguments made. He said there was an argument for hardship and thought the proposal failed on other criteria. He pointed out that the Demolition Committee requirement was its own separate ordinance and not a part of the Board's ordinances, and he didn't know if the Board could tie their approval or disapproval to a completely separate ordinance. However, he thought the petition failed and did not meet other criteria. Chair Eldridge said she would also vote in favor of the motion because she thought a denial would provide a benefit to the general public. She said the way the proposed two-family homes sat on the lot would change the way the neighborhood feels.

*The motion **passed** by a unanimous vote of 6-0, with Mr. Rossi recused.*

- D.** The request of **Portsmouth Submarine Memorial Association (Owner)**, for property located at **569 Submarine Way** whereas relief is needed to construct an addition to the existing building to substantially increase the use which requires the following: 1) Variance from Section 10.440 Use #3.40 to allow a museum where the use is not permitted. Said property is located on Assessor Map 209 Lot 87 and lies within the Single Residence B (SRB) District. (LU-23-165)

SPEAKING TO THE PETITION

Attorney Kevin Baum was present on behalf of the applicant, along with project engineer John Chagnon. He noted that Albacore Park was originally approved by special exception and the Visitors Center was built in 1986. He said they proposed to place a 1,584-sf addition onto the Visitors Center to add more exhibit and meeting spaces, and because it was a significant addition it required a variance because it was a museum use in a residential zone. He said a Parking Demand Analysis was also provided. He reviewed the petition and criteria in detail.

Mr. Rheume said the museum use was originally granted by special exception and asked if the zoning changed. Attorney Baum the ordinance no longer prohibited it. Ms. Casella said she thought it was probably a zoning change and it was further discussed.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF, OR IN OPPOSITION TO, THE PETITION

No one spoke.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Project engineer John Chagnon said he had been involved with the project for a long time and didn't now why it was kept in that zone, but there were a lot of other properties that contained museums that were now in museum zones. He said the Board and City Staff had the ability to consider moving the project into another zone in the future.

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

DECISION OF THE BOARD

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

Mr. Rossi said the overarching consideration was that this is an expansion of a legal nonconforming use, so many of the arguments presented about whether this zone supports that use or transition "this" or "that" are not all that relevant because the use already exists, so granting it would not be contrary to the public interest. He said there was no public interest in discontinuing the use or prohibiting its expansion on this property because the property was large and could accommodate the proposed expansion. He said granting the variance would do substantial justice because since there was no loss to the public by expanding the footprint on the property, any loss to the applicant for not being able to do that would be unjust. He said granting the variance would not diminish the values of surrounding properties because the proposed expansion was closer to Route 1A and would not really impact any of the properties on that side of the property. He said it was also buffered by a large parking lot to neighboring residential properties and therefore would not have the ability to diminish the values of those surrounding properties. He said it was about changing the size of the structure but not the use. He said literal enforcement of the ordinance would result in unnecessary hardship due to the special conditions of the property, which included the nonconforming use that already existed, so there was no logical linkage between prohibiting the expansion of the building and the provisions of the ordinance. Mr. Rheume concurred. He said the term "substantial" was very subjective and in his view of that subjectiveness, the applicant was looking to double the size of the structure. He said it was a minor increase in the square footage of the lot but it met the concept of a substantial increase in the nonconformance. He said the SRB zone was clearly not the right one for the property to be in because it was 20 times larger than required for a single-family home. In the spirit of the ordinance, he asked why one would not want a museum in the SRB zone.

He said traffic and uses other than family ones would be different, but the property was physically cut off from the other portions of the SRB District and there was no road connected to it, and it had an elevation difference. From a hardship standpoint, he said it was a massive property and an existing nonconforming use and wouldn't go away.

The motion passed by a unanimous vote of 7-0.

- E.** The request of **Cate Street Development LLC (Owner) and Buffalo Wild Wings (Applicant)**, for property located at **360 US Route 1 Bypass** whereas relief is needed to install a sign on the northern facing façade which requires the following: 1) Variance from Section 10.1271 to allow a sign on the side of a building where there is no public entrance or street frontage. Said property is located on Assessor Map 172 Lot 1 and lies within the Gateway Corridor (G1) District. (LU-23-162)

SPEAKING TO THE PETITION

Bill McFadden of Barlow Signs was present on behalf of the applicant and reviewed the petition and criteria. [Timestamp 2:49:57]

Mr. Rheume said the size of the proposed sign was about the same size as what was on the front glass portion of the structure and asked if that was all that was proposed. Mr. McFadden said he just wanted a logo on that side of the building. Vice-Chair Margeson verified that the sign was internally illuminated and that the one in the front could not be internally illuminated. She said the applicant chose the Buffalo Wild Wings side knowing about the U-Haul company and the site's limitations. She said the Board had already granted the applicant a variance for the sign on the other side of the building and that the building seemed to have a lot of signage and identification for passing motorists. Mr. McFadden said it was a non-issue heading northbound because there was fair visibility for signage, but the business couldn't be seen until a motorist had passed Hodgdon Way and had to do a U-turn. He said they were only asking for a logo. Vice-Chair Margeson asked how it was that Convenient MD Headquarters had an internally-illuminated sign if it had the same problems. Chair Eldridge said they were granted a variance.

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 said she would not support the variance request because an article in the zoning ordinance stated that it was not allowed for reasons of clutter, distraction, and so on. She said it might be challenging for the business but she did not find any hardship within the land itself that merited granting a variance for an internally-illuminated logo on the side of the building.

*Mr. Rheaume moved to **grant** the variance as requested and advertised, seconded by Mr. Mattson.*

Mr. Rheaume said he understood Vice-Chair Margeson's point and that he also had concerns about the Convenient MD sign previously but thought the applicant had a hardship because the parcel ended up being divided in a very odd way due to U-Haul not wanting to move. He said he still wasn't entirely convinced that what the applicant hoped would happen would take place, but it was nothing that the applicant or the Convenient MD created. He said it was the general nature of how the property was developed in conformance with the zoning ordinance. He said it was a modest request and the internal illumination would be at a height and in a location that would not negatively impact anything because it would be down the road from U-Haul and not face the apartments. He said drivers going by would realize they were going by the place and would be forced to take a U-turn or do something else, but that wasn't the applicant's fault. He said for those reasons, granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said the sign was small and the sign clutter for the very wide-open area was not excessive and not next to or facing a residential area such that it would negatively impact those residents. He said substantial justice would be done because it would give the applicant the opportunity to ensure that people would know and understand that the business was there. He said the public purposes of the ordinance would not outweigh the applicant's desire to have the relatively modest sign on that side of the structure. He said granting the variance would not diminish the values of surrounding properties because the affected properties were commercial businesses with large signs and lighting of their own. He said the hardship was the unique relationship of the building relative to the property, adjacent properties, the road, and the access that created a series of oddities that burdened the structure on that property in such a way that the ordinance didn't make sense in how it was originally conceived. He said the request for a modest sign was a reasonable one. Mr. Mattson concurred and said it would not threaten public safety. He said it might not help everyone see the sign in advance enough to turn at Hodgdon Way but would prevent people from acting erratically after they note that they missed it or having to turn around.

Mr. Rossi said he would not support the motion. He said he was reluctant about approving the Convenient MD sign and now thought that it was starting to turn into a proliferation of illuminated signage. He said the area was one of the first in Portsmouth that people see when they come out of Route 16 and didn't think it was consistent with the purpose of the ordinance to allow it. He said he also thought it was almost impossible not to see Buffalo Wild Wings with its current signage. He said GPS units would eventually catch on and the problem would solve itself without the need for additional signage. He said he did not see the hardship. Chair Eldridge said she would support the motion for the same reason the Board supported the Convenient MD and didn't see that the light would cause light pollution in that area.

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

*Vice-Chair Margeson moved to **suspend** the 10:00 meeting end rule and stay past 10:00, seconded by Mr. Mannle. The motion **passed** by a unanimous vote of 6-0, with Mr. Rheaume abstaining.*

At this point in the meeting, Mr. Rheume left the meeting due to an early flight in the morning.

- F. The request of **Creeley Family Trust, Sean and Andrea Creely Trustees (Owners)**, for property located at **337 Richards Avenue** whereas relief is needed to construct an addition to the existing structure which requires the following: 1) Variance from Section 10.521 to allow a 12.5 rear yard where 20 feet are required. Said property is located on Assessor Map 130 Lot 2 and lies within the General Residence A (GRA) District. (LU-23-163)

SPEAKING TO THE PETITION

Attorney Derek Durbin was present on behalf of the applicant. He gave a letter to the Board that was forwarded to the Planning Department and did not make it into the record. He reviewed the petition and criteria, noting that the present application differed from the previous one that was submitted and denied in August 2023. [Timestamp 3:08:50]

Mr. Rossi verified that if the address was a Lincoln Avenue address instead of a Richards Avenue one, the property would conform to all setbacks.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

John Stebbins of 390 Richards Avenue said he lived five houses away from the applicant and that every house in between, including his, had nonconforming conditions. He said it was a straightforward proposal and that the neighborhood was in support.

SPEAKING IN OPPOSITION TO THE PETITION OR SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

*Mr. Rossi moved to **grant** the variance as presented and advertised, seconded by Mr. Mattson.*

Mr. Rossi said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said it was an odd case where there was a corner lot and some ambiguity about what should be a side yard and a back yard, even though the ordinance was clearly written, but the spirit of the ordinance was not to be hung up on the technicality of whether it was a Lincoln Avenue address or a Richards Avenue one. He said the driveway was coming off Lincoln Avenue and the entrance was off Lincoln Avenue, and the spirit of the ordinance is observed due to the orientation of the building and the entrance coming off Lincoln Avenue. He said substantial justice would be done because there would be no loss to the public for allowing this, which under other circumstances with a different address would be a conforming building. He said since there

was no loss to the public by having this proceed, any loss to the applicant would be an injustice. He said granting the variance would not diminish the values of surrounding properties, noting that there were abutters in support who were in the best position to judge whether the change would affect their properties. He said literal enforcement of the provisions of the ordinance would result in unnecessary hardship due to special conditions of the property having the oddity of a Richards Avenue address where it is oriented in such a manner that it should have a Lincoln Avenue address, and because of that, there is no fair and substantial relationship between the requirements of the ordinance for the rear yard setback on the property in this proposal. For those reasons, he proposed that the variance be granted. Mr. Mattson concurred and said the proposal would make the property closer to conforming and preserve light, air, and privacy.

Vice-Chair Margeson said she would not support the motion because her concern was the addition in massing on the side of the house. She said it was better than the existing one but was concerned that the Board was receiving successive applications that looked less violative of the zoning ordinance or less concerning the second time the Board saw it. Mr. Rossi agreed it was an issue that the Board was facing and that the Board should be careful in speculating when an application came before them because it gave a misleading impression that the Board had an idea of what could be approved. He said each application should be considered on its own merits. Chair Eldridge said the burden was on the Board and that she would vote in favor of the motion, noting that the addition was very large but the ask wasn't very large and it was more conforming.

The motion passed by a vote of 5-1, with Vice-Chair Margeson voting in opposition to the motion.

- G. The request of Bobby and Angela Braswell (Owners), for property located at 82 Wibird Street** whereas relief is needed to demolish the existing accessory structure and construct a new detached garage which requires the following: 1) Variance from Section 10.521 to allow: a) a zero (0) foot rear yard where 20 feet is required; and b) a six (6) foot right yard where 10 feet are required. Said property is located on Assessor Map 148 Lot 59 and lies within the General Residence A (GRA) District. (LU-23-128)

SPEAKING TO THE PETITION

Anthony Tucker Richards of Southern Maine Designs was present on behalf of the applicant. He said the existing dilapidated garage was built on the property line and they proposed replacing it with a new garage on a monolithic slab. He reviewed the criteria and said they would be met.

The Board had no questions, and Chair Eldridge opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

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

Mr. Mattson said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said the proposed use would not conflict with the explicit or implicit purposes of the ordinance and not alter the essential character of the neighborhood or threaten the public's health, safety, or welfare or otherwise injure public rights. He said substantial justice would be done because the benefit to the applicant would not be outweighed by any harm to the public or other individuals. He said granting the variances would not diminish the values of surrounding properties because there was no evidence of that. He said literal enforcement of the ordinance would result in unnecessary hardship due to special conditions of the property that distinguished it from others in the area, and that there was no fair and substantial relationship between the general public purpose of the ordinance's provisions and the specific application of that provision to the property. He said the proposed use was a reasonable one, replacing the garage with a very similar new structure that would be safer and would slightly improve the nonconformity. He said it was an unusual lot shape with a small right-of-way entrance and a tough turning radius for vehicle parking and, given the location of the property compared to the surrounding ones, light, air and privacy would be preserved. Vice-Chair Margeson said the property really did have special conditions because no other property was configured that way, so it was a hardship.

*The motion **passed** by a unanimous vote of 6-0.*

IV. OTHER BUSINESS

There was no other business discussed.

V. ADJOURNMENT

The meeting adjourned at 10:38 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary