



CITY OF PORTSMOUTH

Planning Department
1 Junkins Avenue
Portsmouth, New
Hampshire 03801
(603) 610-7216

ZONING BOARD OF ADJUSTMENT

September 26, 2023

Cynthia Austin Smith and Peter Smith
206 Court Street
Portsmouth, New Hampshire 03801

RE: Board of Adjustment request for property located at 9 Kent Street (LU-23-119)

Dear Property Owners:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **Tuesday, September 19, 2023**, considered your application for demolishing the existing two (2) living unit structures and constructing a one (1) living unit structure, which requires a Variance from Section 10.521 to allow a) 5,000 square feet of lot area where 7,500 square feet are required and b) 5,000 square feet of lot area per dwelling unit where 7,500 square feet are required.

Said property is shown on Assessor Map 113 Lot 42 and lies within the General Residence A (GRA) District. As a result of said consideration, the Board voted to 1) suspend the rules to reopen the public hearing, 2) to accept new information from the applicants, and 3) to **grant** the request as presented and advertised.

The Board's decision may be appealed up to thirty (30) days after the vote. Any action taken by the applicant pursuant to the Board's decision during this appeal period shall be at the applicant's risk. Please contact the Planning Department for more details about the appeals process.

Approvals may also be required from other City Commissions or Boards. Once all required approvals have been received, applicant is responsible for applying for and securing a building permit from the Inspection Department prior to starting any project work.

This approval shall expire unless a building permit is issued within a period of two (2) years from the date granted unless an extension is granted in accordance with Section 10.236 of the Zoning Ordinance.

The Findings of Fact associated with this decision are available: attached here or as an attachment in the Viewpoint project record associated with this application and on the Zoning Board of Adjustment Meeting website:

<https://www.cityofportsmouth.com/planportsmouth/zoning-board-adjustment/zoning-board-adjustment-archived-meetings-and-material>

The minutes and audio recording of this meeting are available by contacting the Planning Department.

Very truly yours,

A handwritten signature in cursive script that reads "Phyllis Eldridge". The signature is written in black ink and is positioned above the printed name.

Phyllis Eldridge, Chair of the Zoning Board of Adjustment

cc: Shanti Wolph, Chief Building Inspector

Rosann Maurice-Lentz, City Assessor

R. Timothy Phoenix, Hoefle, Phoenix, Gormley & Roberts, PLLC
John Chagnon, Ambit Engineering

Findings of Fact | Variance

City of Portsmouth Zoning Board of Adjustment

Date: 9-19-2023

Property Address: 9 Kent Street

Application #: LU-23-119

Decision: **Grant**

Findings of Fact:

Effective August 23, 2022, amended RSA 676:3, It now reads as follows: The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. **The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval.** If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.

The proposed application meets/does not meet the following purposes for granting a Variance:

Section 10.233 Variance Evaluation Criteria	Finding (Meets Criteria)	Relevant Facts
10.233.21 Granting the variance would not be contrary to the public interest.	YES	<ul style="list-style-type: none"> • The applicant is meeting the essential character of the neighborhood specific to the relief that is being asked for. • There are a lot of large structures on the substandard 5,000-sf lots in the neighborhood, some of them with high roof lines.
10.233.22 Granting the variance would observe the spirit of the Ordinance.	YES	<ul style="list-style-type: none"> • The applicant is meeting the essential character of the neighborhood specific to the relief that is being asked for. • There are a lot of large structures on the substandard 5,000-sf lots in the neighborhood, some of them with high roof lines.

<p>10.233.23 Granting the variance would do substantial justice.</p>	<p>YES</p>	<ul style="list-style-type: none"> • The applicant demonstrated what is currently there and what is available on similar lots throughout the neighborhood and what is asked for fell in the balance and is something granted to many others in the past. • There are not other substantial characteristics put forward relating to competing concerns that outweighed the fundamental right to develop a property in conformance with the ordinance.
<p>10.233.24 Granting the variance would not diminish the values of surrounding properties.</p>	<p>YES</p>	<ul style="list-style-type: none"> • The structure is replacing a 2-family home and would be a more conforming building that will not have a different use, and a single-family residence is allowed in the area.
<p>10.233.25 Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.</p> <p>(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.</p>	<p>YES</p>	<ul style="list-style-type: none"> • There are numerous lots in the neighborhood of a similar standard size. • The proposed structure is fully conforming on a lot that is a characteristic size of the neighborhood. • There is no general public purpose of the ordinance that says this specific home should not be built. • The owner is maxing out the height, especially on the side approaching the neighbors, but there wasn't enough to say that it is out of the nature of other uses on the 5,000-sf lots in the area. • The land is the hardship and the applicant decided to build up to the required dimensions.



Bosen & Associates
ATTORNEYS AT LAW

John K. Bosen
Admitted in NH & MA

Christopher P. Mulligan
Admitted in NH & ME

Molly C. Ferrara
Admitted in NH & ME

Austin Mikolaities
Admitted in NH

Bernard W. Pelech
1949 - 2021

October 19, 2023

VIA HAND DELIVERY

Phyllis Eldridge, Chair
City of Portsmouth
Zoning Board of Adjustment
1 Junkins Avenue
Portsmouth, NH 03801

RE: 9 Kent Street (LU-23-119) – REQUEST FOR REHEARING

Dear Ms. Eldridge:

This office represents David and Sandra Mikolaities, Trustees of the Mikolaities Family Trust of 19 Kent Street, William and Catherine Arakelian of 18 Kent Street and Barbara K. Adams, Trustee of the Barbara K. Adams Revocable Trust of 1999 of 75 Kent Street. On their behalf, the foregoing is a formal request that the Board of Adjustment grant a rehearing with respect to its decision of September 19, 2023 to grant variances from Section 10.521 relative to the above referenced property.

I. Standard of Relief.

“Within 30 days after any order or decision of the zoning board of adjustment . . . any party . . . may apply for a rehearing . . . specifying in the motion for rehearing the ground therefor; and the board of adjustment . . . may grant such rehearing if in its opinion good reason therefor is stated in the motion.” RSA 677:2. “A motion for rehearing . . . shall set forth fully every ground upon which it is claimed that the decisional order complained of is unlawful or unreasonable . . . the board of adjustment . . . shall within 30 days either grant or deny the application [for rehearing].” RSA 677:3. The ZBA must grant a rehearing if good reason is shown. RSA 677:2. The purpose of rehearing is to allow the ZBA to correct any errors it may have made. McDonald v. Effingham, 152 NH 171 (2005).

The applicant respectfully submits that the Board's decision was unlawful or unreasonable, based upon a misapplication or misunderstanding of fact and law. Good cause for rehearing exists, as set forth herein.

II. Variances requested vs. variances required.

The application, this applicant's second before the Board this year, requested two variances from Section 10.521, for lot area and lot area per dwelling unit (5,000 square feet where 7,500 is required). The appellants have commissioned a peer review of the applicants' plans by a professional engineer who has confirmed that, as presented, the project requires at least four additional variances. See Memorandum of August Consulting, PLLC dated October 18, 2023 submitted herewith as Exhibit A, and incorporated herein.

Contained in every variance application is the threshold question of whether the applicant's proposed use of property requires a variance in the first place. Bartlett v. Manchester, 164 NH 634, (2013). In other words, regardless of what relief the variance applicant seeks, the Board of Adjustment must inquire in the first instance whether that relief is actually necessary. If the applicant does not require variance relief, for example because the use is an allowed accessory use or the nonconformity is grandfathered, the Board must so find. The obvious corollary is that when the application does not request the appropriate variances necessary for its project, the Board must similarly so find.

At a minimum, variances from Section 10.521 for building coverage are still required because the proposed spa and rear and side yard concrete retaining walls are "structures" as that term is defined in the ordinance, and thus count towards the building coverage calculation¹. The actual building coverage, properly calculated, is 32% where 25% is the maximum permitted.

Furthermore, the "Proposed 6' High Masonry Wall" and "Proposed 4' High Masonry Wall" shown on the plans submitted are accessory structures and are only four feet from the side property line. Because these proposed structures, including the spa, are connected and, taken together, far exceed 100 square feet, section 10.573.20 applies and they all should be set back by the applicable side and rear yard requirements, ten and twenty feet respectively. At the very least, these structures require a variance from the five foot accessory structure setback requirement of section 10.573.10.²

Finally, the project requires relief from Section 10.516.30, which provides that "[o]n a corner lot, no structure, accessory structure, landscaping, or screening which

¹ "Structure" is defined in Article 15 of the ordinance as "[a]ny production or piece of work, artificially built or composed of parts and joined together in some definite manner. Structures include, but are not limited to, buildings, fences over four feet in height, signs and swimming pools."

Section 10.574 provides that "[a]ll accessory buildings and structures shall be included in the computation of building coverage."

² The walls are not "buildings" as that term is defined in the ordinance, therefore, the alternate setback from the lot line of the "height of the building" is not applicable. There is inadequate detail on the spa to determine whether it meets the definition of a building.

obstructs visibility shall be erected or maintained between the heights of 2.5 feet and 10 feet above the edge of pavement grades within the area bounded by the sidelines of the intersecting street rights-of-way and a straight line joining points along said street sidelines 20 feet from the point of intersection of such sidelines or extensions thereof.” As noted in the August Consulting Memorandum, the proposed fence and plantings are not in compliance with this requirement.

The applicants did not request, and the Board did not grant, any of these necessary variances. The Staff Report transmitted to the Board did not identify them. See Exhibit B. The planning staff improperly delegated the interpretation of the ordinance, and the determination of what relief was required to the applicants. See attached Exhibit C. This denied the public a full and fair public hearing on this substantial project.

The number and scope of variances required in any given project are appropriately considered by the Board when making determinations regarding several criteria for granting a variance, including whether granting the variance is in the public interest and is consistent with the spirit of the ordinance, whether granting the variance will do substantial justice, and whether there is an unnecessary hardship. The applicants’ representative also made numerous representations that the proposed dwelling was fully compliant with zoning, other than lot area, which admittedly is impossible to meet. Such representations are conditions of approval upon the variances, under Section 10.235, rendering the variances void on that basis. The extent to which this misrepresentation affected the Board’s consideration and analysis of the application cannot be gauged on the record and rehearing is therefore necessary.

The failure of the Board to address the actual variances necessary, rather than just the variances the applicants specifically sought, was error and requires rehearing.

III. Substantive defects and omissions in applicants’ submission.

Pursuant to the Board’s Rules and Regulations, the minimum requirements for adequate plans and exhibits shall include, among other things, “building plans and elevations of any proposed structures”, and site plans showing proposed conditions including “Dimensions (size and height) of structures.” See Rules, Section IV.6. The applicants failed to submit adequate details regarding the spa and concrete walls. One may presume that had a complete, compliant submission been made, the necessary variances identified above may have been properly identified by staff and addressed by the Board.

Furthermore, planning staff has the discretion to “also require additional information and/or exhibits as needed to illustrate the scope of the project.” Id, at Section IV.8. As identified in the August Consulting Memorandum, significant engineering details are lacking. Specifically, there is no stormwater management plan provided, despite the substantial increase in impervious surface and building coverage and despite the applicant’s representations that stormwater will be discharged by connecting to City structures in the South Mill pond, a sensitive and already overburdened water body. The

applicants are adding over 1000 square feet of impervious surface to this undersized lot, increasing its impervious surface area from 36.5% to 57.8%. The applicant further provided no detail regarding tree removal, drainage, grading and ash removal in the City right of way.

Here, the applicants should have been required to provide sufficient engineering detail to facilitate a proper evaluation of this project's affect on the neighborhood and the public interest. It is noted in the Staff Report that no further review is required for this project beyond a building permit. The Board is reminded that, just this week, it approved a special exception for a 3200 square foot automobile dealership in a fully developed retail strip mall on Lafayette Road, attaching conditions requiring the applicant obtain full TAC review and Planning Board approval. See Case No. LU-23-160. It frankly beggars belief that a new home with over 3500 square feet of living space, resulting in a massive increase in building footprint and impervious surface in a dense residential neighborhood and abutting a public park, and which will have acknowledged stormwater impacts on the South Mill Pond, would be subject to *less* scrutiny.

The granting of variances based upon inadequate and insufficient plans, and without attaching any reasonable conditions providing for further review, was error and requires rehearing.

III. The legal standard for granting a variance.

The appellants respectfully maintain the Board erred in its application of the statutory variance criteria.

A. Granting the variance would be contrary to the public interest or the spirit of the ordinance.

The Board found that granting the variance would not be contrary to the public interest and contrary to the spirit of the ordinance. These criteria are considered together pursuant to Chester Rod & Gun Club v. Town of Chester, 152 NH 577 (2005) and Malachy Glen Associates, Inc. v. Town of Chichester, 155 NH 102, 105-106 (2007). In order for a variance to be contrary to the public interest or injurious of public rights, the variance "must unduly, and in a marked degree" conflict with the basic zoning objectives of the ordinance. Chester, at 581. "Mere conflict with the terms of the ordinance is insufficient." Harborside Associates, LP v. Parade Residence Hotel, LLC, 162 NH 508, 514 (2008). In making such a determination, the Board must consider whether the variance would (a) alter the essential character of the locality, or (b) threaten the health, safety or welfare of the public. Id.

As an initial matter, the Findings of Fact dated September 19, 2023 issued by the Board indicate that these two criteria are met because "[t]here are a lot of large structures on the substandard 5,000-sf lots in the neighborhood, some of them with high roof lines." This is inadequate as a basis for granting a variance as a matter of law under the

Ordinance. Section 10.232.60 specifically provides “the existence of conditions in the surrounding area that are similar to the proposed non-conformity shall not be a basis for the granting of a variance.” The Board should rehear this application on that basis alone.

Here the granting of the variances clearly threatens the health, safety and welfare of the public. As noted in the August Consulting Memorandum, the variances granted will facilitate the construction of a dwelling that will have significant stormwater, drainage and other environmental impacts. This is by definition a threat to public health, safety and welfare. The proposal requires significant impacts upon the public right of way, the public park, and the South Mill Pond, to say nothing of its direct visual and aesthetic impact on the abutters. The Board erred in finding that the granting of the variances would not be contrary to the public interest or contrary to the spirit of the ordinance.

B. Granting the variance would not result in substantial justice.

Here the Board must balance the harm to the applicant if the requested variance is denied against the gain to the general public if the ordinance is upheld. The analysis here really need go no further than the applicants’ failure to seek and obtain all necessary variances for the project as presented, as set forth in Section II above. The Board will recall in May it unanimously denied the applicant’s first proposal, which required seven variances. See attached Exhibits D & E. Although the Board refused to apply Fisher v. Dover to the present application, it nevertheless failed to meaningfully articulate how the present application was less “egregious” than the first.

C. Granting the variance would diminish values of surrounding properties.

The Board addressed this criterion in its finding of facts with the statement that “[t]he structure is replacing a 2-family home and would be a more conforming building that will not have a different use, and a single-family residence is allowed in the area.” Again, this does not take into consideration the additional variances the project requires. Nor does it address the impact such a massive new structure would have on abutting properties.

D. Literal enforcement of the provisions of the ordinance would not result in unnecessary hardship.

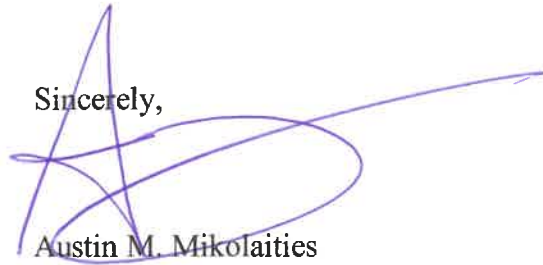
The applicant, in their own words, describes the property as a side by side duplex covering 1,075 square feet with no driveway or off street parking. In May, the Board voted unanimously against the applicants’ project for many reasons, one of which was their inability to establish hardship. Nothing has changed. The applicant moved the house over by 12 feet, but it is essentially the same four-story, full height house, patio/spa with masonry walls. Nothing has changed since May to create special conditions for this property. The proposed underground garage allows for the expansive patio/spa area (which itself requires additional dimensional relief). A house without an underground garage is not a hardship. The majority of the neighborhood has driveways next to their

houses on similar sized lots, and it is possible to develop the applicants' property in a similar way. Five of the six homes with under house garages that the applicants provided photographs of are modest one to two story high homes, not four story full height developments. Those garages are not subterranean, they are at street level.

The Board of Adjustment's conclusion that the applicants were entitled to variances suffered from procedural and substantive defects and was based upon a misapplication or misunderstanding of fact and law and a rehearing is appropriate.

Thank you for your consideration.

Sincerely,

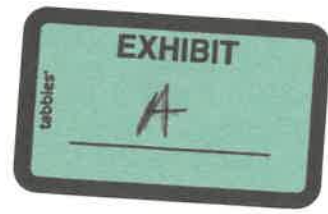
A handwritten signature in blue ink, appearing to read "Austin M. Mikolaities". The signature is stylized with a large, sweeping loop that extends to the right and then curves back down and left.

Austin M. Mikolaities

AMM/

Enclosures

cc: Client (w/ encls.)
R. Timothy Phoenix, Esquire (w/encls.)



Strategic Resource | Proven Results

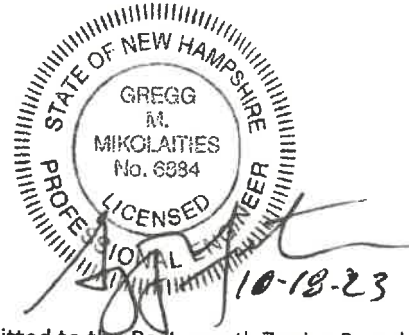
One Willow Lane, Rye NH 03870

MEMORANDUM

DATE: October 18, 2023

TO: Portsmouth Zoning Board of Adjustment

FROM: Gregg Mikolaities, PE



I have completed a review of the September 8, 2023, plans submitted to the Portsmouth Zoning Board titled, "Structure Replacement - Smith Residence" and the Supplemental Memo, dated September 11, 2023, on the redevelopment of 9-11 Kent Street in Portsmouth, NH.

My review has been completed based on my 40 years of civil engineering experience, including permitting dozens of projects in Portsmouth since 1985. My review identified three items of concern that include the following:

1. **Variations:** I have identified at least four additional variations that are required beyond the two that were requested for a total of six.
 - a. The backyard spa is a structure and should count towards building lot coverage thus exceeding the 25% building lot coverage calculations and requiring a variance.
 - b. The back and side yard "concrete retaining wall" is a structure requiring it to be counted towards building lot coverage thus exceeding the 25% building lot calculations and requiring a variance.
 - c. The back and side yard "concrete retaining wall" is a structure that requires a setback variance from the property line.
 - d. The front and side yard fence require a variance for corner lot vision obstruction because both the fence/wall and landscaping exceed the requirement.
2. **Impacts to City Property (Right of Way):** The applicant's submittal lacks information as to the proposed work that will occur within the City's right of way pertaining to grading, drainage, tree removal and the removal of ash material identified in their test pit data.
3. **Drainage:** The redevelopment will significantly change the property's stormwater runoff and offers no stormwater management plan. The runoff is proposed to connect into the City's stormwater system and discharge into South Mill Pond. No details are provided on stormwater treatment and the impact of increasing the undersized lot's impervious surface coverage by 21%.

Below is an expanded description of the above items.

1. **Variations:** This project requires four additional variations:

a. Spa is a Structure: In the Supplemental Memorandum to the ZBA, page 3, the applicant states that the "City Staff have determined that the spa (hot tub) is an accessory structure. Pursuant to Portsmouth Zoning Ordinance §10.573.10, an accessory structure less than 10 ft. tall and less than 100 sf in area must be set back 5 ft. from any lot line." The applicant continues by stating that "the spa will be set into the ground protruding approximately 3 ft. and is 96 sf in area. Accordingly, it must comply with a 5 ft. setback." The applicant concludes by stating on page 7 that, "Lastly, as discussed supra, the spa is treated as an accessory structure."

Pursuant to Section 10.574 of the Portsmouth Zoning Ordinance, "All accessory buildings and structures shall be included in the computation of building coverage." The spa is not. On sheet C-2, the plan labeled variance plan, the 96-sf spa area is not included in the proposed building coverage. The proposed building coverage now increases to 27%, thus requiring the applicant to seek a variance for exceeding building lot coverage.

b. Rear and Side Yard Concrete Retaining Wall is a Structure: On page 6 in the Supplemental Memorandum, dated September 11, 2023, the applicant states that the "City Staff have further confirmed that the landscape walls in the Kent and Rockland Street front yards under 18 inches in height are not structures. The rear patio is also less than 18 inches above existing grade and therefore not a structure."

The Supplemental memo is misleading because the applicant claims, "Similarly, the combination of low wall and short fence in the front yards do not exceed the permitted 4-foot height for fences in the principal front and secondary front yards. In the left side and rear yard setbacks, the combination masonry wall/fence do not exceed the permitted height of 6 feet applicable to fences in rear and side yards". The applicant concludes by stating that the front yard and Rockland Street side yard are walls less than 18" with a fence less than 4 feet – therefore not a structure. Then they continue the argument to the back and south side yard – however, they neglect to mention that there is no fence or combination fence on top of a wall in these areas – just a 4-foot and 6-foot high by 16-inch-wide concrete masonry wall that is a structure.

In Section 10.1530 of the Portsmouth ZBA titled Terms of General Applicability, page 15-38 under Definitions defines a structure as:

Structure: Any production or piece of work artificially built up or composed of parts and joined together in some definite manner. Structures include, but are not limited to, buildings, fences over 4 feet in height, signs, and swimming pools.

In accordance with Portsmouth ZBA 10.574, "All accessory buildings and structures shall be included in the computation of building coverage". The 236-square feet of concrete wall is a structure and as such should be applied to building lot coverage, now increasing their building lot coverage to 32% (5% additional increase beyond the spa).

c. Back and side yard “retaining wall” requires a setback variance from the property line: In accordance with PZA 10.573.20, “An accessory building or structure more than 10-feet in height or more than 100-square feet in area shall be set back from any lot line at least the height of the building or the applicable yard requirement, whichever is less.”

The concrete walls in the rear and south boundary are permanent accessory structures that are 4-feet from the property line and 236 square feet in area (see sheet C-2 Variance Plan, Exhibit 4). It requires a variance for where it is currently located, or it needs to be moved away from the property line in order to be in compliance with section 10.573.20.

The wall should be treated similar to the spa, which the applicant states on page 3 of their Supplemental Memorandum, “is an accessory structure”. Because the spa will be set into the ground protruding approximately 3 ft. and is 96 sf in area, PZO §10.573.10 applies and not 10.573.20. That is why the applicant states that, “it must comply with a 5 ft. setback. As proposed, the spa is 5.2 ft. from the side lot line and 5.2 ft. from the rear lot line and therefore compliant (page 3 of the Supplemental Memorandum).” The wall is not compliant.

d. Front and Side Yard Fence Require a Variance for Corner Lot Vision Obstruction: Both the applicant’s landscape plan (Sheet L-IL) and variance plan (sheet C-2) describe their front/side yard fence/wall as: a “Masonry wall (<18” high: step with grade) with metal picket fence atop; 4’ high or less total, typical.”

Portsmouth ZBO Section 10.516.30 Corner Lot Vision Obstruction states that “on a corner lot, no structure, accessory structure, landscaping, or screening which obstructs visibility shall be erected or maintained between the heights of 2.5 feet and 10 feet above the edge of pavement grades within the area bounded by the sidelines of the intersecting street rights-of-way and a straight line joining points along said street sidelines 20 feet from the point of intersection of such sidelines or extensions thereof. “Both the applicant’s fence/wall and plantings are not in compliance, thus requiring a variance.

- 2. Impacts to City Property (Right of Way):** The submittal lacks information as to the proposed work that will occur within the City’s right of way pertaining to tree removal, grading, drainage and the removal of ash material identified in their test pit data.

The driveway is designed in a manner that will require the homeowner to back their vehicle all the way out on Rockland Street to Kent Street. The site is designed so that a car cannot park in the driveway and remain on the applicant’s property, it will be within the City’s right of way (ROW). In order to access the garage, the City’s right-of-way has to be regraded. Test pit #4 underneath the proposed driveway that was conducted in the City ROW identified as having ash, (Note: all four test pits identified ash, including test pits #1 and 3 within the proposed new building foundation and test pit #2 under the new back yard wall).

Has the applicant determined if it is a hazardous waste and if so, how will they protect the neighborhood during removal and abatement (see Standard Boundary and Topographic Survey Plan for test pit locations). The demolition plan does not show two trees to be removed, including one tree located in the City ROW.

Furthermore, the plans have no details on stormwater management and excavating within the City Right of Way to mitigate their drainage issues. See section 3 below.

- 3. Drainage** - A review of the plan set that includes the proposed drainage and grading plan (sheet C3) indicates that the project will significantly change the property's drainage characteristics, offers no stormwater management plan as to how they will treat stormwater connecting into City structures at South Mill Pond and increases the undersized lot's impervious surface coverage by 21%.

The proposed home's new roofline is changing from east-west to north-south shedding water on to their proposed side yard between their home and the abutter's home, the concrete foundation for the new home increases substantially in length from 34 to 56-feet and then an impervious barrier created by their 6-foot-high masonry wall and 4-foot-deep buried footer continues another 26-feet along the abutter's property line. There now exists an 82-foot-long impervious barrier along a 100-foot property line and stormwater flow that has no place to go.

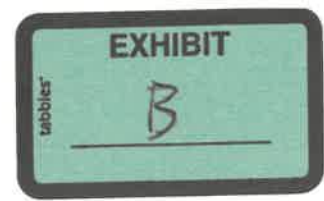
Runoff from off site, as well as on-site, now flows towards the proposed garage doors. The proposed curb cut along the Rockland Street Extension for their driveway is the lowest point where all stormwater will now flow down Rockland Street, down their driveway into the garage at elevation 23.0-feet which is the lowest point. The stormwater has no place to go and must be pumped somewhere.

There is no design information on how the runoff flowing towards the garage doors will be captured and discharged. However, during the September 19th hearing, the applicant's team commented that they will be connecting to the City structures in South Mill Pond (You Tube 1:34:45). There is no information provided on the proposed excavation within the City Right of Way for their stormwater management.

Furthermore, the undersized lot's impervious surface area is increasing from 36.5% to 57.8%. The project is adding over 1,000-square feet of additional impervious surface with no stormwater management devices proposed to mitigate the increase in runoff. The water has to go somewhere. This is a bad precedent for the ZBA and City to accept, an applicant increasing impervious coverage by 21%. The City and its residents will be impacted by flooding and undersized infrastructure that would require upgrades to the municipal collection system.

In summary, my review identified that the submission was incomplete, did not properly identify the required variances, and lacks sufficient engineering details.

Please let me know if you have any questions on the above.



II. OLD BUSINESS

B. The request of **Cynthia Austin Smith and Peter Smith (Owners)**, for property located at **9 Kent Street** whereas relief is needed to demolish the existing two (2) living unit structure and construct a one (1) living unit structure which requires a Variance from Section 10.521 to allow a) 5,000 square feet of lot area where 7,500 square feet are required and b) 5,000 square feet of lot area per dwelling unit where 7,500 square feet are required. Said property is located on Assessor Map 113 Lot 42 and lies within the General Residence A (GRA) District. (LU-23-119) *This item was continued from the August 22, 2023 meeting to request more information from the applicant.*

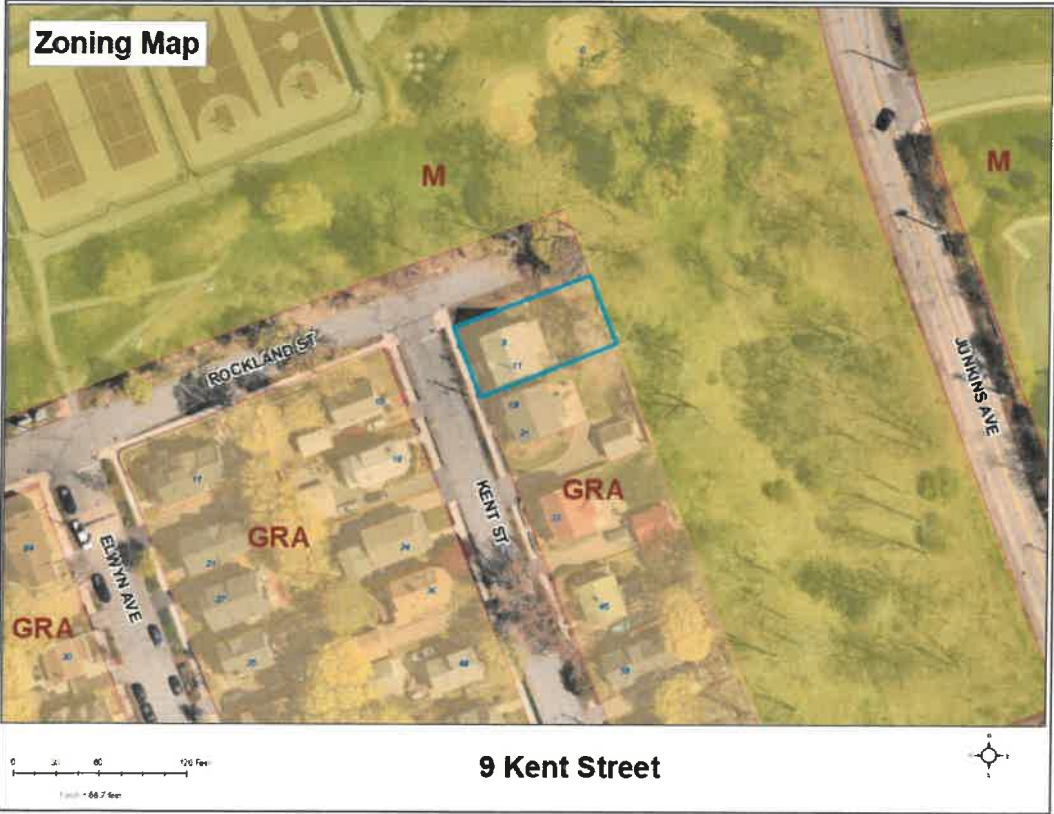
Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Two-family	Demo structure and construct new single unit	Primarily residential
<u>Lot area (sq. ft.):</u>	5,000	5,000	7,500 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	5,000	5,000	7,500 min.
<u>Street Frontage (ft.):</u>	50'+	50' +	100 min.
<u>Lot depth (ft.)</u>	100	100	70 min.
<u>Primary Front Yard (ft.):</u>	7	11	10 (using front yard averaging) min.
<u>Secondary Front Yard (ft.):</u>	16	16	13 (using front yard averaging) min.
<u>Right Yard (ft.):</u>	0.5	12	10 min.
<u>Rear Yard (ft.):</u>	6	>20	20 min.
<u>Height (ft.):</u>	<35	34.5	35 max.
<u>Building Coverage (%):</u>	35	25	25 max.
<u>Open Space Coverage (%):</u>	63.5	42	30 min.
<u>Parking</u>	0	2 (2 car garage)	2
<u>Estimated Age of Structure:</u>	1900	Variance request(s) shown in red.	

Other Permits/Approvals Required

- Building Permit

Neighborhood Context



Previous Board of Adjustment Actions

July 19, 1988 – Relief from Zoning Ordinance including: Variance from Article III, Section 10-302 are requested: a) construction of 4' x 20' rear egress stairs from the second floor to rear yard with 33% building lot coverage in a district where the maximum building lot coverage allowed is 20% and b) construction of said stairs with a 2 ½' right yard where a 10' side yard is the minimum in this district. The Board voted to **grant** the request as advertised.

March 29, 2023 – The Board considered the application for demolishing the existing two-family and constructing a single-family dwelling which requires the following: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling of 5,000 square feet where 7,500 square feet is required for each; b) 53% building coverage where 25% is the maximum allowed; c) a 4.5 foot rear yard where 20' is required; d) a 0.5 foot side yard where 10 feet is required; e) a 0 foot front yard where 11 feet is allowed under Section 10.516.10; and f) a 9.5 foot secondary front yard where 13 feet is allowed under Section 10.516.10. 2) A Variance from Section 10.515.14 to allow a 1.5 foot setback for a mechanical unit where 10 feet is required. The Board voted to **postpone** to the April 18, 2023, meeting.

April 18, 2023 - The Board voted to **postpone** the March 29, 2023, petition to the May 16, 2023, meeting.

May 16, 2023 – The Board voted to **deny** the March 29, 2023, request.

Planning Department Comments

At the August 22, 2023 Board of Adjustment meeting, the Board made the following decisions:

- 1) The application was substantially different from the previous submission and Fisher vs. Dover was not invoked.
- 2) The public hearing was closed.
- 3) A voted to deny the application failed.
- 4) The Board voted to continue the application to the September 19, 2023 meeting with the request for the following information:
 - What is the height, as defined by the Zoning Ordinance, of the structure to be demolished relative to the calculated average grade (elevation 28.92)?
 - Dimensions for the existing and proposed house including square footage
 - A streetscape rendering
 - Will there be City property used to a higher degree than anyone else when they pull out of the garage?
 - A survey plan that just shows the building envelope (without landscaping)
 - Why is the spa exempt from yard requirements and does it qualify as a temporary structure?
 - How is the ground level parking going to be built and what will the change in elevation be?

The applicant has presented the requested information in their updated submission package. Staff have readvertised the application in anticipation of the Boards vote to re-open the public hearing.

For the Board to consider the presented information from the applicant and make a decision, staff recommend the following procedure:

- 1) The Board votes to suspend the rules and reopen the public hearing.
- 2) The applicant gives a brief summary of the new information.
- 3) The Board asks questions of the applicant and project team.
- 4) The Board receives public comment to, for, or against the application.
- 5) The Chair closes the public hearing.
- 6) The Board discusses the application.
- 7) A Board member makes a motion
- 8) The motion is discussed, supported by findings of fact, and voted on.

For this project, the complete demolition of the existing structure creates a vacant lot and will require relief for the non-conforming dimensions of the lot. See Section 10.311 copied below for reference.

10.311 *Any lot that has less than the minimum lot area or street frontage required by this Ordinance shall be considered to be nonconforming, and no use or structure shall be established on such lot unless the Board of Adjustment has granted a variance from the applicable requirements of this Ordinance.*

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.



RE: Is a masonry wall considered an accessory structure?



Stefanie L. Casella
From: slcasella@cityofportsmouth.com
To: David Mikolaities, Sandy Mikolaities

Tue, Sep 19 at 11:28 AM

Hello David and Sandy,

I have forwarded your questions to the applicants and requested that they provide an answer tonight.

Thanks!
Stef

Stefanie Casella
Planner
Portsmouth Planning Department
1 Junkins Avenue
Portsmouth, NH 03801
(603)610-7290

From: David Mikolaities <dmik64@yahoo.com>
Sent: Sunday, September 17, 2023 9:05 PM
To: Stefanie L. Casella <SLCasella@cityofportsmouth.com>; Sandy Mikolaities <charlieranger@hotmail.com>
Subject: Is a masonry wall considered an accessory structure?

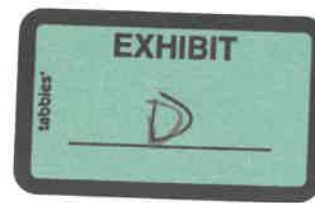
Hi Stefanie,

We were wondering if a 6-foot high masonry wall with footers is considered an accessory structure? And assuming it is, shouldn't it be included in the proposed building coverage calculation of 25%?

Also, in accordance with: 10.573.10 An accessory building or structure not more than 10 feet in height and not more than 100 square feet in area shall be set back at least 5 feet from any lot line. Wouldn't a 4-foot and 6-foot high masonry wall require a 5-foot setback?

Thanks for your time,

Dave Mikolaities



II. OLD BUSINESS

- C. The request of **Cynthia Austin Smith and Peter (Owners)**, for property located at **9 Kent Street** whereas relief is needed to demolish the existing two-family and construct a single-family dwelling which requires the following: 1) Variances from Section 10.521 to allow a) a lot area and lot area per dwelling of 5,000 square feet where 7,500 square feet is required for each; b) 53% building coverage where 25% is the maximum allowed; c) a 4.5 foot rear yard where 20' is required; d) a 0.5 foot side yard where 10 feet is required; e) a 0 foot front yard where 11 feet is allowed under Section 10.516.10; and f) a 9.5 foot secondary front yard where 13 feet is allowed under Section 10.516.10. 2) A Variance from Section 10.515.14 to allow a 1.5 foot setback for a mechanical unit where 10 feet is required. Said property is located on Assessor Map 113 Lot 42 and lies within the General Residence A (GRA) District. (LU-23-28)

Existing & Proposed Conditions

	<u>Existing</u>	<u>Proposed</u>	<u>Permitted / Required</u>
<u>Land Use:</u>	Two-family	Demo structure and construct new single unit	Primarily residential
<u>Lot area (sq. ft.):</u>	5,000	5,000	7,500 min.
<u>Lot Area per Dwelling Unit (sq. ft.):</u>	5,000	5,000	7,500 min.
<u>Street Frontage (ft.):</u>	50'+	50' +	100 min.
<u>Lot depth (ft.)</u>	100	100	70 min.
<u>Primary Front Yard (ft.):</u>	7	0	11 (using front yard averaging in 10.516.10) min.
<u>Secondary Front Yard (ft.):</u>	16	9.5	13 (using front yard averaging in 10.516.10) min.
<u>Right Yard (ft.):</u>	0.5	0.5	10 min.
<u>Rear Yard (ft.):</u>	6	4.5	20 min.
<u>Height (ft.):</u>	<35	35	35 max.
<u>Building Coverage (%):</u>	35	53	25 max.
<u>Open Space Coverage (%):</u>	63.5	33	30 min.
<u>Parking</u>	0	2 (2 car garage)	2
<u>Estimated Age of Structure:</u>	1900	Variance request(s) shown in red.	

Other Permits/Approvals Required

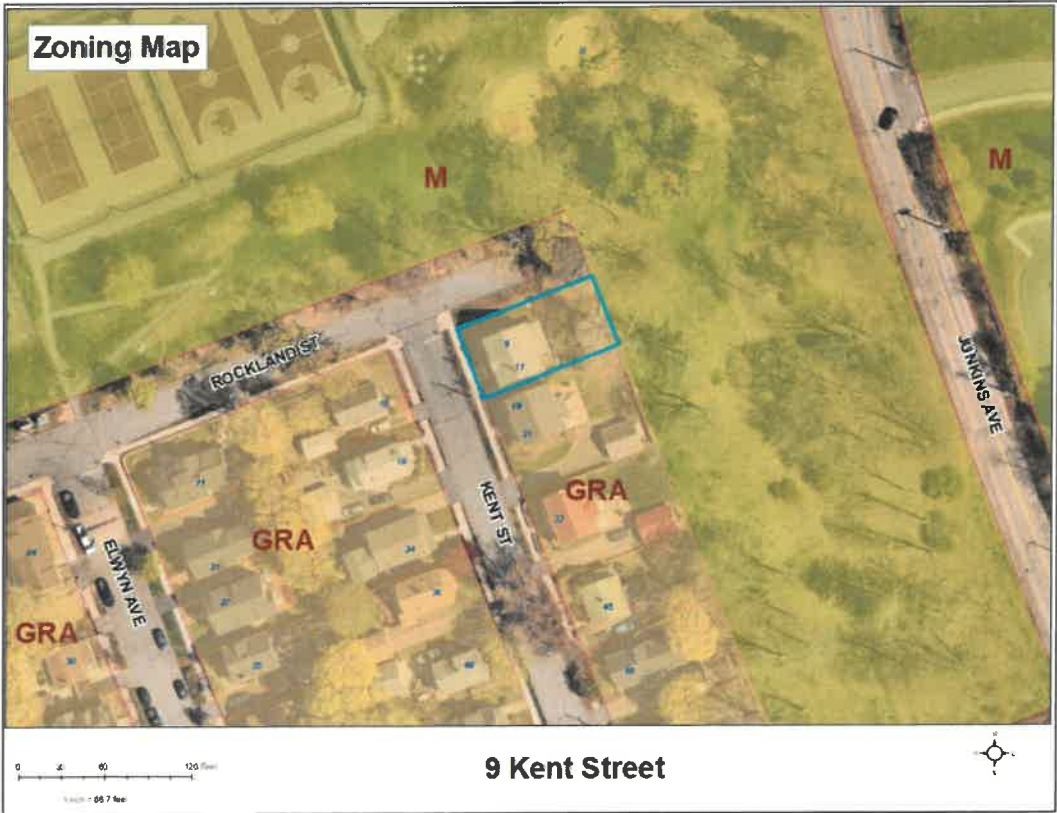
- Building Permit

Neighborhood Context

Aerial Map



Zoning Map



Previous Board of Adjustment Actions

July 19, 1988 – Relief from Zoning Ordinance including:

Variance from Article III, Section 10-302 are requested: a) construction of 4' x 20' rear egress stairs from the second floor to rear yard with 33% building lot coverage in a district where the maximum building lot coverage allowed is 20% and b) construction of said stairs with a 2 ½' right yard where a 10' side yard is the minimum in this district.

The Board voted to **grant** the request as advertised.

Planning Department Comments

The applicant is requesting relief from multiple dimensional standards to demolish the existing structure, construct a single living unit, and add new backyard features.

For this project, the complete demolition of the existing structure creates a vacant lot and will require relief for both the proposed structure dimensions that do not meet zoning and for the non-conforming dimensions of the lot. See Section 10.311 copied below for reference.

***10.311** Any lot that has less than the minimum lot area or street frontage required by this Ordinance shall be considered to be nonconforming, and no use or structure shall be established on such lot unless the Board of Adjustment has granted a variance from the applicable requirements of this Ordinance.*

At the request of staff, applicant presented the project to the Technical Advisory Committee at a Work session for the review of public infrastructure impacts as they relate to the project.

May 8 Update:

On May 8, 2023 the applicants submitted a revised foundation plan after receiving input from the abutter. The changes are summarized in the letter dated May 10, 2023 from Jennifer Ramsay and are as follows: the right side of the structure will be 3 feet narrower on the basement level, the new building will be the same in every other aspect and dimension.

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

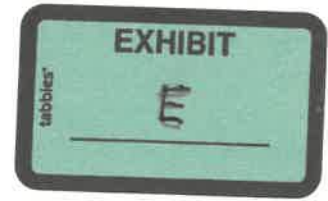
Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.

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.

Findings of Fact | Variance

City of Portsmouth Zoning Board of Adjustment



Date: 5-16-2023

Property Address: 9 Kent Street

Application #: LU-23-28

Decision: **Deny**

Findings of Fact:

Effective August 23, 2022, amended RSA 676:3, I now reads as follows: The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. **The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval.** If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of the all conditions necessary to obtain final approval.

The proposed application meets/does not meet the following purposes for granting a Variance:

Section 10.233 Variance Evaluation Criteria	Finding (Meets Criteria)	Relevant Facts
10.233.21 Granting the variance would not be contrary to the public interest.		
10.233.22 Granting the variance would observe the spirit of the Ordinance.		
10.233.23 Granting the variance would do substantial justice.		
10.233.24 Granting the variance would not diminish the values of surrounding properties.		
10.233.25 Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship. (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	NO	<ul style="list-style-type: none"> It is brand new construction and the applicant could build a new structure in full compliance or require less relief than requested. All the characteristics presented are negative hardships that make the request relief even more egregious.

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.

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PORTSMOUTH ZONING BOARD OF ADJUSTMENT
9 Kent Street Tax Map 113, Lot 42
LU-23-119

OBJECTION TO REQUEST FOR REHEARING

NOW COME, Peter Smith and Cynthia Austing Smith (“Smith”), by and through their attorneys, Hoefle, Phoenix, Gormley & Roberts, PLLC, and respectfully request that the Portsmouth Zoning Board of Adjustment (“ZBA”) deny the Motion for Rehearing filed by David and Sandra Mikolaites, William & Catherine Arakelian, and Barbara K. Adams (collectively “Petitioners”) with respect to the September 9, 2023 decision of the ZBA granting Smith variances from Portsmouth Zoning Ordinance (“PZO”) §10.521 for 9 Kent Street (the “Property”) allowing replacement of an existing nonconforming duplex with a single family home on a 5,000 s.f. lot where 7,500 s.f. lot and lot area per dwelling unit is required (the “Project”).

I. EXHIBITS

1. 9/19/2023 Notice of Decision and Findings of Fact.
2. 8/22/2023 Minutes of the Zoning Board of Adjustment.¹
3. 9/19/2023 Minutes of the Zoning Board of Adjustment.²

II. REHEARING LEGAL STANDARD

Within thirty days after any...decision of the Zoning Board of Adjustment...any party to the action or proceedings,...may apply for rehearing in respect to any matter determined in the action...specifying in the motion for rehearing the grounds therefore; and the Board of Adjustment...may grant such rehearing if in its opinion good reason therefore is stated in the motion.
RSA 677:2.

The New Hampshire Supreme Court has made clear that a “rehearing is not a matter of right” and “in the interest of finality of decisions by zoning boards, rehearings should not lightly be granted.” McDonald v. Town of Effingham Zoning Bd. of Adjustment, 152 N.H. 171 (2005). The ZBA is considered the expert on matters of zoning and local conditions and its decisions are

¹ 8/22/2023 Video begins at approximately the 3:00:10 mark and is available at <https://www.youtube.com/watch?v=ovPFQ2Q2Spg>

² 9/19/2023 Video begins at approximately the 0:7:04 mark and is available at <https://www.youtube.com/watch?v=j0tzrgvGEtw>

deemed prima facia lawful. See The Board of Adjustment in New Hampshire, a Handbook for Local Officials, 2022 p. IV-5; Daniels v. Londonderry, 157 N.H. 519 (2008). Rehearing is proper only where the affected party can show technical error or produce new evidence that was not available at the time of the first hearing. Loughlin, 15 New Hampshire Practice, Land Use Planning and Zoning, Section 21.18 (4th Ed. 2010)(noting that unavailable evidence is should not be evidence that was available and not produced due to lack of preparation).

It is assumed that every case will be decided, originally, only after careful consideration of all the evidence on hand and on the best possible judgment of the individual members. Therefore, no purpose is served by granting a rehearing unless the petitioner claims a technical error has been made to his detriment or he can produce new evidence that was not available to him at the time of the first hearing.

New Hampshire Office of Energy and Planning, The Board of Adjustment in New Hampshire: A Handbook for Local Officials, Chapter IV, P. IV-3 (2022).

III. INTRODUCTION

Petitioners' Request for Rehearing erroneously rehashes the same points previously considered by the ZBA including claims that additional relief is required, and includes a report authored by a relative of Petitioner Mikolaite. Petitioners' Request for Rehearing utterly fails to demonstrate the ZBA committed any error in its analysis and fails to provide new evidence which was unavailable to the Petitioners at the time of the initial hearing. Petitioners' repeated demands, without authority, for submission of further information and plan details are unrelated to the matter within the jurisdiction of the ZBA pursuant to RSA 674:33, (i.e. the application for lot area and lot area/dwelling unit variances). These repetitive claims do not demonstrate the ZBA erred in granting relief for lot size and lot size/dwelling unit. Additionally, such claims are misplaced because the Building Department will review a complete permit plan set before any building permit is issued. Lastly, Petitioners mistaken claim that the *Project* (not the variances for lot size and lot size/dwelling unit) fails to meet the criteria for granting a variance from PZO §10.521 is contrary to RSA 674:33. Petitioners' position also overlooks the fact that the dwelling complies with height, coverage, and yard setbacks; *any* building on the lot requires the same relief for lot size. Accordingly, claims regarding the specific features of this otherwise dimensionally compliant permitted dwelling does not establish that the ZBA erred in granting relief. In sum, Petitioners merely disagree with the collective judgement of the ZBA. Because

Petitioners fail to establish that the ZBA overlooked any evidence or erred in its analysis, the ZBA must deny the Request for Rehearing.

IV. **RESPONSE TO PETIONER'S CLAIMS OF ERROR**

1. **In the absence of an Administrative Appeal, rehearing is not required to determine whether additional zoning relief is required where the ZBA properly deferred Petitioners' claims in favor of review by the Building Department, which is empowered to identify additional zoning relief at any point prior to construction.**

Petitioners' Request for Rehearing fails to produce any evidence not available at the time of the initial hearing and largely repeats Petitioners' previous claims that the spa and masonry wall elements depicted on the Revised Plan Set (**Exhibit H to 9/11/2023 Submission**) do not comply with the Ordinance. This alone compels denial of Petitioners' Request for Rehearing. Contrary to Petitioners' assertion that that Staff impermissibly delegated the interpretation of the ordinance and determination of necessary relief to the Applicants during the process, Staff rendered an opinion on the proposal's overall compliance with the Ordinance and on the specific provisions related to the spa and masonry wall before Smith filed his July 26, 2023 application. (See Applicant's July 26, 2023 Memorandum, August 22, 2023 Minutes, p. 9; Video <https://www.youtube.com/watch?v=ovPFQ2Q2Spg> at 3:23:25). Petitioners never filed an Administrative Appeal of staff's determination or invoked Bartlett v. City of Manchester, 164 N.H. 634 (2013)(holding ZBA has the implicit authority to determine whether an unappealed administrative decision directing applicant to obtain a variance is correct) when it appeared before the ZBA and cannot do so now.

Additionally, Petitioners reliance on Bartlett v. City of Manchester, 164 N.H. 634 (2013) is misplaced. Bartlett involved an abutters appeal of a variance granted to a church permitting it to operate a work-based, self-help organization. The Bartlett Court determined that the Superior Court's subject matter jurisdiction included consideration of the permitted and accessory uses of the property when reviewing whether Manchester ZBA properly found the Church's proposal met the hardship criteria.³ Id. at 640. The Court further determined that the *Applicant's request*

³ See RSA 674:33 I (b)(1):

For purposes of subparagraph I(a)(2)(E), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(B) The proposed use is a reasonable one.

for a variance did not concede the central issue of whether relief was required. This holding has never been extended to require a ZBA, in the absence of an administrative appeal, to entertain an *opposing party's* claim that the underlying administrative decision failed to identify all necessary relief. Accordingly, the ZBA properly declined to make any decision on the need for additional relief stating simply that Smith's Building Permit Plan must comply with other aspects of the Ordinance.

Under these circumstances, the ZBA's approval of Smith's application simply means Smith's building permit application will not be denied because it proposes construction of a single family dwelling on a 5,000 s.f. lot where a 7,500 s.f. lot and 7,500 s.f. per dwelling unit is required. The approval does not relieve the Building Department of its responsibility to thoroughly review the Building Permit Package for compliance with other provisions of the Ordinance. Accordingly, Petitioners' claims regarding additional relief are premature. Assuming *arguendo* Petitioners' claims warrant substantive consideration at this time, a plain review of the Ordinance language affirms that no additional relief is required.

(a) Spa

Petitioners' correctly point out that the spa, as described in Undersigned Counsel's September 11, 2023 Memorandum is a structure, because the narrative described it as protruding 3 feet above the ground. Undersigned Counsel incorrectly described the spa. It was always intended to be less than 18 inches above the ground in accordance with the Ordinance definition of Building Coverage. In fact, on September 11, 2023, Woodburn & Company reviewed the draft Supplemental Memorandum and emailed Counsel requesting she change the 3 feet above ground description to less than 18 inches above ground, but Undersigned Counsel mistakenly failed correct the language before filing the Memorandum. I apologize for this oversight. In addition to this clarification, Woodburn & Company will revise the Building Permit Plan to clarify the height of the spa as less than 18" above existing grade. Given that height, the spa is properly excluded from Building Coverage, defined below:

Building coverage The aggregate horizontal area or percentage (depending on context) of a lot or development site covered by all buildings and structures on the lot, excluding
(a) gutters, cornices and eaves projecting not more than 30 inches from a vertical wall, and
(b) *structures less than 18 inches above ground level (such as decks and patios);*

- (c) balconies, bay windows or awnings projecting not more than 2 feet from a vertical wall, not exceeding 4 feet in width, and cumulatively not exceeding 50% of the width of the building face;
- (d) fences; and
- (e) mechanical system (i.e. HVAC, power generator, etc.) that is less than 36 inches above the ground level with a mounting pad not exceeding 10 square feet.

Staff has again confirmed the exemption. As previously presented, because the spa is less than 18 inches above ground and less than 100 s.f., it need only comply with the 5 ft. yard setback for accessory structures. PZO §10.573.10. Like any accessory structure, it must be considered as building coverage unless it meets one of the exemptions above. PZO §10.574. Accordingly, Petitioners' claim is moot.

(b) Retaining Wall vs. Fence.

Staff is empowered to interpret and administer the Ordinance in accordance with the Ordinance's Rules of Construction. PZO §10.211, §10.1510-14. See also definition of Code Enforcement Officer. Fence is not a defined term in the Ordinance. Accordingly, Staff correctly determined Smith proposed a fence by applying the common meaning of "fence" which is "a barrier to prevent escape or intrusion or to mark a boundary." Websters Third International Dictionary Unabridged, 1993. Fences are specifically excluded from the Ordinance definition of building coverage. We were directed to count our "wall" against open space, have done so and comply with open space requirements. Similarly, fences are excluded from yard setback requirements. PZO §20.515.13. Staff has confirmed the interpretations above. Accordingly, contrary to Petitioners' claims, the ZBA did not err in declining to require additional relief.

(c) Corner Clearance

Rehearing is not required to resolve this issue, which was never raised before or considered by the ZBA. We note that there are several examples of fences and retaining walls on corner lots in town and in this particular neighborhood, most clearly illustrated by 11 Elwyn Avenue. **(Exhibit N to September 11, 2023 Memorandum)**. We also question whether corner clearance is required given that, east of Kent Street, Rockland is not utilized as a thru way and currently only accommodates parking. We await the Building Department's interpretation and will seek subsequent relief or revise the plan if necessary.

Ultimately, the issues above relate solely to:

- i. a 96 s.f. spa

- ii. 236 s.f of retaining wall, and
- iii. a fence in the corner clearance.

Petitioners' assertion that these issues, which relate to landscaping and patio construction, undermine the ZBA's action on a variance allowing replacement of a nonconforming duplex with a conforming single-family home on a nonconforming 5,000 s.f. lot is entirely without merit. The single family home was represented to be, and is, *fully compliant with height and yard setbacks*. The overall project meets the Ordinance's open space requirement. The application of the Ordinance to the spa and fence/retaining wall and Petitioners' claims that additional variances were required to permit these site improvements, were fully briefed before the ZBA over two meetings. (See September 11, 2023 Memorandum; September 19, 2023 Minutes, p.3).

Petitioners position, raised for the first time in the Request for Rehearing without any support, is that the entire patio, because it is bordered by a "wall", should be counted as a structure for setback and/or building coverage. This contravenes the plain language of the Ordinance, which exempts patios and decks less than 18 inches high (Definition of Building Coverage) and fences less than 6 feet in height. It is contrary to common sense and imposes a false distinction between "walls" and "wood fences" surrounding a patio when their functions are identical. Such an interpretation also produces an absurd result that patios all over town that are screened by a fence or held in place by a retaining wall would now require setback relief. This is contrary to basic rules of statutory interpretation, which avoid construction of a statute or ordinance in a manner that results in an absurd result that the legislative body could not have intended. See Dietz v. Town of Tuftonboro, 171 N.H. 614, 618 (2019); Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 75 (2015).

More importantly, it is clear that none of the issues related to the spa, retaining wall/fence, or corner clearance prevent construction of the dwelling on a substandard lot, which was the *only* issue before the ZBA. As with every Applicant, the ZBA's decision does not preclude additional review by the Building Department. Should the Building Department later determine relief is required for these site improvements, Smith will return to the ZBA or modify the Site Plan to address the Building Department's concerns. On this record, however, Petitioner cannot establish that Applicant misled the ZBA, that the ZBA, erred in granting the requested

variance, or that it erred by declining to find additional relief was required. Accordingly, Petitioners Request for Rehearing must be denied.

2. **Rehearing must be denied where Smith's submission met all application requirements; the ZBA solicited additional information about the dwelling and site improvements; and considered the application over two meetings.**

Petitioners' claims that Smith's application is deficient assume unlimited ZBA jurisdiction, contrary to the Ordinance and state law. Such claims are also easily dispelled by the record in this case, which included an initial forty page application package which satisfied the City's requirements, a supplemental fifty-two page application package responsive to ZBA's questions, and two full public hearings.

RSA 674:16 enables municipalities to enact zoning ordinances that regulate *uses* of property; the height, number of stories, size and location of buildings and structures on a lot; and yard size, lot coverage, and density. Portsmouth subsequently enacted those regulations and delegated interpretation of the Ordinance to the Code Official. PZO §10.211, §10.1510-14. The City also delegated various technical advisory duties to the Planning Department and a host of highway, sewer, and other technical duties to the Department of Public Works. Portsmouth City Ordinance §1.106 M & N. RSA 674:33 also dictates the powers of the ZBA to entertain administrative appeals and grant special exceptions, equitable waivers, or variances if the statutory criteria are satisfied.

While Petitioner would have the ZBA review all technical and design aspects of the Project, the plain language of RSA 674:16 and 674:33 do not confer authority upon the ZBA to adjudicate all aspects of a residential site redevelopment. Dimensional or design aspects of the proposed home or site improvements which require no variance (height, building and lot coverage, yards) are not subject to review by the ZBA merely because a variance for lot size or lot size/dwelling unit is required. Unlike the large commercial proposal cited by Petitioners, subject to the City's Site Plan Regulations and Planning Board jurisdiction, Smith proposes residential site redevelopment outside the Historic District. As applied to Smith's proposal, State law and City Ordinances distribute responsibility between the ZBA acting within its statutory jurisdiction, and City staff including Public Works (curb cut, driveway configuration, drainage) and the Building Inspector (zoning compliance, building code compliance). Accordingly, Petitioners' Request for Rehearing to lacks merit and must be denied.

3. **Rehearing must be denied where Petitioners fail to demonstrate the ZBA erred in its analysis of the variance criteria.**

In focusing on the size and design of the home, which fully complies with the Ordinance's dimensional requirements, and on other site improvements that did not require relief, Petitioners overlook the plain language of RSA 674:33 I(a) that empowers the ZBA to:

(2) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

(A) The variance will not be contrary to the public interest;

(B) The spirit of the ordinance is observed;

(C) Substantial justice is done;

(D) The values of surrounding properties are not diminished; and

(E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

(b)(1) For purposes of subparagraph I(a)(2)(E), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(B) The proposed use is a reasonable one.

RSA 674:33, I(a)(2); The Board of Adjustment in NH; PP 11-9, 10 (2022) (emphasis added). See also Harborside Associates, L. P. v. The Parade Residence Hotel, LLC. 162 NH 508 (2011).

The variances requested by Smith (lot size and lot size/dwelling unit) are the sole matters before the ZBA. Simply put, it is the variances, not the Project, which must meet the criteria of RSA 674:33, I(a)(2). The plain language of RSA 674:16 and 674:33 do not confer authority upon the ZBA review dimensional and design aspects of the proposed home which require no variance (height, building and lot coverage, yards) merely because a variance for lot size or lot size/dwelling unit is required.

(a) Granting the *variance* is not contrary to the public interest and the spirit of the ordinance is observed.

Petitioners correctly state that these first two prongs of the variance criteria are considered together pursuant to Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (2007) and its progeny. Given that an Ordinance is itself a declaration of public interest, *any* variance can be construed to be in conflict with the public interest. Accordingly, Malachy Glen and its progeny have held ZBA findings that a variance is contrary to the public interest and

inconsistent with the spirit of the Ordinance requires more than mere conflict. Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 581 (2005). The purpose of a variance is to authorize the landowner to use his property in a manner not otherwise permitted. Loughlin, 15 New Hampshire Practice, Land Use Planning and Zoning, §24.02. (See also Malachy Glen Associates, Inc. v. Town of Chichester, 152 N.H. 102, 107 (2007) “The mere fact that the project encroaches on the buffer, which is the reason for the variance request, *cannot* be used by the ZBA to deny the variance.”).

Rather, the test is whether granting a variance “would unduly and to a marked degree conflict with the ordinance *such that it violates the ordinance’s basic zoning objectives*”. Id. (Emphasis added). Another way to evaluate a variance(s) request is to consider whether granting the variance(s) will “alter the essential character of the locality” or threaten the public health, safety, and welfare. Id. See also Harborside L.P. v. Parade Residence Hotel, LLC 162 N.H.. 508 (2011); Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577 (2005).

Petitioners’ reliance upon PZO §10.233.60 to compel the ZBA to grant rehearing is unavailing. Clearly, the New Hampshire Supreme Court has long-articulated the proper analytical framework for determining whether a variance is contrary to the public interest or fails to observe the spirit of the ordinance. This framework includes consideration of whether granting the variance would “alter the essential character of the locality”, an analysis that – contrary to PZO §10.233.60, necessarily examines the requested variance in the context of the neighborhood. See Walker v. City of Manchester, 107 N.H. 382, 386 (1966) (Noting a hardship may be found where similar nonconforming uses exist within the neighborhood and the proposed use will have no adverse effect on the neighborhood). See also Rancourt v. City of Manchester, 149 N.H. 51 (2003). (noting special conditions include the “property’s unique setting in its environment”).

The ZBA correctly applied the law by considering whether granting variances (to allow construction of a new, permitted by right, dimensionally-compliant, single family dwelling on a 5,000 s.f. lot, in place of a nonconforming duplex 0.7 feet from the property line in a neighborhood of similarly developed undersized lots) would alter the essential character of the locality and on the record before it, correctly concluded that it would not. Because Petitioner has failed to demonstrate any error in the ZBA’s application of law to this application, the ZBA must deny the rehearing request.

Petitioners claims that the construction of the permitted home will result in negative stormwater, drainage, and environmental effects are not relevant to the lot area and lot area/dwelling unit variances before the ZBA, which would be required for the construction of *any* new home *regardless* of the details of other site improvements, drainage, and the like. Additionally, the expert evidence Petitioners now submit cannot support their Request for Rehearing because such evidence was available at the time of the initial hearings.

As a matter of law and as discussed in ¶2 *supra*, ZBA jurisdiction is limited by RSA 674:16, RSA 674:33 and the Ordinance. Smith does not propose a commercial development subject to Site Plan Review or work within the wetland buffer both of which would require review by the Planning Board. This does not mean that technical details of the redevelopment are not subject to *any* City review, only that the review is completed by others. Contrary to Petitioners' assertions, at the request of the Planning Department, Smith's team appeared before the Technical Advisory Committee to discuss public infrastructure impacts of the redevelopment. (See May 11, 2023 Staff Report, p. 11). Smith's team has also met with the Trees and Greenery Committee and consulted with DPW regarding the driveway configuration. Compliance with the Building Code and other City Ordinances regarding stormwater discharge and the like are the province of the Code Enforcement Officials and the Department of Public Works. Petitioners' claims that rehearing is required to examine technical details are factually and legally incorrect. Accordingly, the ZBA must deny Petitioners' Request for Rehearing.

(b) Substantial Justice is done by granting the *variance*.

If "there is no benefit to the public that would outweigh the hardship to the applicant" this factor is satisfied. Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011). That is, "any loss to the [applicant] that is not outweighed by a gain to the general public is an injustice." Malachy Glen, *supra* at 109. Granting the requested variances allows for construction of a single family dwelling on a 5,000 s.f. lot where a 7,500 s.f. lot is required. A requirement that the Petitioners agree is "impossible to meet" (Petitioners' Request for Rehearing, p. 3). The approved variances do not relate to any landscaping or site improvements, but only to the home, which undeniably is more conforming than the existing complies with yard requirements and building coverage.

The record includes numerous plans and renderings which illustrate the tastefully designed home and demonstrate its compatibility with the neighborhood. Clearly, the proposal is

more conforming than the existing duplex 0.7 ft. from the side lot line and garage 1.7 ft. from the side lot line. There is absolutely no harm to any neighbor or the general public from granting the lot size and lot size/dwelling variances. It follows that there is no benefit to the public from denial. Conversely, Smith will be greatly harmed by denial as he will lose the opportunity to reasonably redevelop the Property. On the record before it, the ZBA properly applied the substantial justice test in determining that denial of the relief confers no benefit to the public that outweighs the harm to Smith. Accordingly, Petitioners' Request for Rehearing must be denied.

We note that Petitioners' claims of error regarding the ZBA's finding of substantial justice attempt to bootstrap an appeal of the ZBA's August 22, 2023 decision that the current proposal is substantially different than the application denied on May 16, 2023. Beyond the procedural bar to Petitioners' untimely claims of error, Petitioners' assertions lack factual and legal merit. As a result of design changes undertaken between the ZBA's denial of the March 2023 proposal and the current application, several variances were eliminated:

- i) Front yard setback relief from Kent Street
- ii) Front yard setback relief from Rockland Street
- iii) Right side setback relief for the house, pergola, AC unit
- iv) Rear yard setback relief for the plunge pool, pool equipment pad
- v) Building coverage relief.

Petitioners are wholly unable to establish the ZBA erred in its application of Fisher v. Dover and their claims merely express disagreement with the collective judgment of the ZBA.

Accordingly, Petitioners Request for Rehearing must be denied.

(c) Granting the *variance* will not diminish the value of surrounding properties.

Petitioners again erroneously focus on the size and height of the home which undeniably comply with the Ordinance and therefore are not before the ZBA. See ¶2 and ¶3 *supra*. The record contains plenty of evidence supporting the ZBA's finding that this proposal will not diminish the value of surrounding properties. Smith presented the impact of various redevelopment efforts in the neighborhood, including significant expansions to existing homes and construction of homes on previously undeveloped lots. **(Exhibit O to Smith's September 11, 2023 Memorandum)**. Realtor Erin Proulx spoke on behalf of the project and opined that the removal of the aging duplex which violates the side yard setback with a new tastefully designed home would increase the value of surrounding properties. During deliberations, Member Geffert

noted that there was “ample evidence that granting the evidence would not diminish the value of surrounding properties.” (September 19, 2023 Minutes, p. 7). The proposal replaces an aging duplex and garage significantly violating right side and rear setbacks and no on-site parking with a tastefully designed code-compliant and dimensional-compliant single-family home and related improvements requiring only the lot size/lot size per dwelling unit variance, a situation that cannot be remedied. Off-street parking will be improved by the inclusion of the two-car garage beneath. The proposed project reduces existing nonconformities including dimensional compliance and density improvement from 2500 s.f. (duplex) to 5000 s.f. (single family home). Given the facts of the proposal and the uncontroverted expert evidence, the ZBA correctly found that that granting variances from the lot size/lot size per dwelling unit of 5000 s.f. where 7500 s.f. is required, will not diminish surrounding property values.

(d) Denial of the variances results in an unnecessary hardship.

Petitioner misstates the circumstances of the previous ZBA denial and claims nothing has changed. The ZBA reasoning in denying the previous proposal focused on the absence of a hardship to justify the number of variances requested and those for a new home 0.6 ft. from the side lot line. Noting that the applicant was starting with a clean slate, the ZBA urged construction of a more compliant home. To address the ZBA’s concerns, Smith entirely redesigned the proposed home in favor of an entirely compliant home, dramatically improving over existing conditions. However, Smith cannot cure the size of the lot, which long predated the Ordinance and does not conform to current regulations.

RSA 674:33, I(b) articulates a three part test to establish unnecessary hardship. The first requirement is that the property have “special conditions distinguishing it from other properties in the area”. Contrary to Petitioners’ assertions, in order to find special conditions, it is not necessary for the Property to be the only burdened property, but only that it be burdened distinctly. Harrington v. Town of Warner, 152 N.H. 74,81 (2005). The Property is small, narrow, sloping corner lot subject to two front yard setbacks abutting public space on two sides. The paved portion of Rockland Street abutting the lot is used for public parking and the rest of the Rockland Street right of way is not paved and used for snow storage limiting ingress and egress. The lot is 5000 s.f. where 7500 s.f. is required, there is no way to make the lot comply with the GRA lot size and lot size/ dwelling requirement. As Chair Eldredge said on September 19, “the family couldn’t build a doghouse on this land without a variance.” (Minutes p. 7).

Given that the lot size, configuration, and access issues, together support a finding of special conditions which uniquely burden the Property, Petitioner's request for rehearing is without merit and must be denied.

The second prong of the variance criteria examines whether there is a fair and substantial relationship between the purposes of the Ordinance and its application in this instance. Lot size and density regulations exist to prevent overcrowding and overburdening of the land and, like other dimensional requirements, to allow air, light, separation between neighbors and space for stormwater treatment. In making his motion to approve, Vice-Chair Rheume noted that the lot was similar in size to others in the neighborhood and had previously developed with a two family home for decades so was a buildable lot. He also opined that the new dimensionally compliant proposal was more conforming. (Id.) A majority of ZBA members agreed. Petitioner may disagree with the ZBA's determination that no fair and substantial relationship exists between the general purposes of the Ordinance and its specific application, but having failed to demonstrate that the ZBA erred, their Request for Rehearing must be denied.

The final element of the hardship criteria considers whether the proposed use is reasonable. If the proposed use is permitted, it is deemed reasonable. Vigeant v. Hudson, 151 N.H. 747 (2005). Residential uses are permitted in the GRA Zone. The Project decreases density while dimensionally improving existing conditions. As Chair Eldredge opined, Smith's proposal to build up to the limits of the Ordinance is "Entirely legitimate". Chair Rheume noted that construction of a dimensionally compliant home of this size was "not out of the nature of the surrounding uses" on substandard lots. A majority of ZBA members agreed. Had the ZBA denied the variances for a single-family dwelling that *complies with all dimensional requirements*, the effect would be confiscatory requiring just compensation. Because Petitioner has not presented any technical or legal error in the ZBA's analysis, their Request for Rehearing must be denied.

V. CONCLUSION

In summary, each variance request was supported with detailed plans, other exhibits and expert testimony at the hearing where Petitioner's input was presented and considered by the ZBA. The ZBA acted reasonably and the reasoning of the board members in finding the criteria for each variance satisfied is contained in the minutes. Petitioner provides neither any factual

nor technical error by the ZBA requiring rehearing nor presents any new evidence that was not available at the time of the first hearing.

For all of the reasons stated herein together with the original submission and presentation by Smith's team, and the August 22 and September 19, 2023 Meeting Minutes and video, Smiths respectfully requests that the ZBA deny the Request for Rehearing.

Respectfully submitted,
Peter Smith & Cynthia Austin Smith



By: R. Timothy Phoenix
Monica F. Kieser



CITY OF PORTSMOUTH

EXHIBIT 1

Planning Department
1 Junkins Avenue
Portsmouth, New
Hampshire 03801
(603) 610-7216

ZONING BOARD OF ADJUSTMENT

September 26, 2023

Cynthia Austin Smith and Peter Smith
206 Court Street
Portsmouth, New Hampshire 03801

RE: Board of Adjustment request for property located at 9 Kent Street (LU-23-119)

Dear Property Owners:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **Tuesday, September 19, 2023**, considered your application for demolishing the existing two (2) living unit structures and constructing a one (1) living unit structure, which requires a Variance from Section 10.521 to allow a) 5,000 square feet of lot area where 7,500 square feet are required and b) 5,000 square feet of lot area per dwelling unit where 7,500 square feet are required.

Said property is shown on Assessor Map 113 Lot 42 and lies within the General Residence A (GRA) District. As a result of said consideration, the Board voted to 1) suspend the rules to reopen the public hearing, 2) to accept new information from the applicants, and 3) to **grant** the request as presented and advertised.

The Board's decision may be appealed up to thirty (30) days after the vote. Any action taken by the applicant pursuant to the Board's decision during this appeal period shall be at the applicant's risk. Please contact the Planning Department for more details about the appeals process.

Approvals may also be required from other City Commissions or Boards. Once all required approvals have been received, applicant is responsible for applying for and securing a building permit from the Inspection Department prior to starting any project work.

This approval shall expire unless a building permit is issued within a period of two (2) years from the date granted unless an extension is granted in accordance with Section 10.236 of the Zoning Ordinance.

The Findings of Fact associated with this decision are available: attached here or as an attachment in the Viewpoint project record associated with this application and on the Zoning Board of Adjustment Meeting website:

<https://www.cityofportsmouth.com/planportsmouth/zoning-board-adjustment/zoning-board-adjustment-archived-meetings-and-material>

The minutes and audio recording of this meeting are available by contacting the Planning Department.

Very truly yours,

A handwritten signature in cursive script that reads "Phyllis Eldridge". The signature is written in black ink and is positioned above the typed name.

Phyllis Eldridge, Chair of the Zoning Board of Adjustment

cc: Shanti Wolph, Chief Building Inspector

Rosann Maurice-Lentz, City Assessor

R. Timothy Phoenix, Hoefle, Phoenix, Gormley & Roberts, PLLC
John Chagnon, Ambit Engineering

Findings of Fact | Variance

City of Portsmouth Zoning Board of Adjustment

Date: 9-19-2023

Property Address: 9 Kent Street

Application #: LU-23-119

Decision: **Grant**

Findings of Fact:

Effective August 23, 2022, amended RSA 676:3, It now reads as follows: The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. **The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval.** If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.

The proposed application meets/does not meet the following purposes for granting a Variance:

Section 10.233 Variance Evaluation Criteria	Finding (Meets Criteria)	Relevant Facts
10.233.21 Granting the variance would not be contrary to the public interest.	YES	<ul style="list-style-type: none"> • The applicant is meeting the essential character of the neighborhood specific to the relief that is being asked for. • There are a lot of large structures on the substandard 5,000-sf lots in the neighborhood, some of them with high roof lines.
10.233.22 Granting the variance would observe the spirit of the Ordinance.	YES	<ul style="list-style-type: none"> • The applicant is meeting the essential character of the neighborhood specific to the relief that is being asked for. • There are a lot of large structures on the substandard 5,000-sf lots in the neighborhood, some of them with high roof lines.

<p>10.233.23 Granting the variance would do substantial justice.</p>	<p>YES</p>	<ul style="list-style-type: none"> • The applicant demonstrated what is currently there and what is available on similar lots throughout the neighborhood and what is asked for fell in the balance and is something granted to many others in the past. • There are not other substantial characteristics put forward relating to competing concerns that outweighed the fundamental right to develop a property in conformance with the ordinance.
<p>10.233.24 Granting the variance would not diminish the values of surrounding properties.</p>	<p>YES</p>	<ul style="list-style-type: none"> • The structure is replacing a 2-family home and would be a more conforming building that will not have a different use, and a single-family residence is allowed in the area.
<p>10.233.25 Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.</p> <p>(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.</p>	<p>YES</p>	<ul style="list-style-type: none"> • There are numerous lots in the neighborhood of a similar standard size. • The proposed structure is fully conforming on a lot that is a characteristic size of the neighborhood. • There is no general public purpose of the ordinance that says this specific home should not be built. • The owner is maxing out the height, especially on the side approaching the neighbors, but there wasn't enough to say that it is out of the nature of other uses on the 5,000-sf lots in the area. • The land is the hardship and the applicant decided to build up to the required dimensions.

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

7:00 P.M.

August 22, 2023

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

MEMBERS EXCUSED: ML Geffert, Alternate

ALSO PRESENT: Jillian Harris, Planning Department

Notes: Alternate Ms. Record took a voting seat for all petitions. The timestamps denote the time of the discussion in the meeting video.

Chair Eldridge stated that the applicant for Item E, 303 Bartlett Street, requested a postponement.

*Mr. Rheame moved to **suspend** the rules by pulling Item E, 303 Bartlett Street, out of order. Mr. Mannle seconded. The motion **passed** unanimously, 7-0.*

*Mr. Mannle moved to **postpone** the petition to the September 19 meeting, seconded by Mr. Rossi. The motion **passed** unanimously, 7-0.*

I. NEW BUSINESS – PUBLIC HEARING

Mr. Mattson recused himself from the following petition. The Board discussed whether Fisher v. Dover applied and decided that it did not need to be invoked. [Timestamp 3:20]

- A.** The request of **Islamic Society of the Seacoast Area ISSA (Owners)**, for property located at **686 Maplewood Avenue** whereas relief is needed to construct 6 single living unit structures which requires the following: 1) Variance from Section 10.520 to permit 10,462 square feet of lot area per dwelling unit where 15,000 if required; and 2) Variance from Section 10.513 to permit six (6) free standing buildings where only one (1) is permitted. Said property is located on Assessor Map 220 Lot 90 and lies within the Single Residence B (SRB) District (LU-23-57)

SPEAKING TO THE PETITION

Attorney Justin Pasay was present on behalf of the applicant, along with project engineer John Chagnon and project architect Carla Goodnight. He reviewed the petition. [Timestamp 8:34]

Mr. Rossi asked if the applicant looked at the spacing between the buildings themselves and how far apart they were compared to the SRB zone further up Maplewood Avenue. Attorney Pasay said the project complied with the side setback requirements and that he didn't anticipate any relief for that piece of it. Mr. Rossi said he was looking at the number of structures and how that compared to the density in the sense of having the open space around structures when there is one structure per lot elsewhere in the neighborhood. Attorney Pasay said the goal was to have a reasonable amount of spacing between the individual units but also be able to facilitate continuing the proposal for 6500 square feet of recreational space. He said there was the issue of the form of ownership as a condominium instead of a single-family lot. He said it went to the uniqueness of the property, and they hoped to strike that balance between the form of ownership as a condominium and the density.

Mr. Chagnon reviewed the site plan [Timestamp 15:22]. He noted that the setbacks between the buildings was approximately 20 feet, so if the zoning setback of 10 feet to the property line were applied, it aligned with the light and air between buildings in the zone. Ms. Goodnight reviewed the petition and Attorney Pasay summarized the variance criteria. [Timestamp 18:40]

Mr. Rheume clarified that the amenity was for the use of the six condominium units and their guests and was not a public one. Mr. Rossi said the previous proposal of subdividing the lots and building a unit on each lot wasn't feasible, and he asked if it was due to the need for an access road. Attorney Pasay said building a city road that met the design standards to accommodate a formal subdivision had been the issue.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

Jim Lee of 520 Sagamore Avenue said he was a real estate broker and that one of most important things was location. He said it was a terrible location, which made it a good project. He said several previous applications to build things there didn't work out, and the big benefit to the public was that the units would be so far back that they would not be seen from the road.

SPEAKING IN OPPOSITION TO THE PETITION OR SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DISCUSSION AND DECISION OF THE BOARD

Vice-Chair Margeson said the property did have special conditions and was three times the size that the SRB zone required. She said it had an odd configuration with a small frontage on Maplewood Avenue, but she didn't believe that it met the hardship for six units. She noted that the zoning ordinance said there was only supposed to be one freestanding building per lot and that she would have no problem with four dwellings per lot on the property because it would still retain the lot area requirements of the SRB, but she did not think the applicant met the hardship criteria for the additional two dwellings on the lot. Mr. Rossi agreed that four might be an easier request.

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

Mr. Rheume said the applicant met the criteria [Timestamp 33:01]. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said the unique shape of the property, long and narrow on the street and long in depth, created a set of circumstances that allowed the applicant to take advantage of that by putting multiple buildings that were not generally allowed in the SRB zone, but the positioning of them wouldn't be visible from the road. He said the applicant made a good argument that he approximated the overall density of the other SRB properties to the west. He noted that the Business and GRA districts were also closer to the property and had higher densities, so he felt that the nature of the density aspect was reasonable and within the spirit of the ordinance. He said the condos would be hidden and were respectful of the overall architecture of the neighborhood and Portsmouth in general. He said granting the variances would do substantial justice because of the other unique characteristics, like the short frontage, lot depth, and topography, and there was really nothing the public would perceive from the homes that would outweigh the applicant's ability to make full use of his property. He said it would not diminish the values of surrounding properties because the property butted up against the Business District and had the interstate highway on the opposite side. He said what was built would not be perceived by anyone as something that would be awkward and reduce property values. He said it was also burdened by a power line easement on the rear of the property. Relating to hardship, he said there were the unique characteristics of the property sandwiched between the Business district and very close to the GRA district and up against the interstate. He said the property's long and narrow depth did not look like any of the other SRB parcels nearby and the ones that were closely imitated were ones that had multiple buildings on them. He said those unique characteristics allowed more development than would normally be allowed and that it was a permitted use in a permitted zone.

Mr. Rossi concurred. Regarding the hardship, particularly as it pertained to six structures on that lot, he said there was a special condition of the lot, the shape and size of it and felt that the building of six structures on it did not defeat the public purpose of the SRB district because of the way the property was designed. He said it would maintain a density that was as good if not superior to the surrounding SRB properties and it would maintain adequate space between the structures so that the intended purpose of the ordinance to provide light and air between buildings would be achieved, even though it would be a bit more dense than what the SRB would typically allow.

*The motion **passed** by a vote of 4-2, with Mr. Mannle and Vice-Chair Margeson voting in opposition.*

Mr. Mattson returned to his voting seat. The Board discussed whether Fisher v. Dover applied and, except for Vice-Chair Margeson, had no issues with Fisher v. Dover. [Timestamp 42:03]

- B. The request of Karyn S. DeNicola Rev Trust, Karen DeNicola Trustee (Owner), for property located at 281 Cabot Street whereas relief is needed for a variance from Section**

10.521 to allow a) three (3) foot front yard where 5 feet is required, b) three and a half (3.5) foot left side yard where ten (10) feet is required, and c) 36% building coverage where 35% is allowed; and 2) Variance from Section 10.515.14 to allow two (2) mechanical units to be located 7 feet from the property line where 10 feet is required. Said property is located on Assessor Map 144 Lot 20 and lies within the General Residence C (GRC) District. (LU-23-84)

SPEAKING TO THE PETITION

Attorney Justin Pasay was present on behalf of the applicant, with project architect Carla Goodnight and project engineer John Chagnon. He reviewed the petition [Timestamp 50:16]. Ms. Goodnight said two letters of support were received, and she reviewed the site plan [Timestamp 55:02]. Attorney Pasay reviewed the criteria and said they would be met. [Timestamp 58:48]

Mr. Mattson asked if the applicant averaged the front yard setbacks for the neighboring properties. Attorney Pasay said they had not but noted that there was encroaching by the stairs that went over the line into the City's right-of-way but was consistent with the properties on the east side.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

Elizabeth Bratter of 159 McDonough Street and 431 Cabot Street explained why she thought it was appropriate for the variances to be granted. [Timestamp 1:07:02]

SPEAKING IN OPPOSITION TO THE PETITION

No one spoke.

SPEAKING TO, FOR, OR AGAINST THE PETITION

James Beale of 227 Cabot Street said 28 Rockingham had a lot that was nine square feet larger and the owner was able to put a 1,358-sf house on it without any variances. He said the proposed view of Cabot Street was misleading because it looked like the new building would be the same height as the other four buildings on the street. He said there was no information in the packet about what the finished height of the building would be. He said the applicant indicated that their lot was smaller than the rest of the lots on Cabot Street, but he said there were five smaller lots. He said allowing the variances would be a detriment to the public due to the loss of light and air to the direct abutter.

Ms. Goodnight said they would replicate the existing building's width, height, pitch, etc. and that the new building at the rear would be narrower, so the roof would be lower. She said two of the requested variances were needed to keep the proposed building in the same position as the existing one, so the side variance and the other front yard variance were dictated by that position.

Mr. Mannle asked what the height of the roof on the final building would be. Ms. Goodnight said she didn't recall but that it would be the height of the building next door.

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

DISCUSSION OF THE BOARD

Mr. Mattson said the building height as defined in the ordinance was being halfway between the eave and the ridge, and he further explained it. He said the building was shown as 25 feet tall on the application, and if the applicant went beyond what was allowed, a variance would be needed. Mr. Rossi said the applicant wanted to demolish a building, so he would start with a clean slate. He asked why minor improvements and setbacks compared to the existing structure were relevant. He said the hardship criteria would have to be satisfied and he didn't see how they would be. Mr. Mannle said he was unaware that the house would be demolished because it wasn't in the Legal Notice, but he agreed that it would be a clean slate and that a 30-ft wide structure could easily fit on the parcel. Mr. Rheume explained why he thought there was a hardship and said what was being asked for in terms of setbacks made sense. He said the applicant was consistent with the allowable lot coverage because they were meeting the current 36 percent. Mr. Mattson agreed that a 30-ft wide house could be built but there could be a hardship because the lot was narrower than allowed by the district. He said the building's design was being driven by the existing historic building, and the new building would be closer to conforming.

Vice-Chair Margeson said the lot depth was about 27.5 feet longer than what was required by the zoning ordinance, so the applicant had a lot of space to go back just the two feet for the front yard. She said the applicant was trying to take advantage of the open space on the other lots. She said she agreed with the Board's comments about the front and left yard setbacks but said there would be a much bigger structure on the lot line close to the abutter. She said the applicant could conform to the zoning ordinance on the side yard setbacks if they cut off some of the house. She said the purpose of the zoning ordinance was to protect structures of historical and architectural interest in the City, even outside of the Historic District. She said the potential to change the character of the neighborhood was great and she would not support the application.

DECISION OF THE BOARD

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

Mr. Rheume said the total building coverage relief what essentially what was there now and only one percent above what was allowed. He said it came down to the applicant being compliant on the side yard setback with the new addition that would recreate the feel of the old home and continue the look and feel of the neighborhood. He said the Board had to be careful about taking on the preservation of historic structures, which he further explained [Timestamp 1:28:40]. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance because the proposal was in keeping with the overall character of the neighborhood. He said the requested relief was not excessive and the applicant had tried to respect all the setback

requirements. He said the positioning of the home would be in keeping with the current positioning of the row of houses. He said substantial justice would be done because there was no public perceived need that would say that having a slightly additional setback of the driveway from the next house over would provide a substantial benefit. He said the benefit of keeping the overall rhythm of the street would outweigh any perceived need to more fully enforce the zoning ordinance. He said granting the variances would not diminish the values of surrounding properties, noting that the property was probably a victim of demolition by neglect and the replacement would increase the values of surrounding properties due to its modern amenities and by being a more structurally sound building. Relating to the hardship, he said some of the unique conditions of the structure being demolished had a historic presence of being shoved to one side of the lot and having the driveway on the other side. He said the additional structures were compliant with the setbacks and that the use was a legitimate one for replacing a single-family home with another single-family home. Mr. Mattson concurred. He said the existing home could be demolished without a variance and a contemporary one could be built within the setbacks, so he appreciated the effort gone into not altering the essential character of the neighborhood.

Mr. Mannle said he would not support the application because the applicant had structural issues with the existing house but they still bought it, knowing that they would come before the Board for relief. Mr. Rossi said he still had a problem with the hardship standard and thought that when knocking a structure down and starting with a green field, the burden of approving the hardship on all of those things was not comparative to the structure that currently existed because its foundation no longer had any relevance. He said he did not see anything in the stated hardship and unique characteristics of the lot, and he did not agree that it was a unique lot because it wasn't smaller than the other lots on that side of Cabot Street and was not the only lot adjacent to the CD-4 District. With regard to whether the Board had a basis for considering the preservation of structures of historic or architectural interest, he said that was a broadly interpretable statement within the zoning ordinance. He said one could argue that the Board could make that determination because they had local knowledge of the City but he didn't think it was a good idea for the Board to speculate on whether they had a solid legal foundation for indulging in such determinations. He said there was a big difference in a historic structure and something that was rebuilt to look like one.

*The motion **passed** by a vote of 4-3, with Mr. Mannle, Vice-Chair Margeson, and Mr. Rossi voting in opposition.*

The issue of whether Fisher v. Dover applied to the next petition was discussed by the Board and it was agreed that Fisher v. Dover did not apply. [Timestamp 1:44:08]

- C. The request of **Novocure Inc. (Owner)**, for property located at **64 Vaughan Street** whereas relief is needed to construct a penthouse which requires Variances from Sections 10.5A43.30 and 10.5A21.B (Map) to allow a maximum height of 47 feet where 42 is allowed. Said property is located on Assessor Map 126 Lot 1 and lies within the Character District 5 (CD5) and North End Incentive Overlay District. (LU-20-214)

SPEAKING TO THE PETITION

Attorney John Bosen was present on behalf of the applicant, with Dean Smith from Novocure and project architect Mark Mueller. Attorney Bosen said they appeared before the Board in 2022 and were a denied a height variance but several things occurred, which he reviewed [Timestamp 1:44:42]. Mr. Mueller then reviewed the plan and Attorney Bosen reviewed the criteria.

Vice-Chair Margeson said the applicant stated that the hardship was that there was no outdoor space for employees to congregate, but she thought they could do so without the penthouse. Attorney Bosen said the lot was an irregularly-shaped one that had frontage on two rights-of-way and potentially one on the Worth parking lot. He said filling in that area of the penthouse would allow the employees and guests of Novocure to use it on a regular basis despite the weather.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

Barry Heckler of 25 Maplewood Avenue Provident Condominiums said he was the president of the Board of Directors and that all the condo owners were in support of the enclosure of the rooftop deck. He said it would add to the value of the Novocure building and would also be available to Portsmouth residents if they needed a place to congregate. He said it would not be noticeable by any vantage point in and around the 25 Maplewood Avenue property or down Vaughan Mall.

John Ducey said he owned 172 Hanover Street and shared a common wall with the applicant. He said the top of the building wouldn't be seen at all.

Allison Griffin of 25 Maplewood said she spoke against the project previously but now it had the appurtenance and the second part of the building would match it. She said it made the building look better and she was no longer worried about the height.

SPEAKING IN OPPOSITION TO THE PETITION

No one spoke.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Katherine Hillman said she was a city resident and thought an interesting solution would be a rooftop garden instead of an all-glass space.

Elizabeth Bratter of 159 McDonough Street read a synopsis of the letter she sent to the Board. She said the structure had a flat roof and not a mansard roof like the applicant claimed. She said the penthouse was being shown as a 14-ft tall one and would have a height increase of 54 feet instead of the allowed 40 feet. She said the variance should not be approved and she explained why the project did not meet the criteria [Timestamp 2:11:30].

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

DISCUSSION AND DECISION OF THE BOARD

Mr. Rossi said the buildings to the north were lower than 47 feet and asked what differentiated the applicant's structure from those in terms of hardship. It was further discussed. Vice-Chair Margeson said the building height requirement was currently 40 feet with the penthouse at 42 feet and the other five feet was not allowed by the ordinance. Mr. Rossi said he weighed a 5-ft variance more heavily than he would have in the old ordinance because it was more impactful. [Timestamp 2:31:20]

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

Mr. Rossi said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said there was no vested interest in the public to deny the variance because it did not impact the safety, health, and welfare of the general public. He said substantial justice would be done because there would be no loss to the public with regard to the appearance of the area because the structure is mostly not visible in the surrounding streetscape. He said granting the variances would not diminish the values of surrounding properties because several of them were already taller and having a penthouse on a nearby property would have no impact in a negative way on the values of the properties. He said the penthouse had a nice aesthetic to it and would look a lot better than an open flat roof and would enhance the values of surrounding properties where it could be seen. Relating to the hardship, he said the appurtenances of the elevator on the ends shielded the sight line from the properties on Maplewood Avenue. He said the ridge line did match up with the top level of the appurtenances, which was a special circumstance that distinguished it from the nearby properties in a way that was relevant to the variance being applied for. He said denying the variance due to those special conditions would not do anything to improve the way the building fit in with the surrounding neighborhood and would not alter the character of the area. Mr. Mattson agreed that it would not alter the area's character, noting Jimmy's Jazz Club with its glass structure. He said that the amount of rights-of-way surrounding the property on all sides and the only other building that could be affected (La Caretta) were unique conditions of the property where it was zoned a small lot and had less concerns of light, air and privacy being affected by neighboring buildings. He said several other surrounding buildings were taller. He said the proposal would add functional space to existing parts of the structure that were already at this height and would not dominate or be out of scale with the neighboring properties. He said there would be no fair and substantial relationship between the purpose of the height requirements and its application to the property, and he noted that the penthouse would be less visible due to the setbacks.

Mr. Rheume said the penthouse would not change the fundamental use of that portion of the property. Chair Eldridge said she would support it for many of the stated reasons and because she considered the 5-ft request minor in the whole mass of the building.

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

The Board decided that Fisher v. Dover was not invoked in the following petition. [Timestamp 2:59:02]

- D.** The request of **Cynthia Austin Smith and Peter Smith (Owners)**, for property located at **9 Kent Street** whereas relief is needed to demolish the existing two (2) living unit structure and construct a one (1) living unit structure which requires a Variance from Section 10.521 to allow a) 5,000 square feet of lot area where 7,500 square feet are required and b) 5,000 square feet of lot area per dwelling unit where 7,500 square feet are required. Said property is located on Assessor Map 113 Lot 42 and lies within the General Residence A (GRA) District. (LU-23-119)

SPEAKING TO THE PETITION

Attorney Monica Kaiser was present on behalf of the applicant, with project engineer John Chagnon and landscape architect Victoria Martel. She reviewed the petition and site plan. [Timestamp 3:00:58]

Mr. Rossi said it seemed that the crux of the issue was whether the nonconforming use was being expanded, which would help determine whether a variance was required. Attorney Kaiser said the use would be reduced by the fact that there was an existing duplex that supported two families and a single-family was proposed. Mr. Rossi said the use was residential and it was a nonconforming type of use in the past. He asked if the volume of the new building would be the same or larger than the existing structure. Attorney Kaiser explained why there was a ten percent reduction in building coverage. She said the new building's height would comply and required no relief, but she said she didn't know the height of the existing building. Vice-Chair Margeson said the patio would be less than 18 inches so it wouldn't count as a structure, but there were several things on that patio, like a grill and a spa, and she asked if those things were built in. Attorney Kaiser said the spa was treated by City Staff as an accessory structure and met the 5-ft setback requirement. She said it was the type of thing that could also be removed, but in this case it was set into the ground and required no exterior mechanicals. She said the applicant had been advised that it required no relief. Vice-Chair Margeson asked what the structure adjoining the grill was. Attorney Kaiser said it was on the landscape plan and within the building envelope for the side and the rear and didn't require relief. Mr. Mannle said that any structure 18 inches aboveground was part of the building. He noted the 6-ft high masonry wall on the proposed pavers on the abutter side and a 4-ft wall on the back of the property. Attorney Kaiser said those were treated as a fence. Vice-Chair Margeson said the plans were complicated and it wasn't apparent as to where the building envelopes were.

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

No one spoke.

SPEAKING IN OPPOSITION TO THE PETITION

Dave Mikolaities of 19 Kent Street said the plan set was incomplete compared to the original one because it missed the patio and driveway sections, drainage and grading plans, utility and landscaping plans, and architectural renderings. He said the proposal was contrary to the public interest because the new home would increase from 30 feet to 56 feet in length and the mass of the home will be 56'x40' high and alter the light and air of the public. He said the conforming use would be expanded. He said the proposal failed the criteria.

Cliff Hodgdon of 10 Kent Street said the proposal appeared to comply with the lot size setbacks but the house was an imposing structure and looked out of place with the character of the neighborhood and adjoining city parks. He said the owners thought they had the right to build part of their driveway on the city property at the end of the Rockland Street Extension, and he asked what would happen with snow removal and access to the playground and Langdon Park. He said it wasn't a good idea to transplant a fruit tree on an unpaved city sidewalk. He asked where the stormwater would go. He said the proposal had a lot of vagueness and lacked detailed information.

Duncan MacCallum of 536 State Street said the applicant was entitled to a variance because the lot was only 5,000 square feet, but the lot was a third smaller than normally required for a residential dwelling and the building would be 40 feet high. He said a condition should be included stating that the building height must be smaller or only two stories. He said he was told that the applicant planned to raise the ground level by 17 inches, which would make the size of the building even higher. He said those changes would change the character of the neighborhood.

Barbara Adams of 75 Kent Street said the percentage of lot coverage was still being increased the same way as it was in the first application. She said the underground garage showed a need for a section of asphalt driveway to encroach on part of Langdon Park's grassed area to provide adequate entry in and out of the proposed driveway and garage. She said the cars that were parked on both sides of the end of Rockland Street could be prevented from parking. She said she saw no evidence of hardship because the owners bought the property knowing what it was. She said the proposed design did not meet the character of the neighboring houses nor the City's Master Plan.

Bill Arakelian of 18 Kent Street said the new building would be a vastly oversized one on an undersized lot that would double the size of what was already one of the largest homes in the neighborhood. He said it would be in a very prominent location and would have a negative impact on the abutter and the park. He said the masonry walls on top of an 18" grade would result in a 5'5" cement wall for Langdon Park and the trees would block a sidewalk area on Rockland Street.

Esther Kennedy of 41 Pickering Avenue said the building's size would change the neighborhood and the look of Portsmouth and thought there was no hardship.

Petra Huda of 280 South Street said she agreed that there was too much missing data for the Board to make a decision. She said it was an excessive proposal that would alter the character of the neighborhood and thought the Board should either request more information and drawings or deny the application until they had all the information.

Jim Lee of 520 Sagamore Avenue said there was a disturbing trend in town where newcomers find a house and decide it doesn't work for them and that they need to demolish it and build something bigger. He said any benefit to the applicant would be outweighed by great harm to the public.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Rick Beckstead of 1395 Islington Street said the essential character of the neighborhood would be changed because the proposed home would stand out. He said it was happening all over the city and jeopardizing the character of the neighborhoods. He said there was no hardship.

Mr. Chagnon said the applicant was applying the zoning regulations to dimensional use for the property. He said the Board had enough information to make a decision. He said the plans complied with all the other requirements regarding development of the lot. He said the runoff would not be increased to any neighboring property and the Traffic and Safety Committee would properly site the driveway. He said every public driveway used public property to get from the street to the garage. He said what was seen from the park was a secondary issue. He said the proposal complied with the setback, building height, and coverage requirements as well as lot coverage. He said the proposed structure was a 3-story one and the height wasn't relative to lot size because nothing in the ordinance said one should vary the height of the structure based on the size of the lot. He said the new trees were approved by the Trees and Greenery Committee for planting in a public place.

The Board had questions. Mr. Rheume noted that Mr. Chagnon referenced the height of the proposed structure as 34'6" above an average grade. Mr. Chagnon said the definition was from existing grade, as it was 6 feet from the proposed structure. He said the structure's height was measured from there to the midpoint. Mr. Rheume asked what similar dimensions would be to the existing building from the average grade. Mr. Chagnon said it would be wider but didn't know the exact numbers. Vice-Chair Margeson asked how the underground parking would be done. Mr. Chagnon said the property currently rose from the street, and the parking would go down to the basement level from the street. Vice-Chair Margeson asked if the grade would be raised. Mr. Chagnon said possibly. He said a set of steps went up to the yard and the yard was proud of the street about 3.5 feet and that it was at least 3.5 feet to get to a plateau at the base of the current structure. He said the existing floor level grade was about 32 feet and that they didn't have the grading plan but he didn't think the floor would be raised a lot. Mr. Mattson asked if the grade would be changed anywhere where the building height was calculated from. Mr. Chagnon said the ordinance was revised so that the average plan grade is calculated from existing ground, and if the applicant changed the grade, it wouldn't change the calculation of building height. He said there would be grade changes along the Rockland Street side and some changes were proposed with some landscape walls that would align the grade to the grade at the entrance to make it all one grade.

Mr. Rheume said the public and the Board were concerned that the applicant was somehow building a mound and then building on top and saying it was only 35 feet high. Mr. Chagnon said everything was related to the height of all the structures and that it was related back to the average grade so that they were not exceeding the requirements from the calculated average existing grade. He said the patio in the back was a different measurement and less than 18 inches above the ground, and once it was 18 inches higher it would become a structure, which was the reason it was included

previously, but it had been lowered. Attorney Kaiser further explained the measurement rules that required measuring the grade at various points around the existing building and then averaging it into a calculation called the average existing grade. She said the building wasn't a 5,000 sf building and that the existing home was a 2-1/2 story, not a one story. She said the main structure was 1,075 square feet but didn't know what the figure would be post construction. Chair Eldridge said if the applicant knew the building footprint, they should be able to figure it out. The owner Peter Smith explained that it wasn't just the footprint times 3 because there was an inset on the first floor, and the third floor had a large deck that cut into the square footage.

Vice-Chair Margeson asked Ms. Harris if building the driveway off Rockland Street would go before the Technical Advisory Committee. Ms. Harris said the applicant had to get permission from the Department of Public Works for a driveway permit, but that the right-of-way existed for them to connect. Vice-Chair Margeson asked the applicant if they were raising the grade of the building. Mr. Chagnon agreed and said there were some grade changes associated with the construction along Rockland Street to make it flat around the front of the house. He said the patio would be raised to make it flat because it was a slope, but it would be no more than 18 inches. Attorney Kaiser said the measurement wasn't from that changed grade. Mr. Rossi asked about the patio. Ms. Kaiser said it was the same. Mr. Rossi concluded that the change in grade was not what took the patio out from the lot coverage. Mr. Chagnon said the patio was now no more than 18 inches above the existing grade and it wasn't a structure, and that the patio was lowered but it wasn't because of a change in grade. Attorney Kaiser said they decreased the amount of open space but were still twelve percent above the minimum open space requirement and the building coverage was fully compliant.

Dave Mikolaities of 19 Kent Street said insufficient plans were provided to the Board. He said the new building footprint totaled 1,232 square feet.

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

DISCUSSION OF THE BOARD

Mr. Mattson said he previously voted to deny the application and that a lot of it was due to the abutting neighbor who was the most affected. He said he believed that a lot of those changes and the criteria had been addressed. He said he preferred more information but felt that the application was sufficient and everything that the Planning Department required was submitted. He said the complex architectural drawings required some interpretation but the information was in the packet. He said the Board addressing the criterion of altering the essential characteristics should be regarding the use and not the look of the building. Mr. Rossi said the Board was considering what they deemed to be a new application, and whether it was superior or inferior to the old one wasn't part of their consideration. He asked if a variance was needed at all because it was a preexisting nonconforming use. He said there was an expansion of the nonconforming use over the last six months, which was something the Board could approve or not. He said he was frustrated by not being able to get a direct answer from the applicant to the simple question of what the square footage of the living space in the current structure was and what it would be in the new one. He said all he knew now was that the new structure is substantially a more nonconforming use than whatever it was before to 3,300-4,000 square feet. He said several of the public's comments

resonated with him because of his experience of living at the Jersey Shore and watching the character of those beach neighborhoods change because everyone who bought the quaint cabins to be by the shore tore them down and maxed out everything they could do on those lots. He said there was a similar concern in Portsmouth and prices were skyrocketing. He said the proposed project not only expanded the nonconforming use but did so in a manner inconsistent with the essential character of the neighborhood, and he would not support it. Mr. Rheume said the Board could continue the application if they felt that they needed more information and time to think about it. Vice-Chair Margeson agreed and said she also wanted to see renderings.

DECISION OF THE BOARD

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

Mr. Mannle said the applicant had to fail only one criterion and that it failed Section 10.233.21 of the ordinance because it was contrary to the public interest, considering the size of the proposed structure which would be four stories or 3.5 or three, depending on where the median variance height was measured. He said more information from the applicant would have been better but it wasn't presented, and if the Board granted the variances as presented, it would be contrary to the public interest. Mr. Rossi concurred and said the application also failed the criterion of not affecting surrounding property values. He said the structure was massive, no matter how it was measured, and the expansion of the nonconforming use and the massive structure associated with it would have a deleterious impact on the values of surrounding properties. Chair Eldridge said she would not support the motion because she preferred to continue it and have some of her questions answered and see the building in context. Mr. Rheume said he would also not support the motion. Mr. Mannle said the applicant could have submitted the necessary information, especially considering that the previous application had architectural renderings.

*The motion to deny **failed** by a vote of 5-2, with Mr. Mannle and Mr. Rossi voting in favor of the motion.*

*Vice-Chair Margeson moved to **continue** the application to the September 19 meeting, seconded by Mr. Mattson.*

Vice-Chair Margeson said the Board needed more answers and a fuller application packet. Mr. Mattson concurred and had nothing to add. *The motion **passed** unanimously, 7-0.*

- E. REQUEST TO POSTPONE** The request of **Caleb E. Ginsberg and Samantha L. Ginsberg (Owners)**, for property located at **303 Bartlett Street** whereas relief is needed to demolish the existing detached garage and construct an addition with attached garage which requires a Variance from Section 10.521 to allow a) seven (7) foot left yard where ten (10) feet is required, and b) two (2) foot right yard where ten (10) feet are required. Said property is located on Assessor Map 162 Lot 13 and lies within the General Residence A (GRA) District. **REQUEST TO POSTPONE (LU-23-120)**

DECISION OF THE BOARD

The application was postponed to the September 19 meeting.

II. OTHER BUSINESS

There was no other business.

III. ADJOURNMENT

The meeting adjourned at 11:40 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary

**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 19, 2023

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

MEMBERS EXCUSED: None.

ALSO PRESENT: Stefanie Casella, Planning Department

Chair Eldridge asked for motions to take Items D through F of Section III, New Business, out of order and to postpone them.

*Mr. Rossi moved to take Section III, Items D through F out of order, seconded by Mr. Mannle. The motion **passed** unanimously, 7-0.*

*Mr. Rossi moved to **postpone** Items D through F of Section III, New Business, to the September 26 meeting. Mr. Mannle seconded. The motion **passed** unanimously, 7-0.*

I. APPROVAL OF MINUTES

A. Approval of the August 15, 2023 minutes.

Mr. Mattson asked that the phrase on Page 12, first paragraph, 5th sentence from the bottom be changed from “he said it was spot zoning” to “he said it was similar to spot zoning”.

*Mr. Mannle moved to **approve** the August 15 minutes as amended, seconded by Mr. Rossi. The motion **passed** unanimously, 7-0, with Alternate Geffert abstaining from the vote.*

B. Approval of the August 22, 2023 minutes

Mr. Mattson requested that the last sentence of the second-to-last paragraph on page 8 be changed from “he noted that the penthouse would not be visible to the other setbacks” to “he noted that the penthouse would be less visible due to the setbacks”.

*Mr. Mannle moved to **approve** the August 22 minutes as amended, seconded by Mr. Rossi. The motion **passed** unanimously, 7-0, with Alternate Geffert abstaining from the vote.*

II. OLD BUSINESS

- A. REQUEST TO POSTPONE** The request of **Kathryn Waldwick and Bryn Waldwick (Owners)**, for property located at **30 Parker Street** whereas relief is needed to demolish and remove the existing shed and covered porch and construct a new attached shed with a covered porch which requires the following: 1) Variance from section 10.521 to permit a) 45% building coverage where 35% is allowed, b) one and a half (1.5) foot right side yard where 10 feet is required, and c) two (2) foot rear yard where 20 feet is required; and 2) Variance from Section 10.321 to allow a nonconforming structure or building to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 126 Lot 27 and lies within the General Residence C (GRC) District. **REQUEST TO POSTPONE (LU-23-117)**

Alternate Geffert was seated for voting.

DECISION OF THE BOARD

*Mr. Rheaume moved to **grant** the request to postpone for one month until the October 17, 2023 meeting, seconded by Mr. Mannle.*

Mr. Rheaume noted that the Board already postponed it once, but there were concerns from the nearby property owner and the applicant was working hard to address those concerns.

Vice Chair Margeson confirmed with City Staff that the application would be re-noticed before the application could be heard.

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

- B.** The request of **Cynthia Austin Smith and Peter Smith (Owners)** for property located at **9 Kent Street** whereas relief is needed to demolish the existing two (2) living unit structure and construct a one (1) living unit structure which requires a Variance from Section 10.521 to allow a) 5,000 square feet of lot area where 7,500 square feet are required and b) 5,000 square feet of lot area per dwelling unit where 7,500 square feet are required. Said property is located on Assessor Map 113 Lot 42 and lies within the General Residence A (GRA) District. (LU-23-119) This item was continued from the August 22, 2023 meeting to request more information from the applicant.

Chair Eldridge said the rules needed to be suspended to open the public hearing.

*Mr. Rheaume moved to **reopen** the public hearing, seconded by Mr. Mannle.*

Mr. Rheaume said the Board had prior deliberation on the petition but it was a complicated case and there was some lack of clarity, so the postponement was made to give the application the opportunity to get more information and the Board also wanted to hear more from the public.

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

*Mr. Rossi moved to accept the new information and hear the presentation from the applicant, seconded by Mr. Mannle. The motion **passed** unanimously, 7-0.*

SPEAKING TO THE PETITION

Attorney Tim Phoenix was present on behalf of the applicant, with the owners Peter and Cynthia Smith, Attorney Monica Kaiser, project designer Jennifer Ramsey, landscape architect Robbie Woodburn, and project engineer John Chagnon via Zoom. Attorney Phoenix asked for an additional five minutes for his presentation.

*Mr. Mannle moved to **grant** the additional five minutes, seconded by Mr. Rossi. The motion **passed** unanimously, 7-0.*

Attorney Phoenix said the petition was continued from the August 22 meeting and there were several new exhibits relating to requests from the Board for answers to certain questions. He addressed those questions, which related to the height as defined by the zoning ordinance of the structure to be demolished; the height defined by the zoning ordinance of the proposed building; the exemption of the spa from the setback requirements; how the garage would be built; whether the application proposed to use City property to a greater degree than other residents; what the interior square footage of the proposed residence was; a survey plan showing the building envelope, a two-scale streetscape; and the overall design scale and compatibility. [Recording timestamp 9:52]

Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

Adam George of 134 Lincoln Avenue said the neighborhood had seen a surge of renovations, extensions, and modern projects and the owners went back to the drawing board to address the neighbors' concerns. He asked that the revised proposal be approved.

Kevin O'Connell of 140 Elwyn Avenue said the owners complied with the request for a conforming home, yet a motion was made to deny the request. He said homeowners should not have to wonder if their complying plans will be denied by the Board. He said the petition should be approved.

Jessica Kaiser of 30 Spring Street said the owners developed a structure that was in full compliance with the zoning ordinance and the only remaining challenge was the lot. She said almost every lot in the neighborhood faced the same challenge. She reviewed the criteria and said they would be met.

SPEAKING IN OPPOSITION TO THE PETITION

The abutter David Mikolaities of 19 Kent Street explained all the reasons he thought that nothing changed from the earlier submittal. He reviewed the criteria in detail and said there was no hardship. [Timestamp 43:54]

Jim Lee of 520 Sagamore Avenue said the petition had to fail only one criterion and that it failed the hardship one. He said tearing down the building and replacing it with another one would be an unreasonable use and was the type of thing that drove up the prices of houses in Portsmouth.

Bill Arakelian of 18 Kent Street said the proposed house's mass went beyond any of the examples of nearby homes shown by the applicant. He said one of the largest existing homes on Kent Street would be replaced with one that was 64 percent bigger. He said the cement wall, spa and patio should be included in the building coverage computation.

Cliff Hodgdon of 10 Kent Street said the proposed structure was still long, large, and tall and clashed with the surrounding character and the modern design was in sharp conflict with all the other homes and that there was no hardship. He said the photos of other homes were misleading.

Barbara Adams of 75 Kent Street said most of the houses shown in photos were not on Kent Street. She said the issues were the same as before and there was no hardship. She said the project would alter the essential character of the Kent Street neighborhood and approval would set a precedent for other people to buy small lots and develop them to the maximum.

Esther Kennedy of 41 Pickering Avenue told the Board to do the right thing, noting that people gave them a good rationale of why the petition should be denied.

Rick Becksted of 1395 Islington Street said demolitions made land values rise, which contributed to the City's unaffordable real estate. He said the essential character of the neighborhood was also in the Board's guidelines and should be used to deny the application.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Jeff Hodges of 112 Lincoln Avenue (via Zoom) said the new design conformed with all the technical guidelines in the ordinance other than the lot size. He said allowing a property owner to build a fully conforming house was not contrary to the public interest. He said similar projects had been approved and that the proposal met all the criteria.

Erin Proulx of 99 Daniel Street (via Zoom) said she was in support of the application because it met all the guidelines and the only variance requested was for the nonconforming lot. She said the house wasn't in the Historic District and would enhance the values of surrounding properties.

Jessica Kaiser said the new plans were in compliance and design wasn't an issue. She said the variance request had nothing to do with the structure itself.

Attorney Phoenix said the spa was included in the 25 percent and the City Staff found that the applicant didn't need a variance for the spa or the patio. He said the stone enclosures did not apply

because the front was less than 18 inches and the rear was seen as a fence. He said it was not an expansion of a nonconforming use but for a nonconforming lot. He said the hardship was that the lot cannot be fixed and has special conditions of being located on a corner with an open area behind it and next to it. He said it would not violate the public interest or diminish property values and that the only applicable requirement was the need for a variance due to the size of the lot.

Cliff Hodgdon of 10 Kent Street said all accessory structures should be included in the building coverage, including the spa. He said it wasn't shown in the proposal. He said the front walls were referenced in the proposal as landscaped walls and the side and back walls as fence walls and that they should all be considered structures.

Project landscape architect Robbie Woodburn said at the bottom of the steps of the rear yard patio, the spot grade was 28.8 inches and the patio pitched to the east toward the fence, so it was lower in that corner. She said it wasn't higher than 18 inches. She cited more grades and said the 6-ft wall would be measured from existing grade and would qualify as a fence. She said the wall/fence along the front and sides would not be higher than four feet and the spa was included in the calculations.

Cliff Hodgdon of 10 Kent Street asked who would pay for digging the drainage trench through the park and to the tennis courts, noting that it wasn't on the proposal previously.

Attorney Phoenix said the drainage calculations were provided previously but the applicant was decreasing the impervious coverage, which would create more lot for drainage. He said the drainage would have areas for treatment but wasn't really the Board's purview.

Chair Eldridge closed the public comment session but kept the public hearing open in case there were questions from the Board.

Mr. Rossi said it wasn't a complicated application because the Board was there to consider the lot size, but there was the issue of the essential character of the neighborhood and whether the structure would be consistent with it. Attorney Phoenix said the essential character of the neighborhood, along with each of the other variance requirements, related to the variance needed and not the project that was being done, so the issue was whether the lot and the variance for it would change the essential character of the neighborhood, not the building.

Chair Eldridge closed the public hearing.

DISCUSSION OF THE BOARD

Mr. Rossi said when he read the minutes from the previous meeting, he realized that his logic about the expansion of a nonconforming use was incorrect, so now his position changed because he agreed with Attorney Phoenix's logic and felt that it was more compelling than what he was thinking at the previous meeting. Mr. Mattson said there were more variances requested before and he had not seen an unnecessary hardship within the side yard setback, but since it was no longer asked for, the only thing left was whether the lot size was an unnecessary hardship, and he said the applicant could not change the lot size. Vice-Chair Margeson said she did not find Attorney

Phoenix's view of the essential character of the locale so narrowly and wasn't sure that by granting the variances, the Board was not violating the spirit and intent of the ordinance in terms of the central character of the locality. However, she said in almost all respects, the application improved the conformity with the zoning ordinance in terms of the right and rear yard setbacks, and the building coverage was decreased to meet the zoning ordinance. She said it was tough but thought there might be a problem with the spirit and intent, not with air and light.

Mr. Rheume said it came back to what was relevant to the Board. He said traditionally a request of this sort was, "Is this a buildable lot?". He said other lots in the neighborhood had buildings placed on them, but other aspects of the petition poked at other issues, like demolition. He said he was disheartened by the trend of demolition across the City. He said the value of the land was of greater intrinsic value to someone who wants to buy the land than the structure on it, which would change the characteristics of the City, but it wasn't something the Board had purview over. He said there was the Demolition Committee but that it was very limited in its powers. He said a homebuyer could do what he wanted to with a house outside the Historic District. He said the issue of property values needed to be legislatively looked at and might require State action but it wasn't applicable to what the Board was reviewing. He said the essential character of the neighborhood was tied to the actual relief asked for, and the question was whether the lot was buildable. He said the Board could say there were much smaller homes on the smaller lots and that the applicant's home had to be in conformance with a lower standard than the ordinance would require, but there were other buildings in the neighborhood that were very close to the applicant's building. He said the dormering on the park side was appropriate but the one on the other side but a bit much, but the applicant was building within the allowed envelope. Regarding the fence and the spa, he said the Board would approve the allowable 25 percent and that it was up to the applicant to figure out if that as missed for the fence and spa. He said he didn't think there was enough to say that the application didn't meet the essential character of the neighborhood in terms of the zoning relief being asked for.

Mr. Rossi said he had seen that phenomena of the land in New Jersey, especially along the shore where property became more valuable than the homes built there decades ago. He said the nature of the housing stock in Portsmouth will change unless there are changes made to the zoning ordinance itself to prevent that, but it was outside of the Board's purview.

DECISION OF THE BOARD

*Mr. Rheume moved to **grant** the variance for the petition as presented and advertised, seconded by Ms. Geffert.*

Mr. Rheume referred to his previous comments. He said he had a lot of empathy for the neighbors but there was always a tradeoff between the needs of the property owner and the neighborhood. He said granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance. He said he explained the essential character of the neighborhood specific to what was asked for relief and that the applicant was meeting that aspect. He said there were a lot of large structures on the substandard 5,000-sf lots in the neighborhood, some of them with high roof lines and with dormers, particular placement of windows and so on, and he said the Board couldn't go that far. He said substantial justice would be done, which was a balancing test specific to what's

being asked for in terms of whether the lot is a buildable one. He said the applicant demonstrated what was currently there and what was available on similar lots throughout the neighborhood and what was asked for fell in the balance and was something granted to many others in the past. He said he didn't think there were other substantial characteristics put forward relating to competing concerns that outweighed the fundamental right to develop a property in conformance with the ordinance. He said granting the variance would not diminish the values of surrounding properties, noting that the structure was replacing a 2-family home and losing some dwelling units but would be a more conforming building that would not have a different use, and a single-family residence was allowed in the area. He said it was doubtful that it would diminish the values. He said literal enforcement of the ordinance would result in unnecessary hardship. He said the question being asked was regarding if the lot was buildable. Numerous lots in the neighborhood were of a similar substandard size because the original subdivision was set up that way. He said the property has a structure on it for many years and what was proposed was fully conforming on a lot that was a characteristic size of the neighborhood, even though it was somewhat below the requirements of the zoning applied in general to the neighborhood. He said there was no general public purpose of the ordinance that said this specific home should not be built. He agreed that the owner was maxing out the height, especially on the side approaching the neighbors, but there wasn't enough to say that it was out of the nature of other uses on the 5,000-sf lots on other properties in the area and throughout the City. He said it was reasonable and recommended approval.

Ms. Geffert said there was ample evidence that granting the variance would not diminish the values of surrounding properties. Chair Eldridge said she would support the motion because the land was the hardship and the applicant decided to build up to the required dimensions.

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

- C. The request of **Caleb E. Ginsberg and Samantha L. Ginsberg (Owners)**, for property located at **303 Bartlett Street** whereas relief is needed to demolish the existing detached garage and construct an addition with attached garage which requires a Variance from Section 10.521 to allow a) seven (7) foot left yard where ten (10) feet is required; b) a two (2) foot right yard where ten (10) feet is required; c) building coverage of 27.5% where 25% is allowed; and 2) Variance from Section 10.321 to allow a nonconforming structure or building to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is located on Assessor Map 162 Lot 13 and lies within the General Residence A (GRA) District. (LU-23-120)

SPEAKING TO THE PETITION

Attorney Monica Kaiser was present on behalf of the applicant, along with the owner Samantha Ginsberg, the direct abutters Peter and Donna Splaine, and project engineer Alex Ross. She noted that seven letters of support were received from the neighbors. She handed a written statement to the Board members and asked for an addition five minutes for her presentation.

*Vice Chair Margeson moved to grant the additional five minutes, seconded by Mr. Mattson. The motion **passed** unanimously, 7-0.*

[Timestamp 2:13:35] Attorney Kaiser reviewed the petition. She noted that the tax map showed the deeded property to be more than it really was and explained that the deed error was not noticed before. She said the plan was to adjust the property line to make the T-shape of the property go away and apportion parts of it to the two abutters.

Mr. Rossi asked if the addition was moving over to the right or would be in line of where the current garage was. Attorney Kaiser said the addition would move a bit, explaining that there was a little jog in the lot line before and the garage would slide up by adjusting the lot line. Mr. Rossi said the new lot line seemed strange with the little zigzag but knew that the lot line was changing to bring the building closer in conformance rather than the building changing to become more conforming. Attorney Kaiser said the parties involved explored different ways of doing it and were comfortable with the proposed plan and that the Planning Board would evaluate the lot line. Vice-Chair Margeson said the left yard was seven feet the entire way but not in the beginning, and she asked how that seven feet was right at the front of Bartlett Street. Attorney Kaiser said the house was on an angle compared to the lot line, and the setback to the house was 3.6 feet, seven feet at the corner, and then 9.3 feet at the deck. She said the reason they were asking for the seven feet was because that's where they would fill in and attach to the existing house. Vice-Chair Margeson said the existing conditions stated that it was seven feet but it seemed like three feet. Attorney Kaiser said the three feet would not be expanded and the addition would be put in at the seven feet. Ms. Casella referred to the Staff Memo and clarified that the front portion of the house would not change. Mr. Mattson asked if the applicant considered turning the garage to have a bigger setback. Project engineer Mr. Ross said the turning radius would be too tight and there wouldn't be enough width. Mr. Rheume said it was more of a house addition with a small garage than a garage addition because the size of the addition was about the size of the original house. He said the applicant could have avoided coming before the Board if the lot line was drawn closer to the 295-299 Bartlett Street house and an easement for driving and parking on the property was processed, which would get the 10-ft setback. Attorney Kaiser said the Splaines could claim most of the T-shape because of the way they used and maintained it and it was a tough sell for them to give it up legally. Mr. Rheume asked if the applicant included any maintenance easement on the new addition on the Splaine side of the property as a legal basis for the applicant to do maintenance. Attorney Kaiser said all the parties were willing to do that. Mr. Rheume asked if the planter boxes behind the proposed addition were the basis for choosing the property line to go to that area. Attorney Kaiser agreed.

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. Rheume moved to **grant** the variances for the petition as presented and advertised, with the following **conditions**:*

- 1. A suitable maintenance easement shall be provided on the new lot being created, Lot 162-14, with its increase in size; and*

The subdivision review and approval by the Planning Board shall be required for the proposed lot line adjustment Vice-Chair Margeson seconded the motion.

Mr. Rheume said he was concerned at first as to why the Board didn't try to avoid the situation of creating a new property line and including a 2-ft setback on an addition that didn't exist yet. He said it was an important data point for the Board to say that they could live with it as long as some provision was put into the new agreement between the two new properties that there's a substantial structure that will be very close to the property line that will need maintenance and the owner of the 303 Bartlett Street side will properly maintain that. He said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance because there were tight property lines in that neighborhood. He said it might have seemed like an opportunity to create something more conforming, but there was a historic use of the two properties and the applicant was trying to recognize that *de facto* use of each of the properties. He said the two neighbors amicably worked out the result and understand the impacts, so he thought that reduced some of the concerns about the right setback, which he explained further [Timestamp 2:52:24]. He said there was nothing in the public interest that would outweigh the applicant's and neighbor's decision to run the property line where they did. He said substantial justice would be done because there was no public concern, just the one between the two neighboring properties. He said granting the variances would not diminish the values of surrounding properties because it defined something that was already in existence and the addition would be tasteful and add significantly to the size of the existing home, so it should increase its value and the value of other properties. He said the hardship was the undefined property line that was owned by someone else who didn't realize it and the historical usage, so two property owners were coming up with a solution to meet everyone's needs. He said the addition was a reasonable one, considering the very small size of the existing house. He said there was already a garage and the new one would be moved under the addition. He said there was nothing in the petition that was unreasonable, and he recommended approval. Vice-Chair Margeson concurred and commended the applicant for the thorough application and said it was a good example of negotiating differences with the abutters and coming to an agreement.

Mr. Mattson said what convinced him to approve the petition was the 37'x42' wide lot, which was narrow and drove a lot of the issues. He said that, even with the increased land that would result from the proposed lot line revision, it would still be smaller than what was allowed. He said he would normally be hesitant about approving something so close to the side yard setback, but given the nature of the property and the agreement reached between the neighbors, he was convinced. Mr. Rheume added that the lot coverage was just 2-1/2 percent over and less than what existed in terms of all the other structures being removed to allow the addition, which was not egregious.

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

III. NEW BUSINESS – PUBLIC HEARING

Alternate Geffert took a voting seat for the following petition.

- A.** The request of **J & J's Drop and Drive LLC (Owner)** for property located at **459 Islington Street** whereas relief is needed to install a 54 square foot mural which requires the following: 1) Variance from Section 10.1251.10 to allow 54 square feet of aggregate sign area where 48.5 is allowed; and 2) Variance from Section 10.1251.20 to allow 54 square feet of individual sign area where 16 square feet is allowed. Said property is located on Assessor Map 157 Lot 7 and lies within the Character District 4-L2 (CD4-L2) and Historic District. (LU-23-129)

SPEAKING TO THE PETITION

Landscape architect and site artist Terrence Parker was present on behalf of Liar's Bench Brewery and J & J's Drop and Drive LLC, the brewery's landlord. He said the mural was part of the History Through Art project in the City. He said the variances from the sign ordinance were needed due to the special exceptions of the brewery, the dimensional requirements that were exceeded, and the fact that the west side of the brewery had no street frontage so the mural had to be on that side, which faced the parking lot and bank drive-thru. He reviewed the criteria.

Mr. Rossi asked why the applicant was asking for 54 square feet of aggregate sign area instead of the allowed 48.5 square feet. Mr. Parker said the mural was designed to meet the open space of the portion between the side entrance and one of the garage doors. He said it was aesthetic decision to create a boundary of blue around the mural and that the mural had to be large enough to be read due to its historic graphics and text. Mr. Rossi asked about the durability of the vinyl print fixed to an aluminum sheet. Mr. Parker said it would be solar-sealed onto the aluminum backing and would have a 12-year life span.

Chair Eldridge opened the public hearing.

SPEAKING TO, FOR, OR AGAINST THE PETITION

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

DISCUSSION OF THE BOARD

Mr. Rheume said he wished the ordinance would better reflect the idea of public art of that large of a magnitude being displayed and put it in the sign ordinance even though it wasn't a sign. He said in this case, it was completely divorced from anything taking place inside the business, and if the Board had to apply the sign ordinance to it, that would be the hardship. He said the mural was a reasonably-sized piece of art work and in a parking lot that would not distract drivers. Vice-Chair Margeson said she would not support the petition. She said the concept was great but thought putting the request within the sign ordinance was tricky. She asked what would happen if the Board

got a request from a business that wanted to go larger. She said one standard was applied for a public art mural and another for businesses and hoped that the City Council would consider passing a public art mural ordinance to allow these things, but she didn't feel the variance requests fit into the sign ordinance. Mr. Mattson said that, for similar reasons, he supported it because the hardship was that there was no fair and substantial relationship between the purpose of the sign ordinance and the mural that would protect from a situation of an actual sign advertising something for a business. He said he preferred that the issue be dealt with by the City Council and the ordinance itself but didn't think it set the Board up for a precedent. Mr. Rossi said the last time the Board approved a mural, they thought about it as possibly a public mural fitting into the definition of a museum, which is a permitted use in the CD4L1 District because it is art and for public access. He said because no one was charging for it and someone didn't have to walk inside a building, it was a hybrid use that a commercial signage would not benefit from.

DECISION OF THE BOARD

*Ms. Geffert moved to **grant** the variances, seconded by Mr. Mattson.*

Ms. Geffert said granting the variances would not be contrary to the public interest because the variances requested were for a particular expansion, a tasteful mural, as part of the history project. She said it would observe the spirit of the ordinance because the ordinance did not want obnoxious signs and that the sign would not do a disservice to the area and would be better than advertising Liar's Bench. She said the applicant made a good case of why a larger sign was required. She said granting the variances would do substantial justice, given the location and the abutting uses and the absence of anyone protesting, and that it would advance the information presented on the sign. She said it would not diminish the values of surrounding properties because there was no evidence that it would and she thought it would enhance the values of surrounding properties. She said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because the property had special conditions of not fronting on Islington Street that distinguished it from other properties, and owing to those special conditions, a fair and substantial relationship does not exist between the public purposes of the sign ordinance and the application of that provision. She said the sign would be on the side of the building and would not create any traffic hazard or visual problems for anyone because it would face a bank drive-thru. She said all the criteria were satisfied. Mr. Mattson concurred and said the proposed use was a reasonable one that would not threaten public health, safety, or welfare.

*The motion **passed** by a vote of 6-1, with Vice-Chair Margeson voting in opposition to the motion.*

Mr. Rheume recused himself from the following petition, and both alternates Ms. Geffert and Ms. Record took voting seats.

- B.** The request of **Wayne G. Clough (Owner) and Sophary Sar (Applicant)**, for property located at **100 Islington Street Unit 6** whereas relief is needed to allow an esthetician business which requires a special exception from Section 10.440, Use # 7.20 where it is

permitted by Special Exception. Said property is located on Assessor Map 137 Lot 25-6 and lies within the Character District 4-L2 (CD4-L2) and Historic District. (LU-23-122)

SPEAKING TO THE PETITION

The applicant Sophary Sar was present and said she was a licensed aesthetician. She said she would structure her appointments so that they would not overlap between clients. She reviewed the special exception criteria and said they would be met.

There were no questions from the Board. Chair Eldridge opened the public hearing.

SPEAKING IN FAVOR OF THE PETITION

Dick Gamester of 176 Dexter Road said he supported the application because it would not impinge on any of the special exception criteria and would be the least intensive use on the property.

SPEAKING IN OPPOSITION OR 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 special exception for the petition, seconded by Mr. Mannle.*

Mr. Mattson referred to Section 10.233.21 and said the standards as provided by the ordinance for the particular use were permitted by special exception. He referred to Section 10.233.22 and said there would be no hazard to the public or adjacent properties on account of potential fire, explosion, or release of toxic materials because those were not an issue. Referring to Section 10.233.23, he said granting the special exception would pose no detriment to property values in the vicinity or change in the essential characteristics of any area including residential neighborhoods, business or industrial districts on account of the location and scale of buildings and other structures, parking areas, accessways, odors, smoke, gas, dust or other pollutants, noise, glare, heat, vibration, or unsightly outdoor storage of equipment, vehicles, or other materials. He said it was a minimally impactful use with no exterior changes to the building. Referring to Section 10.233.24, he said granting the special exception would pose no creation of a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity because there was adequate and reasonable parking and the applicant would base her appointment scheduling to handle the flow of visitors. Referring to Section 10.233.25, he said there would be no increase in or excessive demand on municipal services including but not limited to water, sewer, waste disposal, police and fire protection, and schools, given the nature of the business. Referring to Section 10.233.26, he said granting the special exception would pose no significant increase of stormwater runoff onto adjacent properties or streets because exterior changes in this case were not an issue. Mr. Mannle concurred and had nothing to add.

The motion passed unanimously, 7-0.

Mr. Rheume resumed his voting seat and Ms. Record resumed her alternate status.

- C. The request of **Davenport Inn LLC (Owner)**, for property located at **70 Court Street** whereas relief is needed for the following: 1) An after-the-fact Variance from Section 10.515.14 for six (6) existing permitted mechanical units with a setback of 0.5 feet from the property line; 2) Variance from Section 10.515.14 to install a seventh mechanical unit with a setback of 0.5 feet from the property line whereas 10 feet is required; and, in the alternative; 3) Equitable Waiver from Section 10.515.14 for the installation of six mechanical units with a 0.5 side yard setback. Said property is located on Assessor Map 116 Lot 49 and lies within the Character District 4-L1 (CD4-L1) and Historic District. (LU-22-10)

SPEAKING TO THE PETITION

Attorney Chris Mulligan was present on behalf of the applicant, along with Andrew Samonas, one of the principals of Davenport Inn LLC. Attorney Mulligan said the petition was before the Board the previous year to allow the use as an inn and for dimensional variances. He said the applicant had to upgrade the various mechanical systems including the HVAC system as part of the property's renovation and restoration and obtained an administrative approval to site and install a bank of HVAC units to support mini-splits on the left side yard. He said his client had the units installed but was informed by the installer that a seventh unit was necessary, which was installed, so when the client went before the HDC for another administrative approval, he learned that a variance was required for all seven units because they were in the side yard setback. Attorney Mulligan said the requested variances were needed to permit the currently installed units to stay where they were, and if it wasn't granted, he would ask for an equitable waiver from the dimensional requirements. He said the setback was impossible to meet unless all the units were sited behind the building, which would be expensive and inappropriate. He said the area they needed approval for siting the units was the space between the two buildings. He said that space was not usable for any other purpose and the light and air between the buildings would not be affected. He reviewed the criteria.

Mr. Rossi asked if all seven units were installed. Attorney Mulligan agreed, noting that the first six units were installed before anyone realized that a variance was needed and the seventh unit was installed before the applicant applied for an administrative approval. Mr. Rheume said there were two prior condensers along the side of the building. Attorney Mulligan agreed and said the photos showing them were part of the submission to the HDC. He said those two units were gone. Mr. Rheume asked if the applicant and the City Staff discovered that there was a variance granted for those two units. Attorney Mulligan said they did not but it was possible that there should have been. Mr. Rheume asked if the installer indicated a technical reason that moving the HVAC equipment behind the building would be an issue, like pipe runs. Attorney Mulligan agreed.

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

The Board discussed the issue of dealing with the petition as a variance request instead of an equitable waiver one and decided to grant the variances.

*Vice-Chair Margeson moved to **grant** the variances for the six condensers after the fact and for the seventh to be installed. seconded by Mr. Mattson.*

Vice-Chair Margeson referred to Sections 10.233.21 and .22 of the ordinance and said granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance because it would not alter the essential character of the neighborhood and would not affect the public's health, safety, and welfare. She said the issue was the setback requirements for the left yard and the movement of air and light around the building, and that the Board found that the location of the HVAC units did not implicate those concerns. She referred to Section 10.233.23 and said granting the variances would do substantial justice because there would be no benefit to the public in denying the variance request and it would be a tremendous injustice to the applicant. Referring to Section 10.233.24, she said granting the variances would not diminish the values of surrounding properties because the seven HVAC units were in-between buildings. Referring to Section 10.233.24, she said literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. She said the property had special conditions that distinguished it from others in the area, and owing to those special conditions, a fair and substantial relationship did not exist between the general public purposes of the ordinance's provision and the specific application of that provision to the property. She said the proposed use was a reasonable one because HVAC systems would be provided to an approved inn within the Historic District and the special conditions of the property were that it was a very historic one. She said the applicant's representative stated that there would be problems installing HVAC units in the back of the inn, so she found that the property did have special conditions that do not relate to the public purpose of the ordinance as applied to the property. Mr. Mattson concurred and said the units could not be placed on the other side or the front, so there was no other location.

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

THE FOLLOWING ITEMS WILL BE HEARD ON TUESDAY, SEPTEMBER 26, 2023

- 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)

- 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)

- 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)

*It was moved, seconded, and approved to **postpone** the above three items to the September 26 meeting.*

IV. OTHER BUSINESS

There was no other business.

V. ADJOURNMENT

The meeting adjourned at 10:48 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary