

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

7:00 P.M.

May 16, 2023

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

MEMBERS EXCUSED: None.

ALSO PRESENT: Stefanie Casella, Planning Department

The meeting was called to order at 7:05 p.m.

*Mr. Rossi moved to take the postponed petitions out of order to vote on, seconded by Ms. Geffert. The motion **passed** unanimously, 7-0.*

Chair Eldridge read the postponed items into the record. The motions were made and passed as noted under each postponed petition.

I. APPROVAL OF MINUTES

A. Approval of the April 18, 2023 Minutes.

Ms. Geffert noted that on page 12, the 15 Lafayette Road petition, the property was not 40 acres and that the sentence should read: Attorney Pasay reviewed the petition and noted that the property currently had a single-family dwelling but that it had two public roads of frontage.

Under Discussion and Decision of the Board on page 13, Ms. Geffert asked that the phrase ‘comply with the lot’ be changed to ‘comply with the law’ so that the sentence reads as follows: Ms. Geffert said they didn’t need a condition stating that the applicant would comply with the law because the applicant had to.

Mr. Rheaume asked that a change be made for purposes of clarification to the end of the first paragraph on page 13 under Discussion and Decision of the Board to read as follows: He said that a stipulation requiring this would unduly restrict future property owners, which could be a source of a possible lawsuit against the city.

In the last paragraph on page 13, Mr. Rheume requested that, for purposes of clarification, the sentence read as follows: He said that the 100-ft frontage requirement not being met had not stuck out since 1942 when the house was built, and allowing it to continue that way would meet the expectations of the neighborhood.

*Mr. Mannle moved to **approve** the April 18 minutes as amended, seconded by Mr. Rossi. The motion **passed** unanimously, 7-0.*

B. Approval of the May 2, 2023 Minutes.

Vice-Chair Margeson abstained from the vote.

*Mr. Rossi moved to **approve** the May 2 minutes as submitted, seconded by Mr. Mannle. The motion **passed** unanimously, 7-0.*

II. OLD BUSINESS

- A.** The request of **635 Sagamore Development LLC (Owner)**, for property located at **635 Sagamore Avenue** whereas relief is needed to remove existing structures and construct 4 single family dwellings which requires the following: 1) A Variance from Section 10.513 to allow four free-standing dwellings where one is permitted. 2) A Variance from Section 10.521 to allow a lot area per dwelling unit of 21,198 square feet per dwelling where 43,560 square feet is required. Said property is located on Assessor Map 222 Lot 19 and lies within the Single Residence A (SRA) District. (LU-22-209)

Mr. Rheume and Mr. Rossi recused themselves from the petition, and Alternates Ms. Record and Ms. Geffert took voting seats.

*Mr. Mannle moved to allow extra time for Attorney Phoenix's presentation, seconded by Vice-Chair Margeson. The motion **passed** by unanimous vote, 7-0.*

SPEAKING TO THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant, along with Mike Garrepy. Attorney Phoenix reviewed the petition. He compared the project's density to other developments around it and said the four condo units would fit in well. He read part of a letter from a real estate appraiser stating that the project would not result in diminution of values of surrounding properties or change the characteristics of the neighborhood. He reviewed the criteria and said they would be met.

Vice-Chair Margeson asked Attorney Phoenix why he thought the project's area was improperly zoned. Attorney Phoenix said that even though it was a planned unit requirement, in terms of density they didn't meet the RSA requirements and the other properties around it didn't meet them either. He said he believed the project's density was fair and noted that they reduced it from five

units to four. Vice-Chair Margeson said it seemed that 576 Sagamore Avenue was 1.7 acres and 650 Sagamore Avenue was 1.51 acres but were zoned SRB, which was a little anomalous. She referred to the Walker vs City of Manchester case about nonconforming uses and thought it stood for the fact of whether or not the nonconforming uses are created by variances. Attorney Phoenix said in that case, there were other variances for funeral homes permitted, but the hardship was demonstrated if the applicant's project fit into the neighborhood and the others did not. He said he interpreted that case as relating to uses in the zone that also got variances. He said the nature of the lot, being in an SRB zone where no one complies with density requirements, and its shape, size and location also contributed to the hardship.

In response to Mr. Mannle's questions, Attorney Phoenix said the condos would be single-family ones and part of a condominium association and that the applicant would have to go before the Planning Board and TAC for final approvals.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING IN OPPOSITION TO THE PETITION

Tim McNamara of 579 Sagamore Avenue, Tidewatch Unit 19, said he was representing a small committee from Tidewatch. He said over 90 percent of the community as well as other neighbors opposed the project. He said the ordinance stated that one house would be built per acre and one dwelling per lot. He said significant amounts of ledge would be blasted, the elevations were considerable, nearby houses would be blocked from light and space, and there would be drainage issues as well as density and traffic safety issues and alteration of natural space.

Anne Hartman of Tidewatch Unit 3 said the project would have a deep impact on the community in terms of height, light and drainage. She said the current drainage struggles would be made worse by crowding the property's higher ground with a house, garage, patio, roadway and turnaround.

Harry Stow of Tidewatch Unit 22 noted that Tidewatch had 117 and not 122 units. He said the units were housed in 44 buildings on 53 acres, so they had more than one acre per building.

Hal Cail of Tidewatch Unit 122 asked the board to comply with the zoning law of one unit per acre.

Peter Weisel (via Zoom) of Tidewatch Unit 75 said he objected to the project primarily as a cyclist and explained the reasons why, including that having four units made the risk for cyclists four times greater than a single unit due to increased traffic from delivery vehicles, landscaping equipment and so on. He suggested that the board consult with the Parking and Traffic Safety Committee.

Anne Walsh, Tidewatch Unit 7 trustee (via Zoom) said the requested variances didn't meet the criteria. She said the proposal would create a gateway neighborhood that would encourage mixed-use development and would set a precedent.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Phoenix said the proposed buildings would barely be seen through the wooded area. He said he didn't think the light and air would be negatively affected, and the ledge and drainage were not zoning board issues and would be vetted by the Planning Board and TAC. He said the stormwater runoff issues would be improved by the project. He said it seemed incongruous to allow more units per square foot at Tidewatch than what the applicant was requesting. He noted that their real estate appraiser said surrounding property values would not be diminished. He said a landscape buffer would be provided behind the houses.

Peter Wiesel via (Zoom) said the four units would generate four times more traffic than one unit that the property was currently zoned for.

Attorney Phoenix asked about the document that Mr. McNamara submitted to the board. Mr. McNamara said it was a petition signed by nearly all the neighbors, and some were emails that were consolidated into it. Attorney Phoenix said he should have seen it beforehand.

Susan (last name indecipherable) of Tidewatch Unit 42 said it hadn't been made clear how many trees would be cut down. She said it would have an impact on wildlife.

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

DISCUSSION OF THE BOARD

Mr. Mannle said he didn't think the project was feasible at first. He said someone thought a precedent would be set, but he felt that the precedent had already been set by Tidewatch, which had 122 units on 54 acres and was clearly nonconforming. He said the applicant was asking for four single condo units on 1.89 acres, and if Tidewatch wasn't already there, it wouldn't fly. He said the drainage, light and air were TAC concerns. Vice-Chair Margeson said the proposal wasn't eligible for a planned unit development because it was less than ten acres, but she thought there would be real benefits, like bringing the use more in conformance with the land. She said the lot was quite large but was in keeping with the character of the area in a lot of ways. She said she struggled with the hardship a bit because a reasonable use could be made of the property by having one house on it and perhaps a variance for a second house, but there would still be the one dwelling unit per lot. She said the project would fit into the neighborhood, in terms of density. Ms. Record said she didn't see the hardship. Mr. Mattson said if the project were in the SRB District, it would be more compelling. He said the proposed four units were more density than the SRA District, but the ordinance listed SRA and SRB together and indicated 1-3 dwellings per acre. He said the reduced curb cut for a single driveway entrance would be an improvement as opposed to the current impervious area that was there for the commercial property. Ms. Geffert said the criteria involved all Portsmouth

citizens, not only the neighbors, and she hadn't seen a lot of input from anyone other than Tidewatch residents.

DECISION OF THE BOARD

*Ms. Geffert moved to **deny** the variances, seconded by Ms. Record.*

Ms. Geffert said the hardship criteria was the reason for denying. She said she had concern for four units on the property, and she didn't think granting a variance for the property would be contrary to the public interest and did not believe that it would not observe the spirit of the ordinance, especially with Tidewatch behind it. She said she didn't think it would diminish the values of surrounding properties. She said literal enforcement of the provisions of the ordinance, however, would not result in an unnecessary hardship to the property owner, based on the plan for the four units. She said a reasonable use for the property could still be achieved without four single residences on the property. Ms. Record concurred and had nothing to add.

Vice-Chair Margeson said she felt that the four units would be too dense for the lot and that the public would not be served. She wasn't sure that the sloped wooded lot could support four individual dwelling units and thought one less unit would be better. Mr. Mattson said the hardship was with the property and not the owner or their financial condition. He said Tidewatch was similar to the Walker vs City of Manchester case in terms of density. He said three units would be better than four, but that wasn't the board's call. He said the residential use would not have an adverse effect on the residential area. Ms. Geffert and Ms. Record said they did not see a hardship. Chair Eldridge said she would not support the motion because she thought the property would be improved and that she believed in the Walker vs City of Manchester case.

*The motion to deny **failed** by a vote of 5-1.*

*Mr. Mannle moved to **grant** the variances for the project as presented, seconded by Mr. Mattson.*

Mr. Mannle said it was a unique parcel of nearly two acres on a street with a similar development behind it, and due to the lot's location and what surrounded it, he said it was a density request that was less than the density Tidewatch or Sagamore Court. He said granting the variances would not be contrary to the public interest by having more conforming structures on the parcel that were much better than the existing condition. He said it would observe the spirit of the ordinance because the SRA zone limits one dwelling unit per acre, and the applicant was asking for four units on nearly two acres, which would be directly across the street, the SRB zone. He compared the four dwelling units at 21,200 square feet per unit to Tidewatch's 122 units at 19,300 square feet per unit and said the project would be less dense. He said substantial justice would be done and surrounding property values would not be diminished. He said the project would have no effect on anything across the street or at Tidewatch because one wouldn't even see the properties. He said literal enforcement of the ordinance would result in an unnecessary hardship because the property had special conditions of being an oversized lot for the area as well as an angled and elevated one, and only so much of it was usable. He said limiting the lot to a single-family home would be a hardship

and thought that four single-family units on nearly two acres was a more than reasonable use and a huge improvement for the existing property.

Mr. Mattson concurred and said the project would not alter the essential characteristics of the neighborhood because the large lot could not reasonably be subdivided based on its irregular shape and street frontage. In terms of hardship, he said the purpose of the ordinance was to prohibit overcrowding and provide for air, light, and separation. He noted that there was a decent tree buffer in the back portion of the property and the proposed development would push the four homes toward Sagamore Avenue, with a shorter driveway.

*Mr. Mannle **amended** his motion and moved to **grant** the variances for the project with the following **stipulation**:*

- 1) The design and location of the dwellings may change as a result of Planning Board review and approval.*

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

Mr. Rheaume and Mr. Rossi took their voting seats, and Alternate Ms. Geffert took a voting seat.

- B.** The request of **Jared J Saulnier (Owner)**, for property located at **4 Sylvester Street** whereas relief is needed to subdivide one lot into two lots which requires the following: Proposed Lot 1: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling of 9,645 square feet where 15,000 is required for each; b) 80 feet of lot depth where 100 feet is required; and c) a 9 foot right side yard where 10 feet is required. Proposed Lot 2: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling unit of 6,421 square feet where 15,000 is required for each; b) 40 feet of street frontage where 100 feet is required; and c) 80 feet of lot depth where 100 feet is required. Said property is located on Assessor Map 232 Lot 36 and lies within the Single Residence B (SRB) District. (LU-23-27)

SPEAKING TO THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant, along with the owner Jared Saulnier and the project engineer Erik Saari. Attorney Phoenix reviewed the petition and history of the area. He noted that a mistake was made in their submission and that the frontage for the newly created lot was 40 feet and because half of the lot 80-ft lot was on a paper street. He reviewed the criteria.

Vice-Chair Margeson asked how big the house on Lot 2 would have to be in order not to request the variances. Mr. Saari said it would be 1,212 square feet and that there would be no issues with the ledge. Mr. Mannle said if the applicant wanted to build a house on Lot 2, they would have to come back for a variance because it would be a nonconforming use on a nonconforming lot. Attorney Phoenix said that allowing the lot to be created would make it a lawful lot. It was further discussed. Mr. Rheaume asked who was responsible for the plan to extend the paper street. Attorney Phoenix said they met with City Staff and discussed it. He said the paved portion of the driveway ended where the two lots met, so they would continue it for 40 feet on the side of the lower lot to get

access through it. He said he would have to further discuss it with City Staff or the Department of Public Works to see if the extension of a street was a private or city issue. Mr. Rheume said the city would potentially be on the hook. He said a reason why some of the streets didn't get developed was because of the wetlands, and he asked if the applicant had concerns with wetlands. Mr. Saari said there was no evidence of wetlands within a hundred feet of the lot.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING AGAINST THE PETITION

Taylor Andrews of One Sylvester Street said there would be residual effects on surrounding properties and the intensity of land use in the immediate area would increase.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Phoenix said the street extension would be at the owner's expense. He said the lot was 80 percent clear of trees. He noted that the lots across the street were subdivided a while back. He said the project would not harm anyone and made sense, given the nature of the neighborhood.

Vice-Chair Margeson asked which lot was subdivided. Attorney Phoenix said Lots 23243 and 23243-1 were subdivided by the owner and approved by the Planning Board. In response to Mr. Rossi's question, he said the square footage on the 23243-1 lot was 18,000 square feet.

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

DECISION OF THE BOARD

Vice-Chair Margeson said she was concerned that if they granted the variance, they'd create a very small lot and that there could be future requests for variance relief on that lot. Mr. Rossi said that taking what was largely a conforming lot and creating two nonconforming lots almost guaranteed the future need for additional relief on the nonconforming lot.

*Mr. Mannle moved to **deny** the request for variances as presented, seconded by Mr. Rossi.*

Mr. Mannle said granting the variances would not observe the spirit of the ordinance by changing a conforming single-family lot into two nonconforming lots. He noted that the first lot was two-thirds the size with appropriate street frontage and the second lot was a third with less than half of the street frontage. He said the spirit of the ordinance was to have the lots be as conforming as possible or to get them in conformance. Mr. Rossi concurred. He also said he didn't think that comparing the characteristics of the neighborhood to Marjorie Street was appropriate because Marjorie Street had

different density and lot sizes. He said the properties on Sylvester Street were the appropriate comparators. It was further discussed. (Timestamp 2:24:53).

*The motion **passed** by a vote of 4-3, with Ms. Geffert, Mr. Rheaume, and Chair Eldridge voting in opposition.*

Alternate Ms. Record took a voting seat.

- C.** The request of **Cynthia Austin Smith and Peter (Owners)**, for property located at **9 Kent Street** whereas relief is needed to demolish the existing two-family and construct 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. Said property is located on Assessor Map 113 Lot 42 and lies within the General Residence A (GRA) District. (LU-23-28)

SPEAKING TO THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant with the owners, the project engineer John Chagnon, project designer Jennifer Ramsey, and landscape architect Robbie Woodburn. He reviewed the petition and said they wanted to replace the existing duplex with a single-family home and an underground garage. He said the existing building coverage was 35 percent and the proposed was 53 percent. He said the backyard would be raised by 24 inches and have pervious pavers for better drainage, which he said was included in the coverage but was sort of an artificial component. He said several issues drove the plan, including the driveway, pervious pavement, topography, and so on. Mr. Chagnon addressed the drainage issues.

Mr. Rossi asked if the right yard setback was due to the overhangs. Attorney Phoenix said it was due to the cantilever that was over by three feet. Mr. Rossi asked what the hardship of the property was that required a cantilever in the house and bringing it right up to the lot line. Attorney Phoenix said many houses in the area had small lots and were close to the lot line. Mr. Rossi asked how close the external walls in the structure would be to the neighboring property. Mr. Chagnon said the house was pulled to the south due to the desire to park at that basement level. He said in order to get the cars off the street and under the structure with enough clearance, they were forced to push the house in the same location as it is now. Mr. Rossi concluded that the current condition of the house's right side was about .7 feet from the lot line. Attorney Phoenix said the existing was .5 feet.

Mr. Rheaume said the applicant stated that the project proposes a permitted single-family home where a duplex is now, so redevelopment is more than conforming compared to existing conditions.

He said he was confused by that statement and asked how it would make it more nonconforming because two-family homes were permitted in the GRA zone. Attorney Phoenix said he misstated it and that he should have said that it was less density but fewer units. Mr. Rheaume said the packet stated that the project would replace an aging duplex but didn't mention any rotting and so on. He asked if there were similar concerns with the structure. Mr. Smith said he was one of the owners and that he wasn't qualified to say whether the house was ready to fall down. Mr. Rheaume referred to the proposed cantilever and asked what the gap would be between the ground and the first floor. Mr. Chagnon said the cantilever had more to do with the structurability of the replacement home and the existing foundation wall would be used as the sheet pile. Ms. Ramsey said the original foundation floor would not change.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

Dean Baltulonis of 159 Richards Avenue said his home was adjacent to the park and thought the project would be a nice upgrade to the backdrop of the park.

Jessica Kaiser (no address given) said the architectural elements showed modern components but pulled elements from the existing house and surrounding houses as well. She said the garage would sit underground and would not affect the mass.

Alex Greiner of 88 Lincoln Street said the project would be a great addition to the neighborhood.

SPEAKING IN OPPOSITION TO THE PETITION

Dave McGlass (no address given) said he was the abutter and thought the project would not meet the criteria. He said the stormwater impact would increase on his property and the metal roof oriented NS instead of EW would cause the snow to slide off onto their property. He said the overhang would go onto their property and the concrete foundation would be six inches from his property line. He said the stormwater treatment would require the owner to use his property. He said the front porch would be more forward than any other house on Kent Street and would impact the visual environment. He said there were no special conditions of the lot to create a hardship.

Bill Arakelian of 18 Kent Street said the existing property was structurally sound and did not present any undue hardships. He said the proposed design was inappropriate and there was no reason to drive all the setbacks further out of compliance.

Cliff Hodgson of 10 Kent Street said the setbacks would negatively affect the neighborhood and the size and appearance of the new home would alter the essential characteristics of the area. He said there was no hardship and that the owners seemed to think the rules didn't apply to them.

Jim Lee of 520 Sagamore Avenue said the project would alter the essential character of the neighborhood. He also noted that the board was always reluctant to grant a zero lot line.

Barbara Adams of 75 Kent Street said the project would double the size of the dwelling unit to 5,000 square feet and that a patio raised 24 inches with a special surface seemed like building coverage. She noted that the houses on Kent Street were all built in the 1900s and were traditional in size, shape and style, but the applicant wanted a larger 4-story modern California-style building with vertical siding and a metal roof and 300 feet of surrounding retaining cement walls. She said the building would be out of proportion and not compatible with the neighborhood and would alter the essential character of Kent Street. She said there was no hardship.

Matt Beebe of 81 Lincoln Avenue said there was no hardship and thought the design team should find a way to make the house more conforming and get it further away from the lot lines.

Sue Polidura of Middle Street said the proposed house was a very modern structure in a very old neighborhood and was more appropriate for a modern development.

Esther Kennedy of 41 Pickering Avenue read an excerpt from a note from Attorney Duncan MacCallum stating that it was difficult to draw the line between a person's property rights and the neighbor's property rights, but that was what zoning was and did and it required buildings to be a certain number of feet from the neighbor's boundaries for property air, light, and space between buildings. She said the applicant did not meet any of the criteria.

Petra Huda of 280 South Street said she couldn't fathom how the applicant would get all that 'stuff' into that spot. She said there was no hardship and that the petition should be denied.

Katherine Arakelian of 18 Kent Street said eight out of twelve houses on Kent Street were in opposition.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Phoenix said 53 percent was an artificial number because the house was 35 percent where 39 percent was the limit. He said the existing house was the same distance from the common lot line as the proposed house. He said stormwater and snow would be captured and the driveway and garage would free up street parking. He said the larger porch would not affect neighbors' views. He said the applicant was required to do a stormwater plan to document pre- and post-construction. He said the existing home was 2,700 square feet and the proposed home was 39,000 square feet.

Barbara Jenny of 81 Lincoln Avenue (via Zoom) said the project would affect her sense of light and view and also her view of the pond and park. She said she took issue with Attorney Phoenix using the term 'essentially' several times. She said measurements mattered.

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

*At this point in the meeting, Mr. Mannle moved to **extend** the meeting beyond 10:00, seconded by Ms. Record. The motion **passed** unanimously.*

DISCUSSION OF THE BOARD

Mr. Rossi said he liked the design and thought the house would improve the area and didn't think it would be out of keeping with the character of the neighborhood. He said housing styles were different from property to property and people didn't build the way they did years ago. He said he didn't think it would be contrary to the spirit of the ordinance and saw no loss to the public or diminishment of surrounding property values. He said he did have difficulty with the hardship of the land forcing the need for the variances. He thought most of the variances, especially the lot line clearance on the right side, were driven by the desire to have a garage under the residence, which caused everything to be raised and necessitated more drains, retaining walls, and so on. He said he did not think the property offered a hardship that required a subterranean garage and the resulting placement of the house six inches from the right side property line, so on that basis, he could not support it. Vice-Chair Margeson said she would not support it and that she wasn't persuaded that there was a hardship of special conditions that made the property exempt from the ordinance's requirements. She said a particular concern was the elimination of the primary front yard setback from 7 feet to zero, which affected the streetscape. She said the building coverage was also a hard one because it wasn't essentially open space but a structure. She said open space had to be free of structures, and it significantly increased the building coverage and made the property more nonconforming. Mr. Rheume said he could not approve it. He said the applicant was asking for more relief than what was needed for the existing structure in every way. He said the city wasn't getting much from the applicant per the balancing test. He said the applicant's term 'as desired' drove a lot of what was being requested for relief. He said the applicant argued that the 53 percent coverage wasn't a real number but was all the stuff they wanted to create in the backyard, and that just because it was made up of earth and stone didn't make it less impactful. He thought it would be more impactful because the rolling hill topography on the back of the property that contributed to the park had a positive effect that could be negatively impacted. He said the underground garage would be right along the neighbor's wall, and the roof pitch being oriented into a front gable would be more impactful because all the rain and snow would come down on the neighbor's property. He said the project failed several criteria and did not support the balancing test.

DECISION OF THE BOARD

*Mr. Rheume moved to **deny** the petition, seconded by Mr. Mannle.*

Mr. Rheume said the application only had to fail one criterion, and he thought it failed a few. He said a lot of relief was being asked for and neighboring properties would be negatively affected from a light and air standpoint as well as a water runoff standpoint and complexity of design. He said the maintainability of that design would cause the neighbor future issues. He said the structure was in a prominent location and some of the things asked for would negatively impact some of what the public would look for in that location. As for the hardship, he said it was brand new construction and that the applicant could build a new structure in full compliance or require less relief than requested. He said all the characteristics he saw were negative hardships that made the request relief even more egregious. Mr. Mannle concurred. He said the applicant was asking for seven variances for brand new construction, and that two of them couldn't change but five of them could get better. He said it didn't make sense on new construction.

*The motion **passed** by unanimous vote, 7-0.*

III. NEW BUSINESS

Alternate Ms. Geffert took a voting seat.

- A. The request of **Angela Davis** and **Katherine Nolte (Owners)**, for property located at **276 Aldrich Road** whereas relief is needed to construct a 5 foot by 4 foot landing which requires the following: 1) Variance from Section 10.521 to allow a) 3 foot secondary front yard where 30 feet is required; and b) 35% building coverage where 20% is allowed. 2) Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed, or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 116 Lot 14 and lies within the Single Residence B (SRB) District. (LU-23-29)

SPEAKING TO THE PETITION

The owner Katherine Nolte was present to review the petition. She said the reason for the variance requests was to increase the landing and attach the support beams to the existing foundation wall. She reviewed the criteria and said they would be met.

Mr. Rheume asked if Ms. Nolte was doing a major renovation project. Ms. Nolte said it wasn't major because she only eliminated the stairwell that went between the kitchen and living areas and decided to make a 36'x36' landing to go to the patio. She said it had to be expanded by one foot in one direction and two feet in the other direction so that the support beams could go into the foundation. She said the external staircase wasn't originally part of the plan. Mr. Rheume said Ms. Nolte talked about an easement but it was just a city-owned right-of-way. Ms. Nolte agreed and said she had maintained it over the last five years.

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

Mr. Rossi said granting the variances would observe the spirit of the ordinance and would not be contrary to the public interest because there was no public interest that militated against the construction of the landing. He said it would do substantial justice because there would be no loss to the public by the construction of the landing that would outweigh the benefit to the property owner. He said granting the variances would not diminish the values of surrounding properties because the landing was hard to see from the road due to the shrubbery and location. He said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. He said

when the landing was completed, it would be consistent with the character of surrounding properties. He said denying the request for variances would be pointless.

Mr. Mattson concurred and said the unusually large right-of-way on the side of the street was a unique condition of the property and also lessened the effect of the amount of relief being asked for.

The motion passed unanimously, 7-0.

Alternate Ms. Record took a voting seat.

- B. Petition of Salem Manufactured Homes, LLC, for Appeal of an Administrative Decision to require a variance for the expansion of a non-conforming structure in accordance with Section 10.321 of the Zoning Ordinance for property located at 210 Oriental Gardens. Said property is located on Assessor Map 215 Lot 9-21 and lies within the Gateway Corridor (G1) District. (LU-23-43)**

SPEAKING TO THE APPEAL

Attorney John Kuzinevich was present on behalf of the applicant to review the appeal and explain why the mobile home park should be allowed to replace an existing mobile home with a new one without requiring a variance. He reviewed the petition in detail (timestamp 4:13:00).

Vice-Chair Margeson said Section 10.321 of the ordinance was clear in stating that a lawful nonconforming structure may continue and be maintained or repaired but may not be extended, reconstructed, or enlarged unless such extension, reconstruction, or enlargement conforms to all the regulations of the district it's located in. She said the mobile home park is a lawful nonconforming use. She said the zoning itself has changed the Office/Research district, so therefore anything that happens within the mobile park needs to have a variance because it's nonconforming to the current zoning. She cited RSA 674.19, noting that it's in a manner that's substantially different from the use to which it was put before alteration. She said the case law cited was dependent on that part, but the part before it said 'it shall apply to any alteration of a building for use for a purpose', so that State law itself says that the zoning ordinance does apply to the alteration of a building, and that alteration is reflected in Section 10.321. Attorney Kuzinevich said it doesn't apply if it is not substantial. It was further discussed. Attorney Kuzinevich said the use of the mobile home park being there is grandfathered, which means mobile homes within the park can be considered conforming. He said mobile homes were components of the mobile park and not separate structures. Vice-Chair Margeson said there was no grandfathering in zoning ordinances.

Mr. Mattson asked if Attorney Kuzinevich meant that all the structures in the mobile home park could be changed without the need for a variance. Attorney Kuzinevich agreed. He said they focused on the park as a whole and whether or not the use of the park was expanded. Mr. Rossi said Attorney Kuzinevich referred to Section 10.816 for dimensional standards in manufacturing housing park areas. He asked if Attorney Kuzinevich was contending that if a structure would be replaced with a new structure that would not meet the standards, it wouldn't be a concern to the board. Attorney Kuzinevich disagreed and said it would be a valid concern and would require a

variance. He said the new structure was in full compliance with Section 10.826. He said separation between units would be a different issue and concern.

Ms. Geffert verified that Attorney Kuzinevich's argument was that the current Statute permits a modest change to a nonconforming use as long as it's not substantial without seeking a variance, and that the appellant was challenging the action of the Planning Director because he felt it was an error for him to conclude that the change of 148 feet was substantial. Attorney Kuzinevich agreed. Ms. Geffert said she thought the argument that not everything was permitted but some things were was a muddy argument. Mr. Mannle asked what the dimensions of the replacement mobile home were and was told that they were 20'Wx30'L and that the previous structure was 10'Wx50'L.

Chair Eldridge said she didn't understand why Section 10.321 applied to other structures in town but not to mobile homes. She said when a structure was close to a lot line, the issue had to be brought before the board for a variance. Attorney Kuzinevich said the mobile homes could be considered conforming because the mobile park existed. He said it was a grandfathered use of an overall structure, and if one couldn't have changes to the components of that use, one would be denying the fact that it exists as a mobile home park. It was further discussed (timestamp 5:39:55).

Planning Director Peter Britz was present to explain his decision. He said he denied the expansion of a mobile home that expanded by 148 feet because the zone is an Office/Research district and mobile homes are a prohibited use, so those nonconforming uses may not be enlarged or extended. He said the larger mobile home will create a larger footprint, reduce the open space, and increase the coverage of the mobile home part. He said his rationale was if the homes are expanded, the use is expanded. He said the proposed expansion if allowed might not create a noticeable change but there's no stopping the next one that could be bigger, and there's no notice that happens when there's an expansion in the park and that it could impact the residents. He said the size, look, feel, and operation of the mobile park will change if there are no restrictions or controls. He said that was a potential scenario that he considered in his decision. He said the amount of stormwater on the site will change due to more impervious surface. He said his approach was to require a variance request when a mobile home is expanded in this zone, and then a notice will be sent out and residents will be aware of it. He said he also discovered that the city did allow replacement of mobile homes in kind with a building permit in 2019, but in 2007 a variance was required for an in-kind replacement of mobile homes, and three variances for increase in size were required in 2004, 2008, and 2015. He said the record wasn't clear or consistent but he thought a conclusion of this issue would help.

Mr. Rheume asked if the property was zoned Garden Apartment Mobile Home, whether an increase in the size of any of the units would have to come before anyone. Mr. Britz said the city looked at it occasionally to make sure the coverage and the area didn't get exceeded, but he said the applicant was far from that. Mr. Rheume said every other mobile home park that was zoned Garden Apartment Mobile Home and complied with dimensional standards and Section 10.816 would not have to come before the city for one replacement. Mr. Britz agreed. Mr. Rheume said the argument was that because the use is nonconforming, that now applies to the structure. He asked why the ordinance would separate those two out. Mr. Britz said the use is actually changing because the mobile home's size is changing. He said it's a component of a use and if the mobile homes are there and get bigger, the use changes. He said if a one-bedroom becomes two bedrooms the use is

different. Mr. Rheume asked if the city would have control over it if it was denoted as Garden Apartment Mobile Home. Mr. Britz said the lot would be the issue but the use wouldn't change. Ms. Geffert asked if Mr. Britz was saying that it's a nonconforming use, which is the whole park, and any change to a dwelling within that park is substantial. Mr. Britz said any change that's involved in an expansion is substantial but he didn't know if a shape of square footage change would require a variance. It was further discussed.

Attorney Kuzinevich said a single unit was before the Planning Director and the board. He said Mr. Britz admitted that his thinking was all about what may happen with other expansions. Attorney Kuzinevich said the mobile home had two bedrooms and would stay two bedrooms and there was no substantial change. He asked what would happen if a pair of steps was added, if the Planning Department's position was that any change was substantial.

There was no public hearing.

DISCUSSION OF THE BOARD

Mr. Rossi said the Planning Department was looking for some consistent rubric with which to make those sorts of judgments and that it seemed straightforward to him as long as a new structure within the mobile home park, which was a nonconforming use in the zone, complied with Section 10.186. He said there should be no need for further action from the board. Mr. Rheume agreed but thought the board was getting mixed up with the concepts of uses and structures which he further explained. He said there was a fairness issue and thought that anyone who now has a nonconforming use in the city will have all these additional concerns about their structure imposed upon them. He said there were hundreds of uses not allowed by the ordinance that were approved by the board or were grandfathered in because they were an existing use that may remain in place. He said the board could run into legal issues if they went down that path. He said they didn't have that control over Garden Apartment Mobile Home properties and asked why the appellant's property was being unfairly penalized when every other similar property wasn't subject to it within the Garden Apartment Mobile Home zoning. Mr. Mattson said a nonconforming structure is something within the setback, and because it was a mobile home park, the setback issue was different.

Vice-Chair Margeson said almost every one of the applications that the board got triggered Section 10.321. She said she recognized that the manufacturing housing park was situated in the Office/Research district and was nonconforming, and anything that happened to it had to come before the board for a variance because it was not in a district that permitted it. Mr. Rheume said it would create a lot more work for the board and impose on homeowners who are in the area where the zoning doesn't match what they're doing. He said someone would take it to court, and he didn't see how that unfairness would survive through a court challenge. He said the board had to separate those two concepts because by mashing them together, it was creating an unfairness to property owners in the city. When the board said that Section 10.321 was being invoked, it was always a dimensional issue associated with expanding a building in a nonconforming way, and he thought that should be separated from the use requirements of the ordinance because they were two separate concepts. Vice-Chair Margeson said the board had applications for the Waterfront district, where there are single homes and they're not supported to be expanded unless they become a waterfront

business. She said she saw this application as being similar and didn't see the use and dimensional requirements differently based on case law. It was further discussed.

DECISION OF THE BOARD

*Mr. Rossi moved to **grant** the appeal, seconded by Ms. Record.*

Mr. Rossi said the basis of his motion was rooted in practicality. He said this particular mobile home park has a grandfathered use for being a mobile home park. He said within the park there are mobile homes, and as long as any replacement homes comply with Section 10.816, they're complying with the same requirements that other mobile homes would need to comply with in any other mobile park. He said he thought the appellant was correct.

*The motion **passed** by a vote of 5-2, with Chair Eldridge and Vice-Chair Margeson voting in opposition.*

THE BOARD VOTED TO POSTPONE CONSIDERATION OF THE FOLLOWING ITEMS TO THE MAY 23, 2023 BOARD OF ADJUSTMENT MEETING.

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

*Vice-Chair Margeson moved to **postpone** the petition to the May 23 meeting, seconded by Mr. Mannle. The motion **passed** unanimously.*

- B.** The request of **Shawn Bardong and Michiyo Bardong (Owner)**, for property located at **39 Dearborn Street** whereas relief is needed to demolish the existing shed and construct a two-story addition which requires the following: 1) Variance from Section 10.521 to allow a) 5 foot front yard where 15 feet is required; and b) 2 foot right side yard where 10 feet is required. 2) Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed, or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 140 Lot 3 and lies within the General Residence A (GRA) and Historic District. (LU-23-5)

*Mr. Mannle moved to **postpone** the petition to the May 23 meeting, seconded by Ms. Geffert. The motion **passed** unanimously.*

- C.** The request of **Thomas Rooney (Owner)**, for property located at **29 Spring Street** whereas relief is needed to install two mechanical units in the rear of the primary

structure which require the following 1) Variance from Section 10.515.14 to allow a) 7-foot side yard where 10 feet is required; and b) 4 foot rear yard where 10 is required. Said property is located on Assessor Map 130 Lot 21 and lies within the General Residence A (GRA) District. (LU-23-55)

*Mr. Mannle moved to **postpone** the petition to the May 23 meeting, seconded by Vice-Chair Margeson. The motion **passed** unanimously.*

- D.** The request of **Scott Day and Marta Day (Owners)**, for property located at **18 Walden Street** whereas relief is needed to install a mechanical unit which requires a variance from Section 10.515.14 to allow a) 4 foot side yard where 10 feet is required; and b) 2 foot front yard where 10 feet is required. Said property is located on Assessor Map 101 Lot 20 and lies within the General Residence B (GRB) and Historic District. (LU-23-52)

*Mr. Mannle moved to **postpone** the petition to the May 23 meeting, seconded by Mr. Mattson. The motion **passed** unanimously.*

- E.** The request of **The Islamic Society of the Seacoast Area ASSA (Owner)**, and **Chinburg Development, LLC (Applicant)**, for property located at **686 Maplewood Avenue** whereas relief is needed to construct four (4) duplexes and one (1) single living unit to create a total of nine (9) living units which requires the following: 1) Variance from Section 10.440, Use # 1.30 to permit four (4) two-family unit structures where they are not permitted, 2) Variance from Section 10.513 to permit five (5) free standing buildings with dwellings where not more than one is permitted, 3) Variance from Section 10.520 to allow a) 6,975 square feet of lot area per dwelling unit where 15,000 square feet is required; and b) 47 feet of frontage where 100 feet is required. Said property is located on Assessor Map 220 Lot 90 and lies within the Single Residence B (SRB) District and the Highway Noise Overlay District. (LU-23-57)

Mr. Mattson recused himself from the vote.

*Mr. Mannle moved to **postpone** the petition to the May 23 meeting, seconded by Vice-Chair Margeson. The motion **passed** unanimously.*

- F.** The request of **Carl Krukoff (Owner)**, for property located at **3360 Lafayette Road** whereas relief is needed to convert a two bay garage into a third living unit which requires the following: 1) Variance from 10.521 to allow 8,002.5 square feet per dwelling unit where 15,000 square feet is required, 2) Variance from 10.331 to allow a non-conforming use to be extended or enlarged without conforming to the requirements of the Zoning Ordinance, 3) Variance from section 10.440 Use #1.51 to allow three (3) dwelling units where one (1) is permitted. Said property is located on Assessor Map 297 Lot 12 and lies within the Single Residence B (SRB) District. (LU-23-59)

*Vice-Chair Margeson moved to **postpone** the petition to the May 23 meeting, seconded by Mr. Mannle. The motion **passed** unanimously.*

- G.** The request of **John Heath** and **Michael Meserve (Owner)**, for property located at **955 Woodbury Avenue** whereas relief is needed to construct a shed which requires a Variance from Section 10.571 to allow an accessory structure to be located closer to a street than the principal building. Said property is located on Assessor Map 219 Lot 33 and lies within the Single Residence B (SRB) District. (LU-23-56)

*Mr. Mannle moved to **postpone** the petition to the May 23 meeting, seconded by Mr. Mattson. The motion **passed** unanimously.*

- H.** The request of **Shantar Zuidema** and **Abby Zuidema (Owners)**, for property located at **126 Burkitt Street** whereas relief is needed to demolish the existing 10 foot by 16 foot deck and replace with a 6 foot by 4 foot enclosed porch which requires the following: 1) Variance from Section 10.521 to allow a 6 foot right side yard where 10 feet is required, and 2) Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 159 Lot 28 and lies within the General Residence A (GRA) District. (LU-23-61)

*Mr. Mannle moved to **postpone** the petition to the May 23 meeting, seconded by Mr. Rossi. The motion **passed** unanimously.*

IV. OTHER BUSINESS

There was no other business.

V. ADJOURNMENT

The meeting was adjourned at 12:08 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary