



City of Portsmouth
Planning Department
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MEMORANDUM

TO: Zoning Board of Adjustment
FROM: Jillian Harris, City Planner
DATE: September 20, 2023
RE: Zoning Board of Adjustment September 26, 2023

The agenda items listed below can be found in the following analysis prepared by City Staff:

III. New Business

- D. 35 Whipple Court
- E. 253 Broad Street
- F. 815 Lafayette Road

III. NEW BUSINESS

- D. The request of Marcella F. Hoekstra (Owner), for property located at 35 Whipple Court whereas relief is needed in the form of an equitable waiver for 1) an accessory structure with an 8.5-foot right yard where 10 feet was permitted and an 8-foot rear yard where 17 feet was permitted; or in the alternative 2.a) Variance from Section 10.521 to allow an 8,324 SF lot area/dwelling unit where 15,000 SF is required; b) to allow a frontage of 45.83 feet where 100 feet is required; c) to allow an accessory structure with an 8.5 foot right yard where 10 feet is required; d) to allow an accessory structure with an 8 foot rear yard where 9 feet is required; and e) to allow a building coverage of 26% where 20% is allowed. Said property is located on Assessor Map 260 Lot 98 and lies within the Single Residence B (SRB) District. (LU-23-147)

Existing & Proposed Conditions

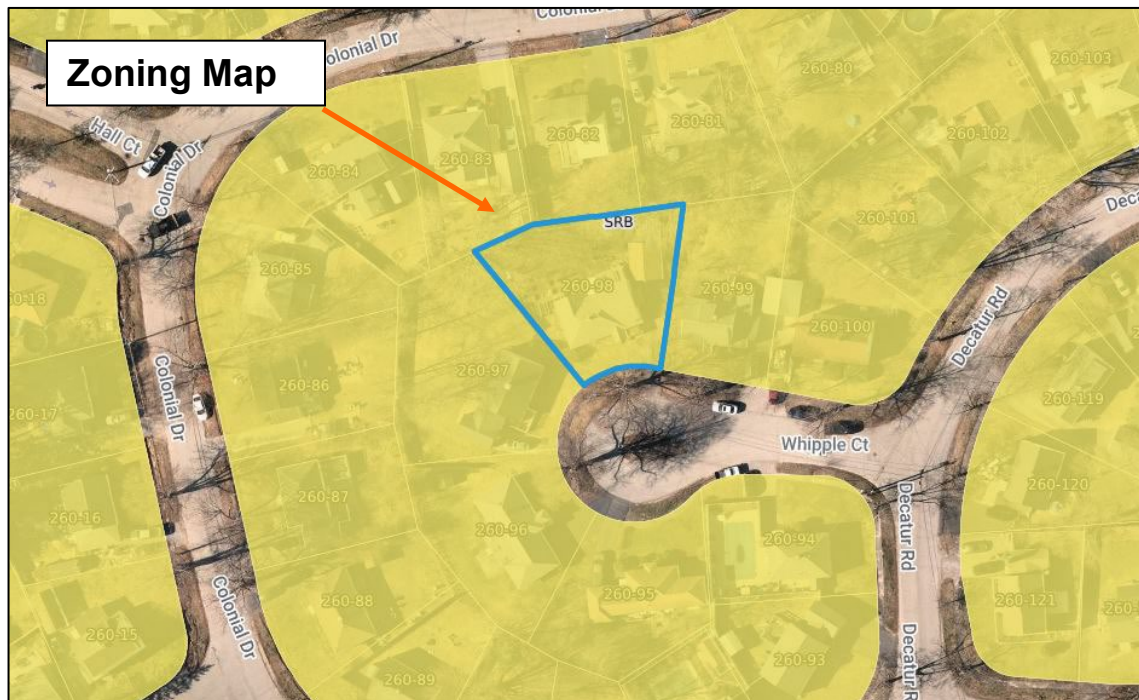
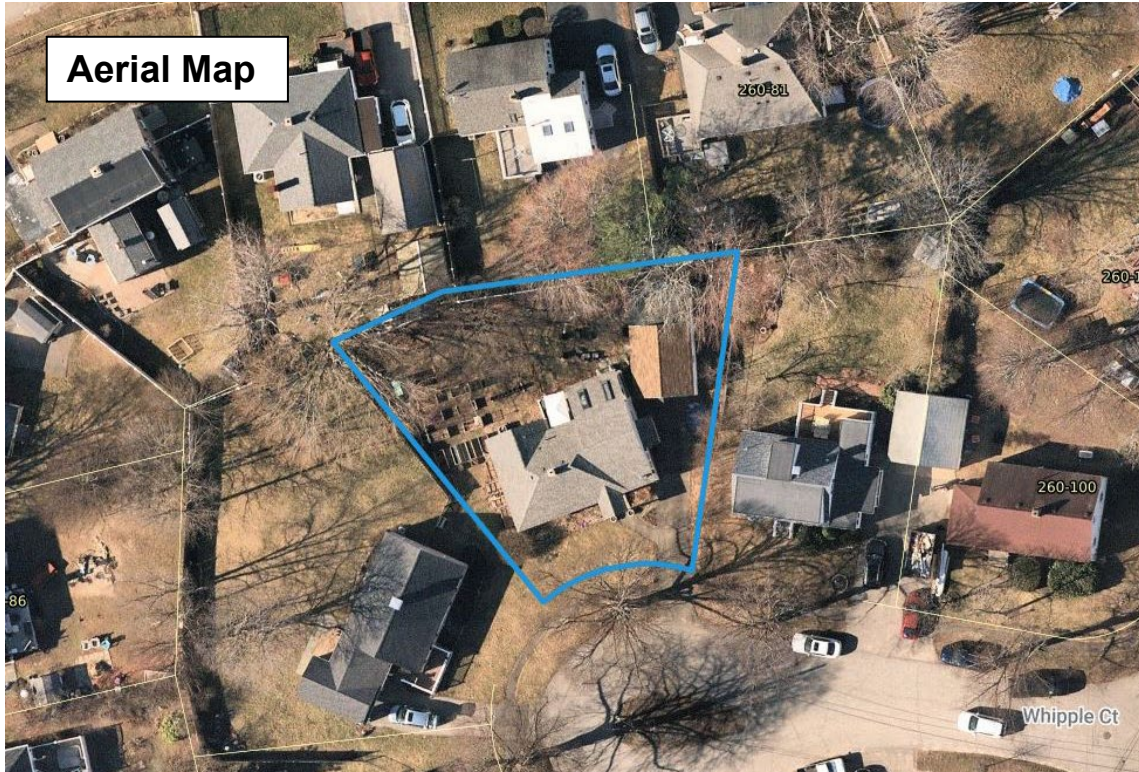
	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use</u>	Single-family dwelling	Detached ADU	Primarily residential
<u>Lot area (sq. ft.):</u>	8,324	8,324	15,000 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	8,324	8,324	15,000 min.
<u>Street Frontage (ft.):</u>	45	45	100 min.
<u>Lot depth (ft.):</u>	101	101	100 min.
<u>Front Yard (ft.):</u>	N/A	>30	30 min.
<u>Right Yard (ft.):</u>	8.5	8.5	10 min.
<u>Left Yard (ft.):</u>	N/A	>10	10 min.
<u>Rear Yard (ft.):</u>	8	8	9 min.
<u>Height (ft.):</u>	N/A	<35	35 max.
<u>Building Coverage (%)</u> :	26	26*	20 max.
<u>Open Space Coverage (%)</u> :	66	66	40 min.
<u>Parking:</u>	3	2	3
<u>Estimated Age of Structure:</u>	1968	Variance request(s) shown in red.	

*June 2021 Variance granted for building coverage

Other Permits/Approvals Required

- DADU Conditional Use Permit
- Building Permit

Neighborhood Context



Previous Board of Adjustment Actions

September 25, 1968 – The Board **granted** the following variance:

- Section 19-105 B to construct a 22' by 18' one car garage with 10' side yard and 17' rear yard.

June 22, 2021 – The Board **granted** the following variance: Construct a 4' x 17' rear addition which requires the following: 1) A Variance from Section 10.521 to allow 26% building coverage where 20% is the maximum allowed. 2) A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged.

Planning Department Comments

The applicant is proposing to convert a portion of the existing detached garage to a detached accessory dwelling unit (DADU). The Zoning Board of Adjustment granted a variance in 1968 for the detached garage to be located 10' from the right property line and 17' from the rear property line. The accessory structure was constructed 8.5' from the right property line and 8' from the rear property line and appears to be a long-standing encroachment into the relief that was granted. The applicant seeks an equitable waiver for the existing garage to be located as it was constructed 8.5' from the right property line and 8' from the rear property line.

In the alternative, the applicant seeks the necessary variances for dimensional deficiencies of the structure/lot in order to proceed with the conversion of the DADU. Section 10.440 – Table of Uses permits a DADU up to 600 sq.ft. Gross Living Area (GLA) in an existing accessory structure that does not conform to the dimensional requirements of this Ordinance or includes the expansion of the existing accessory building, with a Conditional Use Permit granted by the Planning Board. It is the opinion of staff, after conferring with the Legal Department, that this applies to legal nonconforming accessory buildings and therefore an equitable waiver is required or the necessary variances in this instance.

Equitable Waiver of Dimensional Requirement ([RSA 674:33-a](#))

I. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:

- That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;*
- That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or*

applicability made by a municipal official in the process of issuing a permit over which that official had authority;

- (c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and*
- (d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.*

II. In lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.

III. Application and hearing procedures for equitable waivers under this section shall be governed by RSA 676:5 through 7. Rehearings and appeals shall be governed by RSA 677:2 through 14.

IV. Waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions. An equitable waiver granted under this section shall not be construed as a nonconforming use, and shall not exempt future use, construction, reconstruction, or additions on the property from full compliance with the ordinance. This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them.

Variance Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The “unnecessary hardship” test:*
 - (a) The property has special conditions that distinguish it from other properties in the area.*

AND

 - (b) Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

OR

 - Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

10.235 Certain Representations Deemed Conditions

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.

III. NEW BUSINESS

E. The request of Lawrence Brewer (Owner), for property located at 253 Broad Street whereas relief is needed to construct an attached garage and add a second driveway, which requires the following: 1) Variance from Section 10.521 to allow a 7 foot side setback where 10 feet is required; and 2) Variance from Section 10.1114.31 to allow more than one driveway per lot. Said property is located on Assessor Map 131 Lot 16 and lies within the General Residence A (GRA) District (LU-23-148)

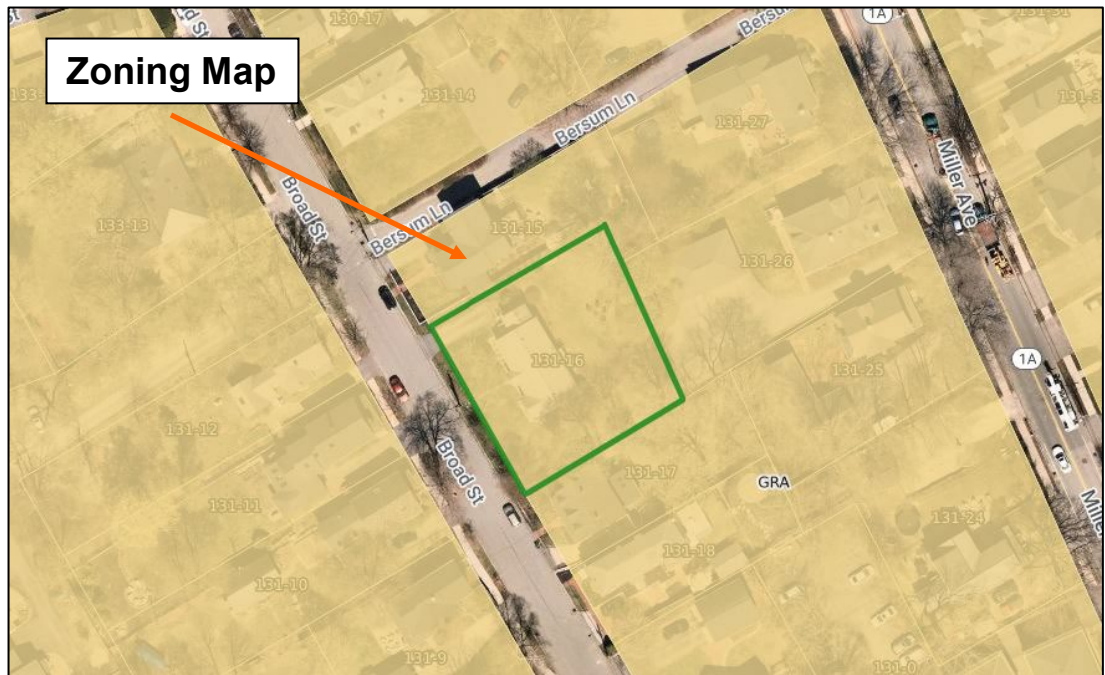
Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use</u>	Single-family dwelling	Attached garage and 2 nd driveway	Primarily residential
<u>Lot area (sq. ft.):</u>	12,196	12,196	7,500 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	12,196	12,196	7,500 min.
<u>Street Frontage (ft.):</u>	110	110	100 min.
<u>Lot depth (ft.):</u>	105	105	70 min.
<u>Front Yard (ft.):</u>	>15	>15	15 min.
<u>Right Yard (ft.):</u>	>10	>10	10 min.
<u>Left Yard (ft.):</u>	20	7	10 min.
<u>Rear Yard (ft.):</u>	>20	>20	20 min.
<u>Height (ft.):</u>	<35	<35	35 max.
<u>Building Coverage (%)</u>	12.5	17.5	25 max.
<u>Open Space Coverage (%)</u>	84	79	30 min.
<u>Parking:</u>	2	4	2
<u>Estimated Age of Structure:</u>	N/A	Variance request(s) shown in red.	

Other Permits/Approvals Required

- Building Permit
- ADU Conditional Use Permit

Neighborhood Context



Previous Board of Adjustment Actions

No previous BOA history found.

Planning Department Comments

The applicant is requesting to construct an attached garage 7' from the left lot line where 10' is required. In addition, the applicant is requesting relief for a second driveway on the lot to accommodate a future addition and attached ADU. Staff recommends voting on each variance request separately.

Variance Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
2. *Granting the variance would observe the spirit of the Ordinance.*
3. *Granting the variance would do substantial justice.*
4. *Granting the variance would not diminish the values of surrounding properties.*
5. *The "unnecessary hardship" test:*
 - (a) *The property has special conditions that distinguish it from other properties in the area.*

AND

 - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

OR

 - (c) *Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

10.235 Certain Representations Deemed Conditions

Representations made at public hearings or materials submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking or uses which are subject to regulations pursuant to Subsection 10.232 or 10.233 shall be deemed conditions upon such special exception or variance.

III. NEW BUSINESS

- F. The request of Prospect North (Owner), for property located at 815 Lafayette Road whereas relief is needed for the demolition of the existing building and tower and the construction of three 4-story, 24-unit multi-family buildings (72 total units) with first floor parking and associated site improvements, which requires the following: 1) Variance from Section 10.5B33.20 (Front Build-out) to permit a front build out of less than 50% of the total front yard width; and 2) Variance from Section 10.5B33.30 (Façade Orientation) to permit a façade orientation that is not parallel with the front property line. Said property is located on Assessor Map 245 Lot 3 and lies within the Gateway Corridor (G1) District and the FEMA 100yr flood and extended flood hazard area. (LU-23-149)

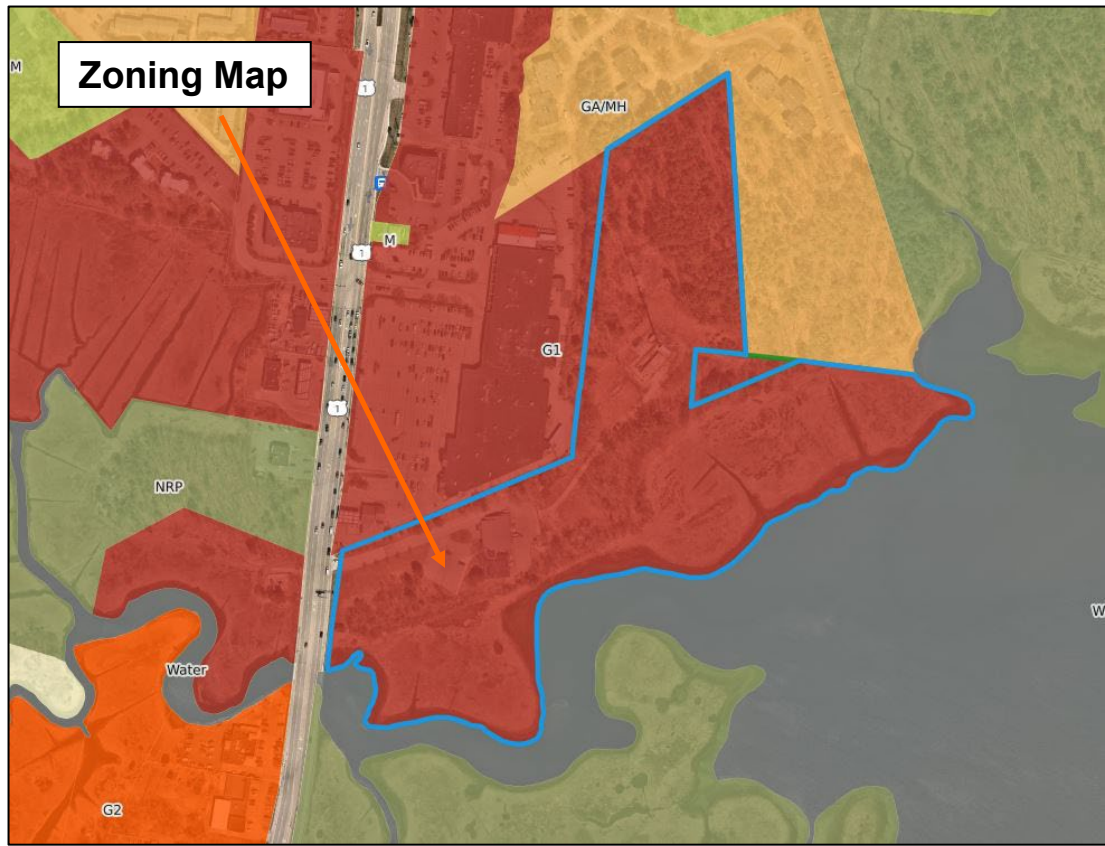
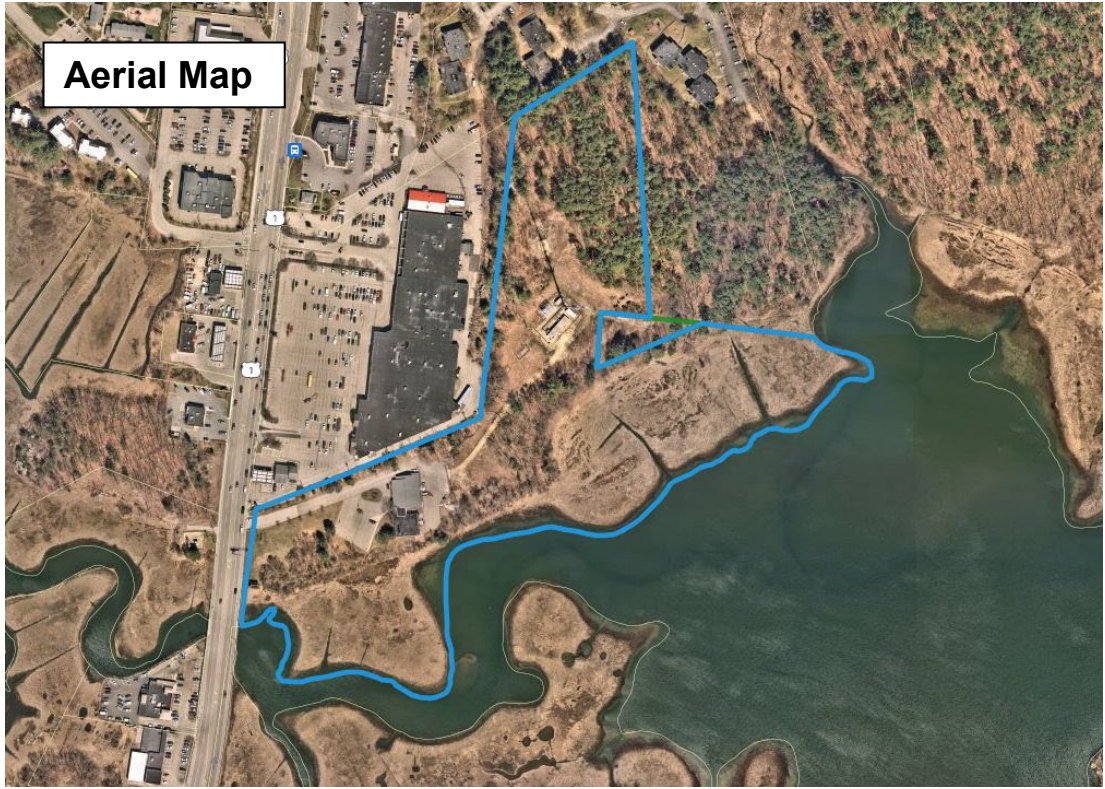
Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Commercial Building and Radio Tower	3 4-story, 24-unit apartment buildings	Mixed Uses
<u>Lot area (sq. ft.):</u>	853,776	853,776	10,000 min.
<u>Street Frontage (ft.):</u>	271	271	75 min.
<u>Lot depth (ft.):</u>	971	971	100 min.
<u>Front Yard (ft.):</u>	>90	90	70-90 max.
<u>Left Yard (ft.):</u>	NA	56	15 min.
<u>Right Yard (ft.):</u>	NA	>15	15 min.
<u>Rear Yard (ft.):</u>	NA	>20	20 min.
<u>Height (ft.):</u>	NA	50	50 max.
<u>Building Coverage (%)</u>	NA	3.6	50 max.
<u>Open Space Coverage (%)</u>	NA	91	20 min.
<u>Front Lot Line Build Out (%)</u>	NA	0	50
<u>Façade Orientation</u>	NA	Perpendicular	Parallel
<u>Parking</u>	118	118	109
<u>Estimated Age of Structure:</u>	NA	Variance request(s) shown in red.	

Other Permits/Approvals Required

- Planning Board Site Plan Review/Conditional Use Permit

Neighborhood Context



Previous Board of Adjustment Actions

No previous BOA history found.

Planning Department Comments

The applicant is proposing to demolish the existing commercial building and tower along Sagamore Creek and to construct three 4-story, 24-unit multi-family buildings (72 total units) with first floor parking. The property is located in the Gateway (G1) District and will require variances for the following deviations from the general standards for all buildings and development in the gateway neighborhood mixed use districts:

- 1) Section 10.5B33.20 (Front Build-Out) – to permit a front build-out of less than 50% of the total front yard width.
- 2) Section 10.5B33.30 (Façade Orientation) – to permit a front façade orientation that is not parallel with a front property line.

Variance Review Criteria

This application must meet all five of the statutory tests for a **variance** (see Section 10.233 of the Zoning Ordinance):

1. *Granting the variance would not be contrary to the public interest.*
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AND

 - (b) *Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.*

OR

 - (c) *Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

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