

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

7:00 P.M.

April 16, 2024

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

MEMBERS EXCUSED: None.

ALSO PRESENT: Stefanie Casella, Planning Department

Chair Eldridge called the meeting to order at 7:00 p.m. She noted that the 865 Islington Street petition was withdrawn by the applicant.

I. APPROVAL OF MINUTES

A. Approval of the March 19, 2024 and the March 26, 2024 minutes.

March 19 Minutes

Mr. Nies requested the following changes: Regarding the approval of the February 21 minutes (page 1), he said that he and Chair Eldridge abstained from the vote. On page 3, second paragraph, he said the 20.4 percent was rounded down to 20 percent and not 2 percent. Mr. Rheaume referred to the last paragraph on page 4 and said the word “terns” should be “terms”.

*Mr. Rheaume moved to **approve** the March 19 minutes as **amended**, seconded by Ms. Record. The motion **passed** unanimously, 7-0.*

March 26 Minutes

*Mr. Rossi moved to **approve** the March 26 minutes as **presented**, seconded by Mr. Mannle. Ms. Geffert abstained. The motion **passed** unanimously, 7-0.*

II. OLD BUSINESS

A. 550 Sagamore Avenue - Rehearing Request (LU-24-9)

Mr. Rossi recused himself from the rehearing request and Ms. Record took a voting seat.

DISCUSSION OF THE BOARD

[Video Timestamp 6:18] Mr. Nies said there were two votes taken at the previous meeting, one to approve the variances and one to deny the variances and that both votes failed. He said it seemed to leave the applicant hanging and thought it conflicted with some of the guidance that the NH manual gave. Vice-Chair Margeson said all zoning boards of adjustment in New Hampshire except for Portsmouth had five voting members instead of seven, so aspects of the Statute and the NH Planning and Land Use regulations and guidance were not applicable to the Board. Mr. Nies said he would feel more comfortable with a vote that was a firm decision. Mr. Rheume said at that particular previous meeting it was unlikely to get a motion that would garner four votes. He said the reason why the approval wasn't granted was not explained in detail, but the key factor was to make sure there was sufficient information for the applicant to understand why the approval wasn't granted. He explained the history behind it. Vice-Chair Margeson said she chaired that meeting and agreed that the minutes did not reflect the robust discussion the Board had but thought there was enough in the record to justify the decision. Mr. Nies said his concern with the voting issue is that the Board did not stop with the failed motion to approve, and if they had, then the applicant would have been denied the variance. He said the confusion was that a second vote was taken, which also failed. Vice-Chair Margeson said the subsequent motion to deny failed to get four votes and that she did not solicit comments because she felt that there was enough in the record to support it. Mr. Mattson said he accepted that a failure to pass is a denial based on the Board's rules but that he could get on board with rehearing the petition because of both votes tying. It was further discussed.

DECISION OF THE BOARD

*Mr. Nies moved to **grant** the rehearing request. Mr. Mattson seconded.*

[Timestamp 17:39] Mr. Nies said the reason for the rehearing was that in effect there was no decision. He said the argument that the Board followed their rules is not accurate because they should have stopped with the denied variance and not voted a second time. If the motion to approve the variance failed, then in accordance with their rules, that stood as a denial, so therefore there wasn't a need for another follow-up motion. He said because the second motion failed as well, he thought it clouds the issue because now there is a motion to pass that failed and a motion to deny that failed, and it raised the question of what the Board's decision really was because neither motion passed. He said that was why he would argue for a rehearing solely on that point and thought it was a process issue. Mr. Mattson said his reasoning for seconding the motion was subtly different in that he accepted that the Board's rules mean that the applicant was denied, but due to the infrequent nature of an affirmative and a negative failing to pass, he could see the usefulness of a clarifying vote of more affirmatively passing or being denied.

Vice-Chair Margeson said she would not support the vote. She thought the rules said if the motion to grant a variance or a special exception resulted in a tie vote, the resulting decision is denial unless a subsequent motion is made that receives at least four affirmative votes. Mr. Mannle said if the motions were reversed and the motion for approval came first and ended up in a 3-3 tie, the Board would entertain a motion for denial and that both motions would end up not getting four votes each. He said the majority of any process was needed to move forward. Mr. Nies said if it had stopped at the first motion, it would have been consistent with the rules and clear that it was denied. He said

the second vote confused the result. Mr. Rheume said the NH Office of Planning and Development was a recommendation and not a law, but it did say that if a motion to grant failed by a two in favor three opposed margin in the case of five members, that did not mean that the variance was automatically disapproved. In such case, he said one of the members who disapproved the motion should propose their own new motion to disapprove the application and state the reason for denial. He said he thought the Board was consistent with that and further explained why. [Timestamp 23:47]. He said the Board could consider in the future whether they should make an effort to postpone until they had a full board. He said he would support the motion because Mr. Nies brought up the issue and he did not think the Board's discussion was fully captured in the minutes or findings of fact. He said the Board should have been more diligent to state that to the applicant, and he thought that the combination of those two deficiencies in the Board's review of the application could rise to the level of saying that a rehearing was warranted. Vice-Chair Margeson asked if the certified record was the transcript of the hearing or the meeting minutes. Ms. Casella said any written record on file was sent and a transcript could be requested. Vice-Chair Margeson said she would not change her mind, especially given that a certified record of the transcript could be provided.

*The motion to grant the request for rehearing **failed** by a vote of 3-4, with Ms. Record, Vice-Chair Margeson, Mr. Mannle, and Chair Eldridge voting in opposition to the motion.*

*Vice-Chair Margeson moved to **deny** the request for rehearing, seconded by Mr. Nies. The motion to deny **passed** by a vote of 4-3, with Mr. Rheume, Mr. Nies, and Mr. Mattson voting in opposition to the motion.*

B. REQUEST TO POSTPONE The request of **Kerrin J Parker Revocable Trust of 2012 (Owner)**, for property located at **86 Haven Road** whereas relief is needed to construct an addition to the existing structure which requires the following: 1) Variance from Section 10.521 to a) allow a 9 foot front yard where 10 feet is required by front yard averaging; b) to allow a building coverage of 29% where 20% is allowed; and 2) Variance from Section 10.321 to allow of 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 206 Lot 27 and lies within the Single Residence B (SRB) District. **REQUEST TO POSTPONE (LU-23-192)**

Mr. Rossi returned to his voting seat and Ms. Record returned to alternate status.

DECISION OF THE BOARD

*Mr. Mannle moved to **postpone** the petition to the May 21 meeting, seconded by Mr. Mattson.*

Mr. Mannle said the Board routinely granted requests to postpone. Mr. Mattson said the applicant was working to make it a better application. Mr. Rheume said the applicant was looking for a one-month continuance to the May meeting, so the motion to postpone it to May 21 was appropriate, also noting that the Board allowed the postponement at the previous meeting.

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

C. REQUEST TO POSTPONE The request of **Atlas Commons LLC (Owner)**, for property located at **581 Lafayette Road** whereas relief is needed for after-the-fact installation of an awning sign which requires the following: 1) Variance from Section 10.1251.20 to allow a 32 square foot awning sign whereas 20 square feet is allowed. Said property is located on Assessor Map 229 Lot 8B and lies within the Gateway Corridor (G1) District. (LU-24-1) **REQUEST TO POSTPONE**

DECISION OF THE BOARD

Mr. Rheume said the Board only had information from the Staff Memo and nothing from the applicant, and he asked what additional information the City Staff looked for. Ms. Casella said the staff requested that the applicant provide the existing signage square footage on the site.

*Mr. Rossi moved to **grant** the request to postpone, seconded by Mr. Mannle.*

Mr. Rossi said if the applicant was not ready to proceed before the Board, it didn't do the Board any good to force them to come and make a presentation. He said there was really no reason not to grant the request. Ms. Casella said the applicant was fine with a one-month postponement because they had to re-notice due to an error. Mr. Nies said it was the second postponement for a property that was out of compliance and that he hoped the applicant would be ready the next time. Mr. Rheume said the Board should be given the full application or whatever condition it was in by the City Staff the next time and review it based on the merits at that time.

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

III. NEW BUSINESS

A. The request of **Chinburg Development LLC (Owner)**, for property located at **6 Boyd Road** whereas relief is needed to demolish the existing structure and construct a new primary dwelling which requires the following: 1) Variance from Section 10.521 to allow a) 6,703 square feet of lot area where 7,500 square feet are required; b) 6,703 square feet of lot area per dwelling unit where 7,500 square feet are required; c) 85 feet of frontage where 100 feet are required; and d) 68 feet of lot depth where 70 feet are required. Said property is located on Assessor Map 175 Lot 13 and lies within the General Residence A (GRA) District. (LU-24-23)

SPEAKING TO THE PETITION

[Timestamp 40:40] Attorney Monica Kaiser was present on behalf of the applicant. She reviewed the petition, noting that the proposed new home itself required no variances except for being proposed on a lot that did not meet the criteria for the existing house. She reviewed the criteria.

[Timestamp 49:28] Vice-Chair Margeson said the Board approved the variance two years before for the eight-condo units, and at that point, 6 Boyd Road was considered for redevelopment. She asked why that wasn't included in the original variance application. Attorney Kaiser said the ownership

changed. Mr. Rheume said it wasn't clear to him because there were four properties in the defined area that included the next petition to be heard, and the applicant's client owned at least two of those four properties. He asked if they owned the lot being developed with the condo complex. Attorney Kaiser said she believed they did. Mr. Rheume said the lot depth is described as 68 feet but that he did not see any drawing dimension in the Board's packet, and he asked how that dimension was calculated. Attorney Kaiser said she thought it was the average of the two side lot lines. Mr. Rheume said when he did it, he came up with a much larger number than 68. Attorney Kaiser said the measurements might have to be taken at certain intervals along the lot or maybe a mistake was made. Mr. Rheume said that in terms of depth, the applicant might be closer to the requirement. He said the applicant was running about 700 square feet short, so if the client owned both properties, he wondered why there was no way to resolve that lot area issue. He said it would have been ideal at the time that the condo complex was proposed if that action was taken to make the lot more conforming, but the client owned all the property lines other than the one against Boyd Road and the two hotels. He said he wanted to understand the client's perspective on why they weren't trying to make this more conforming and require less relief from the Board. Attorney Kaiser said the existing home violated the rear setback and there was a proposal to construct a new home that conforms and pulls itself further away from that lot line. She said there was no difference between a single-family home there now and a new one, and what was proposed would be an improvement on the rear setback. Ms. Casella said the lot depth requirement is the average between the front and the rear, and that she discovered that the property records had not been updated to reflect the new lot lines. She said if the applicant could not support a request they made, the Board could consider removing that portion of the request. It was further discussed. Ms. Casella said her concern was that the Board would grant relief for something that didn't exist. Mr. Rossi said the Board wasn't sure of the lot's depth, so they didn't have the information they needed. Attorney Kaiser said there must be a mistake and offered to withdraw the request for the lot's depth. Mr. Rossi said he thought the lot's shape was a distorted trapezoid and the left lot line was at an angle that would measure much longer than the lot's natural depth, so he suspected that the 68 feet was a straight shot back from the front line to the parallel rear lot line. He said he was reluctant not to consider the 68 feet just because the Board wasn't sure how it was calculated and thought the 68 feet reflected the current condition. Mr. Rheume asked Attorney Kaiser if she was confident that 6,703 square feet was the correct lot area. Attorney Kaiser agreed.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING IN OPPOSITION TO THE PETITION

Chris Randall of 80 Diamond Drive said when his grandparents purchased 212 Woodbury Avenue in 1923, it was an intergenerational home. He said his uncle owned the bungalow at 216 Woodbury Avenue and his grandfather sold the ranch at 214 Woodbury Avenue to his nephew. He said he had a hard time understanding how Portsmouth had a tremendous housing shortage and the fact that those three homes were considered unsubstantial. He said there was no hardship.

Phyllis Randell of 99 Boyd Road said when the project for the corner of Woodbury Avenue and Boyd Road was put forward, part of the agreement was that the homes on Boyd Avenue and adjacent homes on Woodbury Avenue would be renovated. She said the neighborhood had to endure the neglect of the house on Woodbury Avenue for years and now the developers were about to renege on the original plan. She said the new owner should be held to the original agreement and that there was no reason for the homes to be demolished except for corporate greed.

Martin Ryan of 221 Woodbury Avenue gave the Board members a handout with photos of the site and said the neighborhood had a wonderful history. As an abutter, he said he was against any further intensification of construction activities at the Chinburg construction site. He said that, after living with an abandoned house for over two decades, he wanted a win for the neighborhood so he had agreed to the previous developer's proposal. He said the neighborhood lost a one-of-a-kind Victorian and now the developer was proposing to remove a classic bungalow house and a house that had been part of the neighborhood's fabric for years. He said the contract and developer had not been good neighbors and asked that the Board deny any further demolitions.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mark Ayotte of 9 Garden Street said the former owner Mr. Bailey was given a variance for the four pieces of property and wondered if that variance governed what happened on those four lots now. He said it wasn't a positive process for the neighbors for applicants to get approvals and then go back to the Board and change them whenever they wanted to.

Sharon Kempy of 55 Boyd Road said there was nothing wrong with the homes and that she didn't understand how construction companies could change the rules in place.

Karen Foye of 79 Boyd Road said she was opposed to tearing down the homes because the agreement was to renovate them. She said Portsmouth had a housing crisis and many homes were being torn down and million-dollar ones were taking their place.

Attorney Kaiser said the Board had to focus on the variance being requested. She said the site plan indicated that one variance was granted to allow eight dwellings on the adjacent property, and she did not believe relief was granted for 6 Boyd Avenue or for the other Woodbury Avenue property petition. She said as the subsequent purchasers of the development, Chinburg had to proceed in accordance with the submitted plans for that adjacent property and that there was no condition on the relief granted on that property that said what had to be done with the properties on adjacent sides. She said Chinburg had done a lot of work restoring mill buildings and she didn't think it was fair to call out the demolition of other structures as if it was something they did all the time. She said every property owner had the right to build up his property or tear his house down, and she noted that every one of the properties purchased was sold by a long-term community member.

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

DISCUSSION OF THE BOARD

[Timestamp 1:31:22] Mr. Rossi said he was one of the people who voted against the development of the commercial property as it is today but that it was irrelevant to the current discussion except that he wanted to acknowledge the concerns of the neighbors, who he thought all raised interesting points. He said it was worth going back to the variance request for the commercial property and seeing what was promised because when the Board approved variances, they approved them as presented and advertised. He said it was an interesting lesson for everyone with regard to the two properties being presented for variances. He said the written application indicated that there would be improvements to the existing homes/lots, which was lawyer's speak for being able to do whatever they wanted, so he did not think that there was anything in the original application for the variance that said the purchaser promised they would keep the homes as existing on the lot. He said the purchaser may have made other promises to individuals but that it wasn't what was presented to the Board and was not approved. He said one of the rationales for the commercial property was to present the opportunity for moderately priced homes in Portsmouth, which obviously had not happened, but that had no bearing on the current application. He said maybe it was a lesson learned for the Board because the members were often told that if they approved variances that pertained to the density of development, it would increase the housing stock in certain locations and bring prices down in Portsmouth, but he thought it did not seem to work that way. He said the Board did not change the lot lines or how the lots were allocated in the original application, and the only variance that was presented and approved was regarding the density of development and how many dwellings could be put on a single lot. He said the Board focused on the specific variance being requested and in this case, it was simply that they would allow the same use of the property, which was a single-family residence, and that it would be on an existing lot that was dimensionally nonconforming. He said it was not in the Board's jurisdiction to make a judgment on the developer's competence and how they were managing the site. He said the proposed variance was to simply allow the continuation of that use with a new building that performs the same function and that he was in favor of granting the variance.

Mr. Nies verified that the meeting was held in April 2022 and was a request from Tuck. He noted that the written request granting the variance would not diminish surrounding property values, and also indicated that the closest abutters to the eight units were three remaining single family units to be purchased by Tuck and renovated. He said it went on to say that the three existing homes to remain were intended to be rehabilitated and their adjoining yards cleaned up. He noted that it said homes and not properties, which he interpreted as support for the idea that Tuck said they were not going to remove the homes. He asked what it meant when the Board said certain representations made at the meeting are considered to be conditions of granting the variance. Vice-Chair Margeson explained that in April 2022 the homes were identified by their lot numbers, and anything that the applicant says is considered conditions upon which the variance is granted as presented and advertised. She said they did not place stipulations in their variances and everything said in the presentation was considered a condition. Mr. Rossi said the sentence read that eight reasonably-priced homes would be provided and include vegetative screenings and significant improvements of the three existing homes/lots, which he read as the lot would be improved by demolishing and rebuilding a house, but he noted that it pertained to a variance made two years ago and that he did not know to what extent the Board could hold the other two properties. He said it wasn't really an enforceable item to them because there were two different properties that could be owned by two different people, even though they were not, and he didn't see how it was in the Board's jurisdiction

to say that because an adjacent property had certain representations, those representations would be binding to the owners of the current properties under consideration. Vice-Chair Margeson said it was clear when the application came before the Board in 2022 what the applicant would do with the other three lots and that they would be improved. She said it wasn't part of the variance criteria because they were separate lots. She said her concern was with common ownership, and she did not agree with the variance the Board approved. She said the application before the Board was a completely different one and her concern was that the lots were all going to be merged into one lot or one homeowners association. Mr. Mannle said he voted for the development because he assumed that what the applicant said about the two houses in question being renovated or improved would be true. He said he disagreed with Attorney Kaiser's comment that everyone would sell their lots to developers because he didn't see the market being high for a single-family house that abuts an 8-unit construction site, which would decrease the value of that home and would have been a good reason to deny that variance, but it didn't happen. He said the sole owner of the entire block had made no effort to make the specific lot more conforming, and he did not see the hardship.

Chair Eldridge said the Board always approved that type of request and that the house would not take up more space than the existing house took up and would have the same lack of depth. She said the ask was small and separate from the 8-unit request. Mr. Rheume said the Board had to be careful in saying that they always approved that type of situation because each application was unique. He said the lot was not meeting the zoning ordinance requirements, and he had concerns about a recent and still viable opportunity for the property to be brought into a lot more compliance in terms of the overall square footage. He said the applicant, through the previous variance on the adjoining lot, got their cake, and requesting the additional variance on this lot that was not presented as part of the original package would have them eat their cake too. He said he was concerned about the condos being very close to the lot and impinging upon it. He noted that there used to be more open space around the lot, which made its substandard condition more acceptable, and he felt that the applicant had an opportunity to get the property cleaner and not have as many units and could have made it more of a conforming use with just a frontage issue. He said he didn't think it met the hardship criteria or the overall spirit of the ordinance and couldn't see how the Board could legitimately grant the variances. He noted that Chinburg was a conscientious developer and didn't think the range was beyond their ability to renovate. Mr. Mattson said the applicant could ask to change the lot lines but in this case the owner happened to own the adjacent lot, which isn't always the situation. He thought the Board should not consider the neighboring lots and treat the application as a standalone one because a lot of what was being discussed was not relevant. Chair Eldridge said she didn't see how it was a standalone application because there was a piece of land that was undersized and the applicant wanted to build a house on their land that is limited.

DECISION OF THE BOARD

*Mr. Rossi moved to **grant** the variance for the application as presented and advertised, seconded by Vice-Chair Margeson.*

[Timestamp 1:53:10] Mr. Rossi said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said he did not see any impact on the public interest with regard to safety or even creating a more overcrowded condition within the

neighborhood. He did not think there was anything in the petition that would alter the general character of the area and he believed it satisfied Sections 10.233.21 and .22. He said granting the variance would do substantial justice, noting that even though there was a feeling among some of the abutters that they were losing a piece of history, it really was not what was being considered unless it was part of the Historic District. He said substantial justice in this case meant that there would be a tangible loss to the public that would outweigh the benefit to the owner, and he could not see nor did he hear in the comments any substantial loss to the public that would outweigh the rights of the owner to build on the property as they saw fit. He said granting the variance would not diminish the values of surrounding properties because most of the surrounding properties were the condo units, which were the immediate abutters, and he saws no impact on those. He said they were all owned by the same person, and in this case it was relevant because he did not believe that the owner would change the lot in a manner that would reduce the value of his other holdings in the neighborhood. He said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. He said a hardship was defined in a particular way for the purpose of land use determinations, and that it was whether something about the property made it hard to use in full compliance with the zoning ordinance. He said the property's hardship is its preexisting lack of conformity with the variances being requested, like the depth, the frontage, and the total lot area. He said those things could not be changed, and to continue the nonconforming use, one would really have to consider those things to be a hardship for the property. He said he believed that Section 10.233.25 of the ordinance was satisfied by the existing nature of the lot.

Vice-Chair Margeson concurred. She said the request was for the frontage and the lot depth, and the lot depth was 68 feet and probably didn't even require the 68 feet, and the street frontage was 85 feet. She said there was nothing the owner of the lot could have done to increase the street frontage as a result of the condo development next to it, which led to the hardship, and that the hardship was that the previous variance granted was for one single lot that precluded actually increasing the street frontage on the lot, so therefore the interpretation of the enforcement of the provisions for the street frontage did not make sense for this lot. Mr. Rossi noted that the applicant requested relief from Section 10.311, which he thought was not appropriate because the Board would be saying that the lot did not require a variance in order to be developed. He said that didn't make sense because they were granting the variance that is required. Vice-Chair Margeson said that related to the minimum lot area and the street frontage. She said another condition of the lot was that it was undersized. Mr. Rossi said the applicant was getting the variance on Section 10.521. Ms. Casella said she addressed that issue in her memo and that the request from the applicant was for Section 10.311. She said she didn't believe that was applicable because it was the provision that said variances are required if the other dimensions can't be met. She said the applicant was requesting those variances, so that eliminated that need. She said she spoke to the applicant and that it was removed and not put into the notice. Mr. Rossi said he was just acknowledging that he believed the Board was correct.

Mr. Rheume said he would not support the motion because he was concerned that the argument for hardship was that it was something that existed, so therefore it constituted a hardship. He said that wasn't how the Board's criteria worked. He said the Board was saying that it couldn't be changed when it was possible to get it changed. He said the main thing the Board was looking at was the proper amount of spacing between residential properties, and by building right up against the property line, a situation was created for relief for the property for a new use was not appropriate.

*The motion **passed** by a vote of 4-3, with Mr. Rheaume, Mr. Nies, and Mr. Mannle voting in opposition.*

Note: At this point in the meeting, Ms. Geffert left the meeting.

- B.** The request of **Chinburg Development LLC (Owner)**, for property located at **216 Woodbury Avenue** whereas relief is needed to demolish the existing structure and construct a new primary dwelling which requires the following: 1) Variance from Section 10.521 to allow 66 feet of frontage where 100 feet are required. Said property is located on Assessor Map 175 Lot 3 and lies within the General Residence A (GRA) District. (LU-24-24)

SPEAKING TO THE PETITION

[Timestamp 2:09:55] Attorney Monica Kaiser was present on behalf of the applicant. She reviewed the petition, noting that the lot had 66 feet of frontage that had not been changed by the lot line adjustment. She said the new owner wanted to build a home that would comply with all dimensional requirements except for the frontage. She reviewed the criteria in detail.

The Board had no questions. 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 variance for the application as presented and advertised, seconded by Mr. Mattson.*

[Timestamp 2:16:39] Mr. Rossi said granting the variance would not be contrary to the public interest or to the spirit of the ordinance. He said the lot is in a zone where the use is the correct one and the proposed single-family residence would replace the existing single-family residence, so there would be no change in serving the public interest with the new structure v. the one that was currently there. He said substantial justice would be done because the lot would be used in the exact manner in which the variance is being proposed and will continue to be proposed, so there would be no loss to the public by continuing that use. He said it would not diminish the values of surrounding properties because the applicant's property was abutted on one side by a hotel and on the other side by the same owner's property, so it was illogical to assume that the proposed redevelopment of the lot would diminish the value of either the hotel or the property owned by the same person on the other side of the lot. Relating to hardship, he said the special condition of the property is that it is bounded on two sides by developed lots and the side lot lines cannot be moved without bringing some other property equally out of conformance, therefore the 68-ft front lot line is unalterable in any way that would bring the lot in conformance for this purpose. He said the hardship was the nature of the property and the lot that could not be altered to come into full compliance with the

ordinance for the already existing use, so it was unreasonable to apply the ordinance's strict requirements for continuing this use.

Mr. Mattson concurred. He said regarding the hardship, the general public purposes of the ordinance's provision for the specific application regarding the street frontage, and as with the street frontage in the other yards' dimensional requirements, was to preserve light, air, and privacy. He said in this case, even with the inadequate street frontage, the dwelling would still be entirely within the setbacks and meet that purpose, so there was no fair and substantial relationship for this situation. Mr. Rheume said he would support the motion. He said the lot was reconfigured by the applicant's predecessor to be fully compliant in every way other than the street frontage. He said one of the other aspects of the hardship was that it was bordered by a large open space associated with the hotel use on the next property over, so in terms of the true intent of public concerns with the ordinance as to the feel of overcrowding, that helped provide relief on that side.

The motion passed unanimously, 7-0.

- C. The request of **Cyrus Beer and Erica Gardner Beer (Owners)**, for property located at **64 Mount Vernon Street** to amend the Variances granted on March 19, 2024 for the demolition of the existing detached shed and construction of a new shed to include the following: 1) Variance from section 10.521 to allow a 2 foot side yard where 10 feet is required. Said property is located on Assessor Map 111 Lot 30 and lies within the General Residence B (GRB) and Historic Districts. (LU-24-20)

SPEAKING TO THE PETITION

[Timestamp 2:22:20] The applicant Cyrus Beer said he made a mistake by missing the point in the corner that was less than five feet when he asked for a 5-ft side setback. He said he thought it was a side setback but that it actually wrapped around the corner, so he was requesting a change of a 2-ft setback. He said it would still be five feet along the south wall but would allow that corner to be built. He said the location or size of the shed would not change, and he reviewed the criteria. The Board had no questions. Chair Eldridge opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

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

[Timestamp 2:27:10] Vice-Chair Margeson referred to Sections 10.233.21 and .22 and said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. She said the Board often looked at side yard setbacks to preserve light, air, and space between properties, but in this case it was only for a shed in the back of the property and not for any

kind of bigger structure, so she found that the spirit and public interest of the ordinance were met. Referring to Section 10.233.23, she said substantial justice would be done because the public would not lose by the granting of the variance for a minimal setback for a shed. Referring to Section 10.233.24, she said granting the variance would not diminish the values of surrounding properties. She said the Board previously granted it for five feet and it was just a loss of another three feet, and the surrounding properties would not be harmed but in fact would gain by improvements made to the applicant's property. Referring to Section 10.233.25, she said literal enforcement of the provision of the ordinance would result in unnecessary hardship. She said the property has special conditions that distinguish it from other properties 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 this property, and the proposed use is reasonable. She said the shed was an accessory structure to a house in a residential area and the property did have special conditions because the property's topography began to trend upward as one got further away from the side yard lot line, making it difficult to put the shed further in from the lot line. She said it was just a certain corner of the shed that meets a jog on the property line and was a de minimis request. Mr. Mannle concurred and had nothing to add.

Mr. Nies asked if the ownership changed, would it mean that the new owner could enlarge the shed up to two feet from the property line without coming before the Board. Ms. Casella said if a new owner said the variance was granted for two feet, they would have to prove that they could meet the two feet. She said that wasn't the case with this application and the five feet still stands on the back and the other side yard. Mr. Rheume said that was his concern as well, and he recommended a stipulation saying that it is a 2-ft dimension from the jog in the property line and not the overall side yard. Vice-Chair Margeson and Mr. Mannle accepted the stipulation.

The **amended** motion was:

*Vice-Chair Margeson moved to **grant** the variance for the petition as presented and advertised, with the following **condition**:*

- 1. The 2-ft side yard setback only pertains to the area of the jog.*

*Mr. Mannle seconded the motion. The motion **passed** unanimously, 7-0.*

- D.** The request of **O'Brien Family Revocable Trust of 2018 (Owner)**, for property located at **3 Moebus Terrace** whereas relief is needed demolish the existing structure and construct a new primary structure which requires the following: 1) Variance from Section 10.521 to allow a) 10,823 square feet of lot area where 15,000 square feet is required; and b) 10,823 square feet of lot area per dwelling unit where 15,000 square feet is required. Said property is located on Assessor Map 207 Lot 21 and lies within the Single Residence B (SRB) District. (LU-24-40)

SPEAKING TO THE PETITION

[Timestamp 2:36:30] Attorney John Bosen was present on behalf of the applicant, with the owners, architect Carla Goodnight, and engineer Eric Weinberg. Attorney Bosen reviewed the application,

noting that the existing home was old and was served by a private septic system near Little Harbor. He said the plan was to replace the home with a single-family one that met all the dimensional requirements except for the pre-existing lot area deficiency. He reviewed the criteria in detail.

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

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING IN OPOSITION TO THE PETITION

Betsy Tabor of 55 Pleasant Point Drive said she and her husband loved being able to look out and see in all directions. She said the 1958 planners of the neighborhood built the houses close together but adhered to a vision of creating view corridors between the houses, which would not be possible if she or the next-door neighbors built two-story additions out to their lot lines. She said the proposed house footprint was 43 percent greater than the original on an already nonconforming lot, and the new plans were for 67-1/2 feet of length because the garage was going from underneath the house to the side. She said increasing the footprint from 1400 sf to 2,000 sf and two stories high would give her a walled-in effect and take away her view. She said she could not understand the need for such a larger house and that losing her view corridor was a loss for her.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Bosen submitted photos to the Board showing the view from the front and back of Ms. Tabor's home, a view that had a lot of vegetation and was covered by an 8-ft fence. He asked if that particular view was one to enjoy looking at the water. He said there were no view easement or view corridors on record at the Register of Deeds and that the Tabors' objection didn't have anything to do with the variances requested. He said the zoning relief requested was because the lot was small, and all the dimensional aspects of the zoning ordinance were met. He said there were six lots in the area, five of which needed the same relief that the applicant was requesting because they were all small lots. He said he believed that all the zoning criteria were met.

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

DECISION OF THE BOARD

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

[Timestamp 2:48:42] Mr. Rheume said he understood the applicant's concern about the loss of a view and noted that the Board had several arguments over the years about views being disrupted by a proposed change, but he said it was necessary to place some type of restriction of a subject parcel to preserve that view. He said if there was a master plan put in place to preserve certain view sheds when the subdivision occurred, it had to be recorded as part of the deeds of each of the properties

going forward. He said even if the applicant kept the current home, they had a right to add an expanded garage and place it in any perceived view shed of any abutting property. He said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said the applicant made a good argument that there is an overall characteristic to the neighborhood. He said when the subdivision was created, the same sized lots were created with homes placed on them, and the applicant was not proposing to do anything different by placing another single-sized family home on the lot and making it slightly more conforming. He said it would conform with the other setback requirements of the ordinance. He said substantial justice would be done, noting that the purpose of the ordinance in this case was to prevent overcrowding. He said the established neighborhood was designed around the applicant's sized lot and the applicant was not proposing to change any of that but simply wanted to take advantage of the allowed zoning characteristics of the lot and to build a new home within those characteristics. He said granting the variance would not diminish the values of surrounding properties because the applicant was building out and would be in conformance with the ordinance on a lot with similar characteristics to the other lots around it, so it would not negatively impact other property values. Relating to the hardship, he said it was a macro look of the characteristics of the envisioned lot in this particular zone compared to what is here and was substandard in terms of total square footage but was representative of a micro area, so he did not think it was different than what the overall zoning objectives are. He said there were unique characteristics to the property relative to the overall expectations of the zone that it happened to lie in, which indicated that it was not truly fair to apply the requirements of that zone on this parcel. He said the property could not be reasonably used in strict conformance with the ordinance. He said the applicant was not proposing to change the use of a single-family home, although the size and dimensions were different, but the applicant could have placed an addition on the existing home that would have those same characteristics. Mr. Rossi said the Board saw a lot of cases of an existing use like this that will continue, but it was a nonconforming lot and there was no basis for denying a variance request in many of those circumstances. He said several suggestions were made concerning things not in the zoning ordinance, but unless there was some modification made to the ordinance stating that other things that could be considered with some kind of formula about how large or tall of a house could be put on a nonconforming lot where all the setbacks are still conforming, there really was nothing the Board could say was correct or not correct, so within the limitation of the ordinance as it stands, he thought the Board's decision was correct.

Vice-Chair Margeson said she would not support the motion because the lot and anything that needed to be built on it did not need to have relief due to the size of the lot, but it was almost two-thirds less than what was needed for the SRB zone, so that building coverage is 19.8 percent, which is close to 20 percent but the 20 percent goes with the 15,000 square feet and not with the 10,823 square feet. She said the renderings of the house showed it without much elevation, and when she toured the area she found that the house was high up. She said the proposal would alter the essential character of the neighborhood. Mr. Rheume said he didn't think there was any indication that the applicant would be getting extra coverage and said it met the 20 percent requirement. Chair Eldridge said she didn't think the neighborhood had an essential character because there were many different types of architecture in it, including new additions. She said the house was high and would be noticeable but that it met all dimensional criteria. Mr. Mattson said it was interesting that a property could meet both the street frontage and lot depth but still be too small in lot size.

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

- E. WITHDRAWN BY APPLICANT** The request of **Maxico LLC (Owner)**, for property located at **865 Islington Street** whereas relief is needed to establish a yoga studio with more than 2,000 square feet of gross floor area which requires a Special Exception from Section 10.440, Use #4.41 where it is permitted by Special Exception. Said property is located on Assessor Map 172 Lot 11 and lies within the Character District 4-W (CD4-W). (LU-24-41) **WITHDRAWN BY APPLICANT**

The petition was withdrawn by the applicant.

IV. OTHER BUSINESS

A. Training Opportunities

- i. NH OPD Spring 2024 Planning and Zoning Conference – May 11, 2024
- ii. OPD Planning Lunch Webinar “Welcome to the Board” – April 18, 2024

Chair Eldridge said the conference was worthwhile. Ms. Casella said the lunch webinar was part of the monthly webinar series that OPD did.

V. ADJOURNMENT

The meeting adjourned at 10:03 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary