

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

7:00 P.M.

December 17, 2024

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

MEMBERS EXCUSED: None.

ALSO PRESENT: Stefanie Casella, Planning Department

I. ELECTION OF OFFICERS

*Mr. Rossi moved to nominate Chair Eldridge as Chair, seconded by Mr. Mattson. The motion **passed** unanimously, 7-0.*

*Mr. Rossi moved to nominate Vice-Chair Margeson as Vice-Chair, seconded by Mr. Mannle. The motion **passed** unanimously, 7-0.*

II. APPROVAL OF MINUTES

A. Approval of the **November 19, 2024** meeting minutes.

Mr. Rossi asked that the November 19 minutes be amended to remove the word ‘and’ in the following sentence in the last paragraph on page 11: “He said substantial justice would be done because, since there would be no impact on the public, **and** any loss to the applicant would not be outweighed by a loss to the public.

*Mr. Rheume moved to approve the minutes as amended, seconded by Vice-Chair Margeson. The motion **passed** unanimously, 7-0.*

III. OLD BUSINESS

- A.** The request of **361 Hanover Steam Factory LLC (Owner)**, and **Hampshire Development Corporation LLC (Applicant)**, for property located at **361 Hanover Street** whereas relief is needed to expand and renovate the existing commercial building and convert it to multi-family residential and to construct three new multi-family residential buildings which requires the following: 1) Variance from Section 10.642 to allow residential principal uses on the ground floor of the buildings; 2) Variance from Section 10.5A41 - Figure

10.5A41.10D to a) allow for "Apartment", "Rowhouse" and "Duplex" building types where they are not permitted; b) allow a ground floor height of 10.5 feet where 12 feet is required; and 3) Variance from Article 15 - Definition of Penthouse - to allow a penthouse with a setback of 8 feet from all roof edges where 15-20 feet is required and to allow no greater than 80% of the gross living area of the level of the floor below where 50% is the maximum. Said property is located on Assessor Map 138 Lot 63 and lies within the Character District 5 (CD5) District and the Downtown Overlay District. (LU-24-196)

Mr. Rheume recused himself from the petition, and Alternate Ms. Record took a voting seat.

SPEAKING TO THE PETITION

Attorney John Bosen was present on behalf of the applicant, with the project team Steve Wilson and Shayne Forsley. He asked for an additional five minutes for his presentation.

*Mr. Mattson moved that the applicant be granted additional time, seconded by Vice-Chair Margeson. The motion **passed** unanimously, 7-0.*

[Timestamp 11:05] Attorney Bosen reviewed the petition and said there were three plans: a vested design review plan, a vested design review plan with no ground-floor commercial. and a CUP plan with no ground-floor commercial and a smaller penthouse design. He noted that the City and many neighbors were not in favor of commercial uses in that section of town, so the applicant came up with the CUP plan that was favorably received by the Planning Board in July. He described Buildings A, B, C, and D and explained why zoning relief was necessary, and he reviewed the criteria. He said the CUP plan was preferred.

[Timestamp 30:58] Vice-Chair Margeson asked what kind of commercial uses were contemplated under the vested plan. Attorney Bosen said it would be available space for anyone who wanted to rent it, like office space or retail, and that it would require employers and employees to have street parking. He said the other issue was that the commercial use would not be visible to the downtown area and the public would not realize it was there unless they knew about it, so the team concluded that it would not be a good site for commercial. Mr. Mannle asked about the CUP plan's design. Attorney Bosen said the architectural plan for the fourth building with the penthouse wasn't fully developed but the guidelines were well defined in the ordinance for the penthouse.

[Timestamp 34:57] Mr. Nies said the proposal had been through design review before the Planning Board yet the applicant was before the BOA with a CUP proposal from an informal consultation with the Planning Board. He asked if the applicant was committed to developing the CUP proposal if the variances were approved. Attorney Bosen agreed. Mr. Nies said he read the Planning Board meeting minutes and saw that there was no action taken by the Planning Board that supported the CUP proposal, but there were comments and concerns. He asked what justified the applicant's claim that the Planning Board supported the CUP proposal. Attorney Bosen said the project team felt that the Planning Board was collectively supportive of the CUP plan but that the applicant could not make it a formal application until they got through the BOA. Mr. Nies said he was unclear on what the CUP would grant the applicant and asked if it was just the additional floor in Building A.

Attorney Bosen said the CUP plan was seeking the additional height and providing community space and workforce housing. Mr. Nies asked where the community space was proposed. Attorney Bosen said it would be the multi-modal way. Mr. Wilson explained that the modal way would extend from Rock Street laterally to the right along the front of Building A and the rear of Buildings B, C, and D. Mr. Nies asked if the modal way would also serve as the driveway for access to the buildings, and Mr. Wilson said it would not. Mr. Nies asked for more details of the building heights. Mr. Wilson said the elimination of the commercial level in the buildings would allow the elevations of Buildings B and C to be lowered under the allowed 40 feet, so the property could transition to the neighborhood on the southwest corner. He said the CUP referred to an Incentive Overlay District, which was still subject to approval by the Planning Board. He said if the BOA denied the penthouse and approved the CUP plan, the applicant would be entitled to build a mansard roof on that elevation that would be 16-18 feet, which was the reason the elimination of the commercial was important. Mr. Nies said the as-of-right design would therefore be three stories plus a mansard roof, but the CUP plan showed a 52-ft building height. He said the first floor of Building A had two versions on the site plan, one that said it was first-floor residential and one that said 'see floorplan', which did not show residential. Mr. Wilson said the front 20 or so feet would be residential. Mr. Nies said Building D was referenced as having a 3-story build but in other places it was noted as a 3-1/2 story. Mr. Wilson said it was a confusing caveat of the zoning regulations. He said the area under the roof was considered an attic and habitable, so it was misleading. He said the 3-1/2 story reference in the package was a typographical area.

[Timestamp 49:24] Mr. Rossi asked how many residential units were in the as-of-right plan and the CUP plan. Mr. Wilson said the as-of-right plan had 42 units, six of which were commercial. He said the CUP plan would add six residential units on the top floor of Building A but would eliminate four commercial units in the front, for a total number of 46 units. Mr. Rossi said the applicant stated that it wouldn't make any difference whether he got the variance for the penthouse. He asked what the loss to the property owner would be in that case. Mr. Wilson said he had not said that it would not be important. He said the original plan did not transition from the taller corner of the property to the shorter southeast corner of the project, so if they were granted the penthouse as a tool in the project, it would result in an overall reduction of the real height of the building and would also result in good-looking architecture. Mr. Rossi asked Attorney Bosen to rephrase the hardship justification for the penthouse. Attorney Bosen said the hardship would be to the land in its entirety, noting that there was an 8-ft grade difference and a 7300-sf strip of land between Foundry Place and their development. Mr. Rossi asked how that hardship related to the penthouse. Attorney Bosen said that granting the penthouse relief would get a better-looking building with less volume.

[Timestamp 55:32] Chair Eldridge said there was no photo of the penthouse in the packet, so she did not think she had enough information. Attorney Bosen said the penthouse did not have a lot of design elements because the applicant was waiting until he had the variance relief. It was further discussed. Mr. Nies said the package had an illustration that showed the first floor of Building A to be much higher than the first two floors of Building B. He said there was also a table that indicated that the ground story of Building A was 10 feet and Buildings B, C, and D were 12 feet. He said he had a hard time reconciling those measurements with the figure and that it was difficult to figure out what Building A would look like. Mr. Wilson said he could ask to table the vote on the penthouse so that he could better illustrate it. Vice-Chair Margeson said she was reluctant to bifurcate the

application. She thought the height of the penthouse was proper before the Planning Board as a CUP, but that the BOA needed visual presentations and more information. Mr. Mannle said the neighbors indicated that the preferred CUP was in front of the Planning Board in May. Mr. Wilson said it was July. Mr. Mannle asked if the applicant had subsequent meetings with the Planning Board regarding the alternate CUP plan. Mr. Wilson said they did not. He said they stopped the Planning Board process six months ago to develop the plan but had fallen short on the architectural components. Mr. Mannle said the public had not weighed in on the CUP plan either. Attorney Bosen said it had been a very public process but they could not go further without zoning relief. It was further discussed.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

[Timestamp 1:10:05] Peter Happny of 66 Rock Street said Mr. Wilson had developed some of the better buildings in Portsmouth in the past decade. He said it would be a positive addition to the neighborhood. He said commercial places did not work in his neighborhood.

Robin Husslage of 27 Rock Street said the CUP plan was a big improvement over the as-of-right plan. She said the Planning Board applied the incorrect zoning of CD-5 to the lot and included the Downtown Overlay on the back portion, allowing the buildings to go another story higher. She asked that the Board encourage the applicant to tweak the CUP plan so that granting the variances would be justified and would not be contrary to the public interest or negatively impact the neighborhood. She suggested conditions if the variances were granted for the CUP option,

SPEAKING IN OPPOSITION TO THE PETITION

Elizabeth Bratter of 159 McDonough Street said the applicant did not have enough information for the Board to consider the all the variances. She asked that the petition be postponed so that the applicant could present the necessary facts, and she said the legal notice should be corrected.

Geraldine Gaeta of 91 Langdon Street said the CUP plan was an improvement but the lot was in the North End Overlay District, where the intent was to facilitate the density on the front-facing street. She said the parking would encroach on a neighborhood slow street.

Allery Lane of 306 Hanover Street said there was a serious parking issue in the neighborhood and asked where visitors would park. She said the buildings around the neighborhood were getting bigger and encroaching. She said the multi-modal road area would be too narrow and not safe.

Nicole LaPierre of 44 Rock Street said she was a direct abutter and that her house was 20 feet high. She said the project was not compatible with the established character of its surroundings and that the area's zoning was not properly done. She said the CUP plan increased the number of residential units and lowered the number of parking spots. She said the streets that would service the project were small and narrow and would not handle the density. She said her property and others would be diminished. She said there was a lack of visual transparency in all the buildings.

[Timestamp 1:28:38] Attorney John Lyons said he represented the Hill Hanover Group LLC, a legal abutter to the project. He showed a diagram of his client's property. He said the applicant admitted that Hill Street was a private right-of-way that ran behind his client's property into the proposed parking area and that his client owned that right-of-way and that there was a dispute that would end up in Superior Court. He said the issue had become relevant because Attorney Bosen indicated that they had the right to use Hill Street as an access point and that emergency vehicles and pedestrians would use Hill Street as part of the development. He said it would be a significant overburdening of a narrow right-of-way and would negatively impact the value of his client's property. He said the multi-modal way would go between Buildings C and D and down Hill Street. He said his client objected to Variance Requests 1 and 2. He said another issue was that the applicant prepared a site plan that set out the Hill Street right-of-way that also ran under Building D. He said the variances requested did not meet the criteria and there was no hardship. Vice-Chair Margeson asked if Attorney Lyons' client's right-of-way rights would be impacted in the same way by the as-of-right design. Attorney Lyons agreed and said they were unable to reach an agreement. He said they could not have the right-of-way eliminated, as proposed by the project, nor have it overburdened by a multi-modal way that is unequipped for certain vehicles.

Marcy Vaughan of 407 Hanover Street said she was directly across the street from the proposed row house. She said she did not have enough information to ascertain whether the development would impact her negatively. She said the streets in the neighborhood were not amenable to a lot of traffic. She asked that the applicant withdraw his petition so that the neighbors could learn more about it. She said the neighbors had not seen the traffic study and there were a lot of concerns about parking and the burial ground in the parking lot.

Julienne Echavarri of 34 Rock Street said the traffic in the neighborhood caused by the development would be too much and suggested that the development's entrance be on Foundry Place instead.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DECISION OF THE BOARD

[Timestamp 1:39:34] Vice-Chair Margeson said she usually hated to postpone a petition but thought it would be worth it in this case. She said the application was complicated and that the packet was full of information that didn't really help, noting that the Board didn't care about the vested plan because it said the applicant could build without coming before them. She said a postponement would be merited, especially given the abutter's view that they may be in favor if they had more information. Mr. Mannle agreed and said the added legal issue precluded the Board from making any decision. Mr. Nies agreed that the application should be postponed and said he'd like to see Building A's elevation along Foundry Place and other things that clearly delineated heights, and that he would also like to see clarification on the number of stories on Building D and the correct story height table. Mr. Rossi said he didn't think it was practical to postpone the petition until a legal matter was resolved because it could take years. He said the applicant made a good faith effort to be responsive to the needs of the neighborhood, and that the development would have a big

impact on the neighborhood that was unavoidable based on the way it was zoned. He said the Board didn't have the option of being more restrictive than the zoning. He said he was in favor of postponing until the Board had the proper information. Vice-Chair Margeson said the legal issue was not within the Board's purview. Mr. Mattson said he was in favor of postponing mainly because he wanted more information on the specific variances asked for.

*Vice-Chair Margeson moved suspend the rules, seconded by Mr. Mannle. The motion **passed** unanimously, 7-0.*

The public hearing was re-opened so that the Board could state the information that was needed.

*Mr. Mattson moved to **postpone** the hearing until the January meeting, seconded by Mr. Mannle.*

Mr. Mattson said the Board needed to have more information related to the variances requested regarding the penthouse, the gross living area, and the penthouse setback, visual schematics of Building A, plan and elevation information, renderings, and a traffic study. Mr. Mannle concurred.

*Mr. Nies moved to **amend** the motion for postponement to include that the following items be brought back to the Board: a clear depiction of the heights of the floors for all buildings, clarification on the number of stories on all the buildings, and the traffic study if available.*

Mr. Mattson and Mr. Mannle accepted the amendments. Chair Eldridge said she wanted to see what the development would look like next to the orange house and how it would fit into the landscape, and that she wanted more information about the burial ground. Mr. Mattson agreed.

Ms. Casella summarized the final list of items to be brought back to the Board:

- 1) Elevations of Building A;
- 2) Heights on all buildings;
- 3) Number of stories on Building D;
- 4) A traffic study if available;
- 5) A streetscape
- 6) More information on the burial ground; and
- 7) Clarification of the heights of the stories.

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

B. WITHDRAWN 84 Pleasant Street - Request for rehearing **WITHDRAWN** (LU-24-195)

The petition was withdrawn by the applicant.

IV. NEW BUSINESS

Mr. Rheume resumed his voting seat, and Ms. Record returned to alternate status.

- A. The request of **Patrick and Wendy Quinn (Owners)**, for property located at **124 Melbourne Street** whereas relief is needed to construct dormers onto the existing structure which requires the following: 1) Variance from Section 10.521 to allow a) 15 foot front yard where 30 feet is required; b) 20 foot secondary front yard where 30 feet is required; c) 7 foot left 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 233 Lot 55 and lies within the Single Residence Business (SRB) District. (LU-24-202)

SPEAKING TO THE PETITION

[Timestamp 2:04:23] Attorney Chris Mulligan was present on behalf of the applicant. He reviewed the petition and said relief was needed to permit a vertical expansion over an existing nonconforming footprint on an existing dwelling. He said the 1890s home had nonconforming setbacks and that the proposed dormers would not further invade into those setbacks. He said the small bungalow needed significant updating but was constrained by the small size of the lot, and the only way to expand the living space was vertically. He reviewed the criteria.

[Timestamp 2:11:10] Mr. Rossi asked if the structure itself would remain intact, and Attorney Mulligan agreed. Mr. Rheume said the proposed dormers increased the height of the overall building by about 1-1/2 feet. Attorney Mulligan said it depended on the pitch of the dormered roofs but agreed that there would be an increase in height, although he thought it was closer to seven inches. It was further discussed. Mr. Rheume said the applicant was before the Board in July to get permission to build a home on the next lot over, and he asked Attorney Mulligan about the reasoning for allowing the extension to get that close to the property line, or if the applicant had considered an alternate design that would keep it out of the side setback. Attorney Mulligan said there was no alternative design, and if they eliminated one side of the addition, it would be a vernacular bungalow with a lopsided dormer on one side. He gave the Board the site plan from the earlier project and said the Board approved a structure in that plan that was shifted as far over to the left in the available building envelope on the next site. He said the effect was the separation between the two buildings of 25 feet and that it complied with the purpose of the setbacks. Mr. Rheume said it indicated the proposed residential footprint, and he asked if the design and execution would be solid. Attorney Mulligan said it was advertised and approved by the Board and that it would not change.

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 petition, seconded by Mr. Mattson.*

[Timestamp 2:18:04] Mr. Rossi said there was a historic structure already within the setbacks, so the reason behind the variances was the location of the existing structure that could not be moved. He said adding a second story was a reasonable thing to do. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance and would not create any substantial light and space concerns. He said substantial justice would be done because there would be no loss to the public by adding the dormers and no impact on the surrounding houses. He said any loss to the applicant would be unjust. He said granting the variances would not diminish the values of surrounding properties because the project would be an improvement to the house and give it more square footage and also increase its value. He said literal enforcement of the provisions of the ordinance would result in unnecessary hardship, noting that the unique aspect of the property was that it has the specific variances related to adding height above an existing structure. He said there would be no change to the setbacks as a result of granting the variances, and literally enforcing the code would prevent the expansion of the house. He noted that the Board members were often chagrined when they saw older homes that represented the character within the neighborhoods in Portsmouth demolished for brand new construction. He said it was an opportunity for the applicant to keep a historic and characteristically consistent structure in the neighborhood by doing an intelligent addition to it. He said all the criteria were satisfied. Mr. Mattson concurred and noted that the property was also a small buildable envelope, and if the applicant were not asking for the variance, he would be asking for another variance to build out laterally instead. He said the relief asked for was less impactful. Mr. Rheume said he would support the motion and noted the fact that the lot was a corner lot, and corner lots got penalized by having two front setbacks in many of the zoning areas. He said the front setback was substantially greater than the side setback, and if it were not a corner lot and about 30 feet from the secondary front yard, it would not be an impediment to the applicant.

The motion passed unanimously, 7-0.

- B.** The request of **Kent and Jennifer Bonniwell (Owners)**, for property located at **332 Hanover Street** whereas relief is needed to demolish the existing primary and accessory structure and construct a 2-living unit structure which requires the following: 1) Variance from Section 10.5A41.10A to allow: a) 2,167 square feet of lot area per dwelling unit where 3,000 square feet is required; b) a secondary front yard of 17 feet where 12 feet is the maximum; and c) a finished floor surface 6.5 feet above the sidewalk grade where 36 inches is maximum. Said property is located on Assessor Map 126 Lot 43 and lies within the Character District 4-L1(CD4-L1) District. (LU-24-211)

SPEAKING TO THE PETITION

[Timestamp 2:23:29] Mr. Rheume said he was struggling with the Fisher v. Dover requirement for the application. He said he was in favor of the original application, but the Board had denied it. He said the applicant was before the Board with some changes that had to do primarily with the structure's height, a 3-1/2 foot difference, but most of the other major factors of the property were unchanged. He said the height variance was never requested and that the variance criteria submitted were identical. He said the Board had a finality with their decision-making process and that he

didn't see that there was something sufficiently different to say that Fisher v. Dover did not apply. Mr. Nies said he also voted against the motion to deny for the original proposal. He said the Board's reason for denial was that they didn't think the structure was consistent with the character-based zoning, nor with the District and other surroundings for preservation and enhancement of the area. He said there was a change in the height and some changes to the front façade in the current application, which appeared to have convinced some of the neighbors that it was more consistent with the character of the neighborhood. He said he felt that there were enough changes that Fisher v. Dover may not apply in this instance and that the Board should at least hear the application. Vice-Chair Margeson said she agreed with Mr. Rheume that the height was not a variance request. She said the removal of the windows had played no part in her previous decision, and that not everything the abutters said was relevant. She said there was no change between the current application and the one that the Board denied and thought the Board should invoke Fisher v. Dover. Chair Eldridge said she agreed with Mr. Nies, noting that there was a big difference in the way people felt about the building. Mr. Rossi said the previous 4-3 vote was very close and felt that the changes did not have to be that large to work around Fisher v. Dover. Mr. Mattson said he saw the similarities but thought the perception of the project by the abutters and the applicant was quite different. Vice-Chair Margeson said the abutters' perceptions and the closeness of the Board's decision-making did not factor into Fisher v. Dover. Mr. Rheume said one of the major factors that the applicant was asking for was the lot area per dwelling unit. He said there was a lot of discussion about that, and that to get the two units, the structure would have had to be fairly large, which had been an issue. He said he was concerned about the Board revising things that we put in the 'done' pile, and he thought the Board had seemed adamant and resolute in their prior decision making. He said he did not see enough of a difference in the current application.

*Mr. Rossi moved that the applicant be allowed to speak to the Fisher v. Dover issue. Mr. Mattson seconded the motion. The motion **failed** by a vote of 4-3, with Mr. Nies, Mr. Mannle, Vice-Chair Margeson, and Mr. Rheume opposed.*

Mr. Mannle moved that Fisher v. Dover apply, seconded by Vice-Chair Margeson.

Mr. Mannle said the applicant made some design changes in response to the neighborhood's concerns, but he thought Mr. Rheume and Vice-Chair Margeson were correct in stating that the application had barely changed, and he believed that applying Fisher v. Dover was appropriate. Vice-Chair Margeson said the application was not very different from its predecessor heard in October. Mr. Rossi was he was one of the people who voted against the petition originally, and his rationale had been the lot size per unit, which had not changed. He said there was not a substantive change in the application. Chair Eldridge said she had mixed feelings because the public interest had changed and the way the neighborhood felt about the application had changed, which she thought made a difference in how the Board had to see it. Mr. Rheume said the business before the Board was not a result of a neighborhood vote and that the Board had to be cautious about the finality of their decision.

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

- C. The request of **Walter and Tamara Tate (Owners)**, for property located at **108 Burkitt Street** whereas relief is needed to construct an addition above the existing enclosed porch and replace a mechanical unit which requires the following: 1) Variance from Section 10.521 to allow a 4 foot right side yard where 10 feet is required; 2) Variance from Section 10.515.14 to install a mechanical unit 1 foot from the side property line whereas 10 feet is required; and 3) 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 30 and lies within the General Residence A (GRA) District. (LU-24-203)

SPEAKING TO THE PETITION

[Timestamp 2:38:20] The applicants Walter and Tamara Tate were present to speak to the petition. Ms. Tate reviewed the petition and said the proposed renovation would make the winterized porch ceiling height match the rest of the floor. She said they would also replace the existing mini split condenser with a central air condenser in the same location.

[Timestamp 2:42:04] Mr. Nies asked if the applicant considered any other locations for the condenser, like the other side of the house where it would comply with the setback. Ms. Tate said they thought leaving it with the electrical equipment would be best. She reviewed the criteria. Mr. Tate noted that there was a bulkhead, staircase, and window on the other side.

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

*[Timestamp 2:48:32] Mr. Nies moved to **grant** the variances for the project as presented and advertised, seconded by Mr. Rheume.*

Mr. Nies said granting the variances would not be contrary to the spirit of the ordinance and the public interest. He said there was no evidence that it would alter the essential characteristics of the neighborhood because it was a residential area and would stay a residential area. He said it would have no effect on the public's health, safety, and welfare or the light and air of any neighbors. He said the condenser's location would be in the same place as the current mechanicals, which had not caused any problems before. He said granting the variances would do substantial justice because there would be no benefit to the public by denying the variances, and the loss to the applicant if denied would be substantial because he would lose considerable utility of the house. He said granting the variances would not diminish the values of surrounding properties, noting that there was no evidence that it would have any impact on the values and might increase them. He said literal enforcement of the ordinance would result in unnecessary hardship because the property had

special conditions of being an undersized lot for the zone and having the existing structure on one side of the lot, which put it off center. He said the requested variances would not enlarge the footprint of the house and would just add onto the house to make it more usable. He said there was no fair and substantial relationship between the purpose of the ordinance's provision and its specific application to the property, and there was no reason to deny the variances. Mr. Rheume said the size of the proposed addition was very modest and would just go up to the top to the current existing story. Regarding the condenser, he noted that the City Council was planning to allow mechanical units to be placed anywhere on a lot.

The motion passed unanimously, 7-0.

Mr. Mannle moved to go past the 10:00 meeting end time, seconded by Mr. Rossi. The motion passed unanimously, 7-0.

D. The request of **Kathryn and Bryn Waldwick (Owners)**, for property located at **30 Parker Street** whereas relief is needed to install two mechanical units which requires the following: 1) Variance from Section 10.515.14 to install a mechanical unit with a) a 5 foot right side setback where 10 is required and b) a 0.5 foot rear yard setback where 10 is required; and 2) Variance from Section 10.515.14 to install a mechanical unit with a) a 2 foot right side yard setback where 10 is required and b) a 2 foot rear yard setback where 10 is required. Said property is located on Assessor Map 126 Lot 27 and lies within the General Residence C (GRC) District. (LU-24-205)

SPEAKING TO THE PETITION

[Timestamp 2:53:35] Project architect Anne Whitney was present on behalf of the applicant to review the petition. She referred to the survey plan and tax map to show how the buildings were oriented on the property and explained why the chosen location was the best one to place the mechanical units because they would not be visible to the public and would be farther away from the abutters. She reviewed the criteria and said they would be met.

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

[Timestamp 2:57:25] Mr. Mattson said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said the heat pump condensers were a

modest imposition because they were very quiet and not noticeable, and soon the ordinance would presumably allow them. He said the proposed location was the most reasonable one on the property. He said granting the variances would do substantial justice because it would benefit the owner without any detriment to the public or other individuals. He said the values of surrounding properties would not be diminished because the property would be improved. He said literal enforcement of the ordinance would result in unnecessary hardship, noting that the property's special conditions were its irregular lot shape and the fact that it was already undersized in one of the smallest lot size zones. He said adding the mechanical units within the yard setbacks in the fenced-in rear area would be reasonable and there would be no fair and substantial relationship between the general public purpose of the ordinance's provision and the specific application of that provision to the property. Mr. Nies concurred and had nothing to add. Mr. Rossi said it would be unwise of the Board to consider potential changes in the zoning ordinance when voting on a matter before then under the current ordinance.

The motion passed unanimously, 7-0.

E. The request of **Chris G. and Lisa Alexandropoulos (Owners)**, for property located at **3168 Lafayette Road** whereas relief is needed to establish a tattoo studio which requires the following: 1) Variance from Section 10.440, Use # 7.20 to allow a personal service use where it is not allowed. Said property is located on Assessor Map 292 Lot 150 and lies within the Single Residence B (SRB) District. (LU-24-207)

SPEAKING TO THE PETITION

[Timestamp 3:01:02] The applicant Sonya MacMillan said she was trying to buy the property from the owners. She said she currently owned a tattoo studio in Durham. She reviewed the criteria and noted that the dwelling was already used for a small business.

[Timestamp 3:07:37] Mr. Rheume asked Ms. Casella what the concern was about parking that was mentioned in the Staff Memo and for which a stipulation (or condition) was recommended. Ms. Casella said she asked the applicant to provide a parking space count for the Staff Memo according to the dimensions outlined in the zoning ordinance. She said the applicant complied and submitted a parking layout. She said the issue was that there were three stacked spaces, which the ordinance did not allow, and she wanted to ensure that what the Board was approving was the use and not the layout of the parking. Mr. Rheume said it would be acceptable if the applicant wanted to use the additional spaces for personal parking. Ms. Casella said what the applicant chose to do with Parking Spaces 5 and 6 was her business and that it was just Parking Spaces 1-4 that met the regulations. Mr. Nies asked Ms. MacMillan if there would be evening hours beyond 5:00 p.m., and Ms. MacMillan said there would not.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING IN OPPOSITION TO THE PETITION

Tony Mitchell (via Zoom) said he and the other members of his 18-unit condo association on 55 Ocean Rd were against the petition and that they submitted a letter of dissent to the Board. He read the letter, which stated that the condo association opposed the variance because they were concerned about the potential negative impact on the neighborhood. He said the tattoo parlor would be incompatible with the residential character of the neighborhood and that the adults-only business might maintain late hours and draw disruptive transient crowds. He said traffic safety and parking would be issues as well as declining property values. He said the condo development was located on Lafayette Rd but was oriented to Maple Haven behind them.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Ms. MacMillan said her customers would not leave her premises and walk around the neighborhood and that she would only see 1-2 customers a day. She said she felt that the condo association spoke to the discrimination that people felt for persons who like to decorate their bodies.

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 Vice-Chair Margeson.*

[Timestamp 3:18:35] Mr. Rheume noted that uses were often before the Board that were special exceptions, which was a case that the zone recognized and that there were a number of different uses. He said the SRB in particular was very restrictive on any kinds of uses because the concept was that it is a residential area and that business uses are probably not entirely compatible with that. He said a variance was a higher bar than a special exception, and there were several things about the property and the proposed use that were unique. He said the property was carved off a larger property that did have a residential use on it with the intent that it was designed to be front-facing on Lafayette Rd, which was far more business oriented and only had a few pockets of residential. He said the building was uniquely sited up against Lafayette Road and that most of the residences were set much farther back from the road. He said the structure was designed around a business use in mind and had a successful business for many years. He noted that the adjacent condo complex was created with relief from the Board and was already bordered by an MRB parcel that also had a business on it. He said some of the concerns from the condo residents were unfounded because it was not a pedestrian traffic oriented type of business. He said people would go for their art treatments and then drive away. He also noted that the entryways into the condo complex were quite a distance away on Ocean Road, and if there was excessive traffic or a need for parking, it would not go around the corner into the condo complex. He said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said it would be

consistent with the overall character of the neighborhood because most of the Lafayette Rd properties were business related. He said it would be in keeping with the long-time use of the parcel. He said substantial justice would be done because the applicant would use the structure in the same business manner, even though the nature of the business was different. He said the business would be oriented toward Lafayette Rd and not to the residences behind it, and the abutters felt that they were more part of the Maple Haven community anyway. He said the balancing test was the interests of the surrounding neighbors and the City as a whole and the applicant's intent to make use of the modest facility. He said granting the variance would not diminish the values of surrounding properties because the business would be in character with the overall feel of the Lafayette Rd area and would not negatively impact any of the surrounding properties. Regarding the hardship criteria, he said what was unique about the property that distinguished it from others in the zone was that it was a very small parcel caved out of a larger parcel with a clear intent to be a business oriented toward Lafayette Rd, and the use was a reasonable one. He said the business' intensity could not be that great because it would be limited by the property's size and the structure. Vice-Chair Margeson noted that the lot narrowed going backwards and she didn't see how a house could fit into that lot and be a residential use. Mr. Rossi said normally when the Board looked at special exceptions, they looked at criteria like hazards being introduced to the area through odors, stored materials, explosive, fire hazards, and so on. He said there would be nothing like that, so even if it were a special exception, it would fit those criteria.

The motion passed unanimously, 7-0.

V. ADJOURNMENT

The meeting adjourned at 10:28 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary