

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

7:00 P.M.

September 15, 2026

MEMBERS PRESENT: Beth Margeson, Chair; Jeffrey Mattson, Vice Chair; David Rheaume; Thomas Rossi; Thomas Nies; Robert Sullivan; Mike Lucas, Alternate

MEMBERS EXCUSED: None.

ALSO PRESENT: Stefanie Casella, Planning Department

Chair Margeson called the meeting to order at 7:00 p.m.

Mr. Rossi moved to suspend the rules in order to address the postponements, seconded by Mr. Nies. The motion passed unanimously, 7-0.

Chair Margeson stated that Old Business Petition A, 315 Banfield Road, was postponed to the October 20th meeting.

Chair Margeson read Old Business Petition B, 64 Woodworth Avenue, into the record.

Mr. Nies moved to postpone the petition to the October 20th meeting, seconded by Mr. Rheaume. The motion passed with all in favor, 7-0.

Chair Margeson recused herself and Vice Chair Mattson was Acting Chair. He read Petition III New Business A, 50 Whidden Street, into the record.

Mr. Rheaume moved to postpone the petition to the October 20th meeting, seconded by Mr. Nies.

Mr. Rheaume said the postponement was requested due to significant information that was provided the day before regarding the application and that one or more abutters also had concerns about the petition, and he thought the Board should have time to consider that information more thoroughly. He said the applicant's representative also requested more time to consider the information.

The motion passed with all in favor, 6-0, with Chair Margeson recused.

I. APPROVAL OF MINUTES [Timestamp 8:58]

A. Approval of the August 18, 2026 meeting minutes.

Mr. Rheaume moved to approve the August 18 minutes with corrections. Mr. Nies seconded.

Mr. Rheume said that the sentence in the second paragraph on page 4 should have the word “being” added. The sentence now reads: “Mr. Rheume asked if there was anything in writing relating to the City regarding the street being a paper one.”

Mr. Rheume said the Chair’s restated final motion at the end of page 7 was misplaced and should be stated at the top of page 6, replacing the amended motion. It now reads: “The amended motion was as follows: Mr. Sullivan moved to **postpone** the public hearing and request to the September 15th meeting so that the applicant can provide information on how and when driveway access will be provided to lot 233-135 and information on adopting the portion of Joffre Avenue to add square footage to the applicant’s lot. Mr. Rheume seconded the motion.”

Mr. Nies said the word “length” in a sentence in the last paragraph on page 10 should be “lengthy”. The sentence now reads: “He said he found it difficult to reconcile allowing an animated sign just because it was an upgrade, given the lengthy prior discussion and decision by the Planning Board several years before.”

The motion passed with all in favor, 6-0, with Mr. Rossi abstaining.

B. Approval of the August 25, 2026 meeting minutes. [Timestamp 11:58]

Mr. Rheume moved to approve the August 25 minutes with corrections. Vice Chair Mattson seconded.

Mr. Rheume said the top sentence on page 4 should read as follows: “He said none of the properties along West Road had all their parking behind them and not many properties complied with the parking being set back 50 feet as required.” Further down on page 4, he said the sentence about the applicant’s proposed uses being allowed by special exception should read as follows: “He said some of the applicant’s proposed uses would be allowed by special exception and that outdoor dining was a permitted accessory use in the G1 and G2 Districts.”

On page 5, second paragraph, the sentence “ He said that Vice-Chair Mattson thought there was nothing de minimis about the requests, but Mr. Rheume thought they were justified” should read as follows: “He said that Vice-Chair Mattson thought there was something de minimis about the requests, but Mr. Rheume thought they were substantial but justified.” Also on page 5, Mr. Rheume said the sentence “He said what the applicant was asking for is a small portion of the property and said the physical constraints of the property would prevent further expansion” should be clarified and should read as follows: “He said what the applicant was asking for is outdoor dining on a small portion of the property and said the physical constraints of the property would prevent further expansion.” The change was further discussed by Vice Chair Mattson. He agreed with Mr. Rheume’s change but noted that his earlier reference to de minimis really referred to the impact of the surrounding industrial uses as opposed to the requests themselves.

Mr. Nies said on page 2, the sentence “He said a place of assembly is allowed to have entertainment, comedy, or music but is not listed in the ordinance as an accessory use for a

restaurant” should read as follows: “He said a place of assembly is allowed to have entertainment, comedy, or music but they are not listed in the ordinance as an accessory use for a restaurant.”

The motion passed with all in favor, 6-0, with Mr. Lucas abstaining.

II. OLD BUSINESS

- A. POSTPONE** The request of **Hope for Tomorrow Foundation (Owner)**, for property located at **315 Banfield Road** whereas relief is needed to construct an addition to the existing school on the property, which requires the following: 1) Variance from Section 10.334 to allow the existing primary and secondary school use (Use #3.21) to be extended to another part of the remainder of the land. Said property is located on Assessor Map 266 Lot 5 and lies within the Industrial (I) District. **POSTPONE** (LU-26-41)

The petition was postponed to the October 20th meeting.

- B. REQUEST TO POSTPONE** The request of **Ann Marie Wiley Revocable Trust (Owner)**, for property located at **64 Woodworth Avenue** whereas relief is needed to construct an addition to the existing structure which requires the following: 1) Variance from Section 10.521 to allow a) 8.5 foot left yard where 10 feet are required, and b) 26% building coverage where 20% is the maximum. Said property is located on Assessor Map 243 Lot 42 and lies within the Single Residence B (SRB) District. **REQUEST TO POSTPONE** (LU-26-102)

DECISION OF THE BOARD

The petition was postponed to the October 20th meeting.

- C.** The request of **Michael J Ferrelli (Owner)**, for property located at **0 Joffre Avenue and 18 Barberry Lane** whereas relief is needed to construct a single-family home on a vacant lot which requires the following: 1) Variance from Section 10.521 to a) allow for 0 feet of street frontage where 100 feet is required; b) allow for 12,185 square feet of lot area where 15,000 square feet is required; c) allow for 12,185 square feet of lot area per dwelling where 15,000 square feet is required; and 2) Variance from Section 10.1114.31 to allow for two driveways on a single lot where one is permitted. Said properties are located on Assessor Map 233, Lot 135 and Lot 131 and lie within the Single Residence B (SRB) District. (LU-26-92)

SPEAKING TO THE PETITION [Timestamp 20:02]

Attorney Derek Durbin was present on behalf of the owner Michael Ferrelli. He explained that his colleagues presented the application on August 18 but there was confusion expressed by the Board on the paper street and how legal access could be appropriately provided for the rear lot in the future, so the Board voted to postpone the hearing so that the applicant could provide more

information on how and when driveway access would be provided to Lot 233-135 and information on adopting the portion of Joffre Avenue to add square footage to the applicant's lot. He said he met with City Deputy Attorney Trevor McCourt and City Staff to discuss the Board's request for information. He said a question arose about how the Board verified that the city has no interest in the paper street. Related to legal access, he said he proposed in a letter submitted to the Board what he believed was a reasonable solution to any concerns that the relief for the rear lot could be granted by the Board but there could be a future question of access. He said he proposed two conditions for the Board's approval: 1) that an agreement, deed, covenant, or other written instrument of similar effect shall be approved by the city's Legal Department and recorded with the Registry of Deeds reserving the driveway access easement across the lot; and 2) the exact location and configuration of the driveway across that lot may be modified by the Department of Public Works. He said Attorney McCourt had asked to insert "or the Fire Department" prior to issuance of the driveway permit and that the applicant agreed to add it. Attorney Durbin said that was how they proposed to address the first item, a request for information to the Board. Relating to the second issue regarding the paper street on Joffre Avenue, he said the Board should have correspondence from the city that should resolve questions about the status of the paper street, and the city had not asserted any legal interest in the paper street. He said his letter also pointed out case law surrounding the issue. He said where there is not any specific grant, dedication, or acceptance of a streetway like this or it cannot be proven that the city has accepted it, the ownership resides to the center line of the abutting property owner's lot. He said his client does own to the center line of the paper street and that the land area was his. He said they applied in the manner they did, excluding that portion of the paper street, just out of an abundance of caution, but it did not take away from the fact that the lot is a 14,152-sf lot, so any future efforts to seek a release deed from the city would be merely for the purpose of clarifying title record of that land in the future. He said his client wanted to do that but had not done so yet and that he was not seeking any other dimensional relief that is not associated with the existing lot itself. He noted that the criteria was addressed at the prior meeting.

[Timestamp 26:25] Mr. Sullivan said that, regarding the access to the lot, the Board's concern was that upon granting the variances, one could acquire a building permit to build a house on that lot and yet there would still be at that time no access to the lot for the owner of the house. He asked if it would be acceptable to add the phrase "prior to the issuance of a building permit on this lot" to the end of that condition. Attorney Durbin agreed. Mr. Rheume said some of the feedback that the Board preliminarily got from the Fire Department was that the proposed driveway should be 20 feet, recognizing that the current end of Barberry Lane is 16 feet. He said there was a steep turn getting into the driveway, so the concern was to be able to get fire apparatus up there. He asked Attorney Durbin to clarify that the current plan showed it as being a 20-ft wide driveway access. Attorney Durbin said the driveway was proposed to be 16 feet in width, but the scope of the easement area itself took grading into account, so the driveway with the paved portion would be 16 feet wide, with the easement being 20 feet. Mr. Rheume said the new information provided by the applicant stated that the applicant not only has the right to access this lot but also has reasonable development expectations and is not seeking any dimensional relief distinct from the existing conditions of the lot. Mr. Rheume said there was zero feet of frontage on any street with this lot and it was also undersized. He said Attorney Durbin made a compelling argument that it was just

under 1,500 sf. He asked about that statement in context of the zero feet of frontage where 100 feet is required. Attorney Durbin said it is a lot that was created by record with the presumption that there would be a street constructed across Joffre Avenue. He said that was never accomplished, but it did not take away from the fact that the lot of record was created. He said whether the city constructed the street or not was never within any of the surrounding landowners' control. He said it could be looked at as extreme relief for a zero-ft frontage but there is precedence throughout the city for that as well of for other paper streets, and it gets into questions of lot densities, which is one of the purposes behind frontage requirements. He said the other purpose is to provide sufficient access, which in this case is being accomplished through the driveway easement across the front lot. He said the other alternative was for the owner to assert his right in an easement by necessity, but the owner did not want to upset his neighbors. He said he believed that, regarding the frontage requirements, the spirit and intent were accomplished.

[Timestamp 32:25] Mr. Rheaume moved to suspend the rules and re-open the public hearing for the Board's continuation of discussion on this matter, seconded by Mr. Nies. The motion passed with all in favor, 7-0.

Chair Margeson opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one spoke. Chair Margeson closed the public hearing.

DECISION OF THE BOARD [Timestamp 33:38]

*Mr. Nies moved to **grant** the variances as requested and advertised, subject to two **conditions**:*

- 1) An agreement, deed, covenant, or other written instrument of similar effect shall be approved by the city's Legal Department and recorded with the Registry of Deeds reserving a driveway access agreement across tax map 233 lot 131 to tax map 233 lot 135 prior to the issuance of a building permit for this lot; and*
- 2) The exact location and configuration of the driveway across tax map 233 lot 131 to tax map 233 lot 135 may be modified by the Department of Public Works or the Fire Department prior to issuance of a driveway permit.*

Mr. Sullivan seconded and had nothing to add.

Mr. Nies said the lot is one that was on a street that was never adopted or accepted by the city and the city has no interest in it, so as a result, it has no street access. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said there was no evidence that it will affect the health, safety or welfare of the neighborhood, have any negative effect on light and air, or alter the essential characteristics of the neighborhood. He said the proposed lot is undersized and that it remains to be seen exactly how much undersized it is for the

neighborhood, but there was a utility access on one side, so it would have no effect on anyone on that side. He said the lot has a paper street in front of it that may turn out to be properties owned by the owner but it does not have any effect on that side either. He said lot size was designed to prevent overcrowding, which would not happen in this case. He said the restriction on driveways, as pointed out, was that the requirement for street frontage is to help reduce and control lot density. He said that was not really an issue in this case, and there was no access to it. He said the restriction on the number of driveways also facilitates traffic flow and the streetscape. Due to where the two driveways will turn out to be, he said it is not an issue because Barberry Lane is there. He said granting the variance would do substantial justice, noting that he did not see any possible benefit to the public by denial, and there would be a significant loss to the applicant because he would not be able to develop his lot. He said granting the variances will not diminish the value of surrounding properties, noting that no evidence was present that it would. Relating to the hardship criteria, he said there are a few special conditions to the lot including that it was created prior to the adoption of the zoning ordinance, so it is an existing nonconforming lot with respect to size. He said the problem with street frontage is that the street that was planned was never accepted by the city and has never been built, and the city has no interest in it, so that leaves no access to the lot. He noted that the lot also abutted a utility right-of-way on one side. He said, given these special conditions that distinguish the property from other properties in the area, and owing to these conditions, there is no fair and substantial relationship between the purpose of the ordinance and its specific application to the property. Mr. Sullivan concurred and had nothing to add.

Mr. Rheume said he still had a lot of reservations about the application. He said there was more to the 50-ft of frontage than just determining the streetscape. He said he did not think that the ordinance said anything about having zero feet and yet still considered something a buildable lot. He said in this case, there was a way out that would provide some street frontage and would be more honest in the sense that the easement going across the front lot really occupies a good portion of it. He said about 20 percent of the front lot would be burdened by a driveway that the owner is paying taxes on but will never get any benefit from because it is there to act as a substitute street and support the building of a structure on the lot behind it. He said a lot revision would provide two 15,000-sf lots with the added square footage allowed by the fact that the paper street does exist and there is additional square footage that would eliminate one of the two things the Board was providing some relief for. He said the other thing that would no longer be as significant would be the ability to have some level of frontage on a city street. He said he would support the motion, however, because he thought there was enough uniqueness. Mr. Rossi said he would not support the motion. He said the requested degree of relief on lot size is no longer justified now that the city has acknowledged that they have no ownership of what would have been the street that is a paper street and it is now part of the lot. He said he did not think the hardship was there to justify the specific degree of relief being requested for lot size.

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

D. The request of Kathleen B. and Kent A. Logan, Susan E. Lassen, Scott A. Lupkas, and Guy D. and Elizabeth R. Spiers (Appellants), for appeal of decision of administrative

officials to classify the art studio attached to the side of the third dwelling unit as an R2 non-transient sleeping unit for property located at **28 Blossom Street**. Said property is located on Assessor Map 111 Lot 40 and lies within the General Residence B (GRB) and Historic Districts. (LU-26-114)

[Timestamp 45:11] Chair Margeson stated that the appeal was for an administrative code official and that the Board would review it as if they were the code official. She said the Chief Building Inspector Shante Wolph, Planning and Sustainability Director Peter Britz, and Deputy City Attorney Trevor McCourt were also present.

SPEAKING TO THE PETITION [Timestamp 48:40]

Attorney Robert Baker on behalf of the appellants was present. He stated that Chief Building Inspector Shanti Wolph issued a Notice of Determination declaring that the unit being used for sleeping and dwelling will be declared an R2 non-transient sleeping unit under the 2024 International Building Code. He said since 2023, the property owners had their adult son Christopher sleeping in the studio. He noted that 28 Blossom Street was an improved lot with a 2-family dwelling that received a variance in 1987 to authorize a third dwelling unit and convert a barn-like structure into an artist's studio. He said the appellants believed that Mr. Wolph created an ad hoc use under the ordinance to create a new use that does not exist under the current version of the zoning ordinance. He said the way to amend the zoning ordinance would be to file a formal amendment to be approved by the Board or to petition the City Council for an article to make the same amendment. He asked the Board to reverse the Chief Building Inspector's determination and to also determine that occupancy of the unit may not lawfully continue in its current form.

[Timestamp 51:51] Chair Margeson said the memo that the Board received identified a dwelling vs. a sleeping unit and that a dwelling unit includes a kitchen, cooking facilities, and so on. She said the unit in question did not have that, and she asked why Attorney Baker still thought that converted it into a dwelling. Attorney Baker said a dwelling unit is designed to house someone on a more permanent basis, and it seemed that because Christopher had slept in the studio since 2023, the unit did not quite match under the zoning ordinance what a dwelling unit consists of and the purpose of it, so in order to accommodate the conditions that would be necessary to issue a Certificate of Occupancy, Mr. Wolph reclassified it as a sleeping unit. Attorney Baker said they also believed that having an Accessory Dwelling Unit (ADU) is not permissible in this case because the owners do not live in the building and there has not been a special permit application applied for.

Mr. Rheume asked Attorney Baker to elaborate more on Section I, the Statement of Standing, and the impacts made by Mr. Wolph's decision on the neighborhood character, on-street parking, density, and life safety in the General Residence B district. Attorney Baker asked that the Board just focus on the argument that it is an impermissible ad hoc creation of a permitted zoning use in the zoning ordinance and that he wanted to avoid issues that did not have to do with zoning regulations. Mr. Rossi said it was an interesting case because in essence, what the appellants were asserting is that there is an approved use of that space as an art studio. He said there are many other potential

uses that are not specifically mentioned in the zoning ordinance and that this use of the studio is perhaps one of those uses where someone sleeps in the studio. He said it seemed that, based on this assertion, there is a tacit assumption that once a use is permitted, in this case the use being an art studio, all other uses that are not specifically mentioned in the ordinance would be prohibited. He said he had a hard time seeing how it was a fair application of the zoning ordinance. Attorney Baker said sleeping and inhabiting a space is unique to the public's safety as well as the health and safety aspects of the zoning ordinance, so sleeping and inhabiting a space can and should get special consideration apart from other uses that might be permitted. Chair Margeson asked how making the studio into a non-transient sleeping unit made it a dwelling as defined in the zoning ordinance. Attorney Baker said a dwelling should be a situation where someone is using the accommodation for things like sleeping, cooking, and showering, but if there are not certain amenities provided in the dwelling unit, then it becomes an issue of public safety, and a Certificate of Occupancy could not be issued for that. He said the term 'sleeping unit' is a unique carve-out for something that does not exist under the zoning ordinance, which he further explained.

Mr. Nies referred to Section 10.434.40 that stated that if a use is not specified in the ordinance, it is prohibited. He said he would perhaps support Attorney Baker's argument that allowing someone to sleep in an art studio is prohibited. He said Section 10.811.50 stated that other accessory uses and access structures may be permitted if the code official determines that such uses and structures are customarily associated with and subordinate to a principal permitted use. He asked Attorney Baker how he proposed that the two be reconciled in relation to his comment because it seemed that the issue was a code official making a determination that the access use may be permitted because it is customarily associated with or subordinate to a principal use. Attorney Baker said the accessory use in this case could heavily imply that it is an accessory dwelling unit, which would be permitted if the owners lived in the unit, but they do not, so that use would not be permitted.

[Timestamp 1:04:13] Shanti Wolph (via Zoom) stated that this is a pre-existing residential multi-use space being used as an art studio or an overflow space. He said there was a complaint asserting that someone was living there, so he had to follow up on it because the previous use was never described as a dwelling unit. He said he went to the property on July 29 and saw that there were no smoke detectors and that the insulation was not covered, and there was no dresser, no bed, no closet, and no means of cooking. He said he wanted to ensure that the space was safe for whoever was using it. He said he returned on August 13 to make sure the issues were corrected, and he was satisfied that someone could get out safely if there were issues. He said in the past that an accessory use to a primary dwelling was like a shed, but in this case the primary dwelling is on a different parcel of land. He said the studio was not a commercial unit and not for rent and was being used by the family of the primary home. He said in his first letter, he classified it as an R2 non-transient sleeping unit because he wanted to find out how the use would be described from the building code perspective. He said his second letter was supplementary and got more into his wanting to ensure that he was not reclassifying the use but describing the use that he saw. He said in this case, the sleeping unit distinction is that the clarification is based on the specific use of the studio by the owner's son and that the studio does not contain the necessary living facilities. He said it is a residential use and not something that would be allowed in new construction.

Mr. Rheume asked what the genesis was for Mr. Wolph getting involved and if there was a building permit requested by the homeowner. Mr. Wolph said he was a code enforcement officer as well and it was alleged that someone was living there, which would be a violation of the zoning and the building code because it was never qualified as an independent dwelling unit. Mr. Rheume asked why adding a shower was considered if no one was living in the unit. Mr. Wolph said it was the definition of the R2 non-transient sleeping unit as defined in the International Building Code. He said the shower was not critical because the owner's son bathed in the primary house, but there used to be a shower in the unit at one time. Mr. Rheume asked what the basis of adding the words "use limitation" was and for saying that the studio is approved only as an R2 non-transient sleeping unit and shall not be rented, lease, or otherwise used as an independent unit. Mr. Wolph said his job is not to change how the space is being used but only to describe it and make sure that whoever is staying there is safe. Mr. Rheume asked how the letter was documented and filed so that it could be found again in the future. Mr. Wolph said the letter was in a hard file folder in the Planning Department and that it could also be electronically uploaded. He said it was kept in the same record-keeping manner as the decision by the Board of Adjustment.

[Timestamp 1:17:47] Planning and Sustainability Director Peter Britz reviewed the letter he sent to the Board and the statements made by Mr. Wolph. He said there were art supplies in the studio, so it was still being used as an art studio. He said there was no kitchen in the dwelling and no place for clothes, clothes washing, a bureau, and so on. He said the important thing was the lack of a kitchen, where one could cook their own food, so it would not rise to the level of a dwelling unit from a zoning standpoint. Mr. Rheume asked what the involvement of the code enforcement officer was. Mr. Britz said Mr. Wolph was the code enforcement officer in this situation and that he or a Planning designee would be the code enforcement officer in other situations. He said there was also a code enforcement officer in the Legal Department for zoning ordinance violations. Mr. Wolph said the Legal Department was fully aware of the case.

Mr. Nies said there were three examples of dwelling units in the zoning ordinance that do not have kitchens in them, like independent living units in retirement buildings that have access to common facilities with kitchens. Mr. Britz said those units were co-living shared units, but in this case there was no kitchen. It was further discussed. Mr. Rossi asked if there was a change in use if an artist decided to sleep in a space approved as an art studio. Mr. Britz said it would not because it was part of the process that an artist might have.

[Timestamp 1:23:53] The owner Hannah Burke said the studio was a small multi-use space that had been used in the same manner since the mid-1970s. She said it was originally meant as an art studio for her father but over the years it morphed in different ways and was used as needed for gatherings or for a family member who needed a space. She said her son had been there only intermittently and not for years and that it was not a permanent living situation for him. She said the studio was used as needed for his support and safety and that he ate and bathed at their house that was located seconds away around the corner. She said there were two apartments in the main house and a carriage house between the barn, which was a third rental unit. She said the art studio was in the

barn and that all the units were attached by external connections. She said the studio was still being used by her husband as an art studio.

Chair Margeson opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION [Timestamp 1:29:17]

Peter Carey said his house was about 50 yards from the back of the barn. He said it was not a dwelling unit under the code and it was not a use specifically allowed under the ordinance, so it had to be prohibited. He said Mr. Wolph bootstrapped the situation into an accessory use but tied it to a different property, which was not a precedent that should be established in Portsmouth.

Kathleen Logan of 21 Blossom Street said she knew the space was always used as an art studio but never knew that it was an overflow space for visitors to sleep in. She said she and other neighbors asked the code official and the police why the city allowed the Burkes to put their son in that space and that she was always told that it was not a problem. She said she and the other abutters did not know if the space was safe for the neighborhood.

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

[Timestamp 1:39:43] Mr. Rheume said the Board was looking at it as a code official, and he asked if he had the authority to be able to make this determination regarding calling it an R2 non-transient sleeping unit. He said the appellant made a good point that it is not something in the zoning ordinance, so it came down to basically creating a use in the zoning ordinance that just isn't there, or trying to do something that our zoning ordinance should have but does not have. He said none of the Board's deliberations had anything to do with whether the use had been proper or what is going on or the conditions of who might be where. He said it really was an academic exercise of the Portsmouth code official who looked at something, wrote a letter, and said they would consider it this "thing", an R2 non-transient sleeping unit. He said it was derived out of the building code, which is separate from the zoning ordinance. He said he was more concerned with the conditions of approval that came out of what the code official did, which was basically saying that it needed a shower to satisfy hygiene requirements. He said that was sort of saying that changes had to be made to make it in compliance with the thing we are saying it is. He said his other concern was the term "use limitation", which to him implied something more toward a zoning use rather than something related to a configuration and all the things looked for from the code official in terms of safety. He said now the Board was discussing what seemed like stipulations or something that would be in the ordinance, like it shall not be rented, leased, or otherwise used as an independent dwelling unit. He said that was where it started to cross over into something that really is the purview of the zoning ordinance and the Board rather than simply an interpretation of how to make it an established use safe for carrying out the recognized implications of that use. Mr. Rossi agreed that the zoning official overstepped in trying to define a new use that is not in the zoning ordinance and would require deliberation in a different body to get it there, but at the same time he said it could be true as saying that the zoning official did not err in stating that the unit was not a dwelling unit and

therefore was not in compliance with what was approved for the use of the structure. He said he was reluctant to go down the road of prohibiting something that is not specifically prohibited as a use. Mr. Nies said he was struggling with the idea that there is an accessory use that does not appear to be an accessory use for the property it is on. He said the art studio is located on a property but it not being used by any of the residents on that property as their art studio. He said accessory uses are supposed to be associated with the principal use of the property, and he was not sure that was the case in this situation. Vice Chair Mattson said the principal use of the property is residential, so an art studio being an accessory use to that is allowed, but he agreed that the art studio is not on the property that the owner uses as a primary residence. It was further discussed. Chair Margeson said the issue before the Board was whether or not the changes convert the space from an art studio into something else, and she thought that something else is a dwelling and does not fit the definition of dwelling in the zoning ordinance. Mr. Rheume said the code enforcement official put a label on it, the R2 non-transient sleeping unit, which was the whole point of writing the letter, and it was limited to the things one could and could not do with it, like not renting it out. He said that act of labeling it was critical. Vice Chair Mattson said the art studio is not a dwelling because it has no kitchen or access to a kitchen on the property, and he said there was no actual proof that it was being used as a dwelling. He asked at what point sleeping there supposedly made it a dwelling. He said the main thing was that nothing had changed. He said there was an attempt to make a change to correct a perceived wrongdoing, but if there was no wrongdoing in the first place, no change would be needed related to zoning. He said the unit was not being allowed to be rented and was not a new condition that stepped into zoning ordinance territory. He said there was nothing that does not allow someone to sleep there, and whether or not it has a shower will still not make it a dwelling unit. Mr. Nies said he struggled with the accessory use issue. It was further discussed.

DECISION OF THE BOARD [Timestamp 1:57:01]

*Mr. Rossi moved to **deny** the appeal because the physical changes requested by the Code Official would not convert the space into something other than an art studio and there is nothing in those physical changes that is incompatible with the use of an art studio. Vice Chair Mattson seconded.*

Mr. Rossi referred to the first question as to whether the physical changes requested by the code official would convert the space into something other than the art studio. He said they do not because there is nothing in those physical changes that is incompatible with the approved use as an art studio, so there is no new use and no need to address the second question. Vice Chair Mattson concurred and had nothing to add.

Mr. Rheume said he would not support the motion. He said the code enforcement officer classified the unit as an R2 non-transient sleeping unit, which was different than the art use. He said it met the first criteria because something did change there. Vice Chair Mattson said it was not a change regarding the zoning ordinance but was a building code classification with suggested changes to meet that classification.

The motion to deny passed by a vote of 5-2, with Mr. Rheume and Mr. Nies voting in opposition.

III. NEW BUSINESS

- A. REQUEST TO POSTPONE** The request of **Christopher H Daniell (Owner)**, for property located at **50 Whidden Street** whereas relief is needed to construct a rear addition and cantilevered deck which requires the following: 1) Variance from Section 10.521 to allow a 9.5 foot rear yard where 25 feet are required. Said property is located on Assessor Map 102 Lot 66 and lies within the General Residence B (GRB) and Historic Districts.
REQUEST TO POSTPONE (LU-26-15)

DECISION OF THE BOARD

The petition was postponed to the October 20th meeting.

IV. ADJOURNMENT

The meeting adjourned at 9:00 p.m.

Submitted,
Joann Breault
BOA Meeting Minutes Taker