



CITY OF CONCORD

New Hampshire's Main Street™
Zoning Board of Adjustment

**December 6, 2023,
Meeting Minutes**

Attendees: Chairman Christopher Carley, Nicholas Wallner, Laura Spector-Morgan, Andrew Winters and Tedd Evans
Absent: James Monahan
Staff: David Hall, Code Administrator
Tracey Hutton, Zoning Administrator
Deborah Tuite, Board Secretary

Meeting commenced at 6:00 pm.

- 1) Call meeting to order
- 2) Chairperson's comments
- 3) Public Meeting
- 4) Public Hearings
- 5) Review and acceptance of Findings of Fact
- 6) Review and acceptance of Minutes
- 7) Any other business that may legally come before the Board

PUBLIC MEETING

0080-2023 **7 Break O Day – GWP – Gateway Performance District; BIG STEP LLC,**
Owner:

We have received two requests for a rehearing for previous Case number ZBA 0080-2023 where the applicant, Kassey Cameron, seeks review of the Planning Board's June 21, 2023 determination that a charitable gaming hall and microbrewery at 7 Break O'Day are permissible uses under the zoning ordinance in the City's Gateway Performance District.

0118-2023 *Kassey Cameron requests a rehearing on the issue of Timeliness.*

Chair Carley mentioned that the Board does not hear testimony in a rehearing request, rather they review what was submitted. The criteria to grant a rehearing is made by finding that the ZBA made an error in procedure or law, or that a new piece of information came forward that was germane to the decision and not available at the time of the hearing.

Mr. Winters stated that he felt Ms. Cameron's request was very thoroughly briefed, however he felt there was nothing new presented.

Ms. Spector-Morgan would not grant a rehearing on timeliness as she felt the board did not make an error, however would be inclined to grant a rehearing on the second standing issue.

Mr. Evans had no comment.

Mr. Wallner concurred.

Chair Carley agreed with his colleagues that there was no justification for a rehearing on the issue of timeliness.

A **motion** to deny the rehearing request of the case based on timeliness was made by Laura Spector-Morgan, seconded by Mr. Winters; passed by unanimous vote.

0119-2023 *John G. Cronin requests a rehearing on the issue of Standing.*

Laura Spector-Morgan stated that she believed at the time and still believes the applicant has no standing. Felt she is no differently aggrieved than any other member of the public and you need to show a personal aggrievement, additionally stated that the mere fact that she drives through that intersection is not enough to prove standing. She would vote to reconsider.

Mr. Evans concurred.

Mr. Wallner did not concur.

Mr. Winters did not concur even though Ms. Spector-Morgan spoke very strongly with a lot of good points, he did not see anything new that would impact the decision we made. He was not inclined to reconsider.

Chair Carley was inclined to agree with Mr. Winters, mentioning that he did not vote in favor of granting standing for the same reasons as Ms. Spector-Morgan, however, he didn't see a justification for a rehearing.

A **motion** to deny the rehearing request of the case based on standing was made by Mr. Wallner, seconded by Mr. Evans; passed by a vote of 4-1, with Ms. Spector-Morgan in the minority.

PUBLIC HEARINGS

Chair Carley brought to the attention of the Board a few administrative matters that needed to be dealt with having to do with three cases that were before them this evening.

0122-2023 -89 North State Street.

Chair Carley mentioned to the applicants that there would only be four members of the board to hear their case, due to conflict of interest of one member. He stated that there would only be four votes, and they would need three votes in favor. He stated that if the appellant agreed to be heard by a four-member board, is not a reason to request a rehearing. Chair Carley also mentioned that they have the right to a five-member board in which case they would need to be heard at the next meeting. He questioned the appellant if they are willing to be heard by a four-member board.

Attorney Gareth Orsmond stated that they prefer to defer to the next meeting to have a five-member board.

Chair Carley stated that the board should open and recess to the next meeting.

A **motion** to open and recess the case was made by Mr. Wallner, seconded by Ms. Spector-Morgan. The motion passed unanimously, with Mr. Winters abstaining.

0126-2023 - 41 Bradley Street.

Chair Carley mentioned to the applicants that there would only be four members of the board to hear their case, due to conflict of interest of one member. He stated that there would only be four votes, and they would need three votes in favor. He stated that if the appellant agreed to be heard by a four-member board, is not a reason to request a rehearing. Chair Carley also mentioned that they have the right to a five-member board in which case they would need to be heard at the next meeting. He questioned the appellant if they are willing to be heard by a four-member board.

Mr. Leidy agreed to be heard by a four-member board.

0108-2023 – 30 River Road.

Chair Carley mentioned to the Board that there is a request to be exempted from the 100-year floodplain requirement, however, there is an additional request that will be heard next month having to do with a modification of the building. The question to the Board is do they want to hear the case tonight, or in the interest of efficiency to defer the case to next month in favor of hearing both requests.

Ms. Spector-Morgan stated that she would be fine to hear the case if the appellant wanted to be heard, understanding the 45-day timeline.

Mr. Winters agreed to leave it to the appellant.

Attorney John Cronin stated that they would like to be heard tonight as the two applications are not related as there are different circumstances.

0127-2023 5 Short Street; RD – Downtown Residential District; Mark Beauregard, Owner:

Applicant seeks a variance to Article 28-4-1(h), Table of Dimensional Regulations, to allow for 75% lot coverage instead of the 60% allowed.

Mark Beauregard and Janet Levy testified. Mr. Beauregard mentioned that last month he was approved for a variance to pave a driveway up to within one foot of the property line, but it was over the allowable 60% permeable rate, coming in at 75%. He mentioned that this part of the city is somewhat grandfathered in, as it is a historic part of the city. The lot does not fit any of the ordinances in place today. Many of the lots do not conform to the ordinance.

Mr. Carley asked if it was the same plan as last month, Mr. Beauregard confirmed it was but it was more tailored to the impervious part.

Mr. Beauregard mentioned that the hardship is that he won't have any adequate places for people to park. The street has restrictions with no parking from January 1st through March 15th, as well as between 7:00 am and 6:00 pm there is a two hour maximum limiting the ability to park on the street.

Ms. Spector-Morgan asked Code if he used gravel, would he have the same issue.

Code: Dr. Hutton confirmed that to be the case.

Mr. Beauregard mentioned that currently the lot is used as a parking area for 2 units, but it is muddy. Upstairs has one spot, downstairs has two spots. The home was built in 1880.

Ms. Levy mentioned the hardship is that it is an unusually small lot, and the only way to have parking is to pave it. The relief is the minimum necessary to have the minimum amount of parking. The authorization would not be against the public interest as there is no public parking on the street and the curb is cut already there and they are parking there. Substantial justice is done as this is existing parking and we are just looking to pave it.

Ms. Spector-Morgan asked if it would affect surround property values, and Mr. Beauregard stated it would not.

In Favor: none

Opposed: Mr. Roy Schweiker testified. He stated that he does not live in the neighborhood, however interested in the case from an environmental standpoint, mentioning that there is a product called pervious pavement that would allow them to solve their problem. H asked the Board to postpone their decision while the applicant looks into this option.

Code: none

Mr. Beauregard agreed that it is an option, but also trying to put this in under a budget. Cost is a factor and paving would be quick and easy. The properties to the east and west are almost all impervious. Ms. Levy mentioned she has designed pervious parking. There needs to be a substantial area to allow it to drain. White's park is the only pervious parking lot in Concord. This is not a good location for this type of surface as there would not be an adequate area to drain.

Code: Dr. Hutton did not have any knowledge or information as to how Engineering views permeable surfaces.

Chair Carley mentioned the request was coverage of 15% over what is currently allowed.

DECISION:

Mr. Wallner mentioned that the characteristics of the neighborhood is comprised of small lots; recalling testimony from last month, most homes have paved lots, so reasonable use would include the right to a paved lot.

Mr. Evans agreed.

Ms. Spector-Morgan stated she would move to grant the variance, mentioning that the spirit of the ordinance would be observed and that it would not alter the character of the neighborhood given the other paved lots. The lot does appear to be smaller than other lots in the neighborhood making it unique and harder to meet the requirements, and the variance won't diminish values, agreeing that pervious pavement would not be an option here.

Mr. Winters agreed, stating that it is a small lot with a relatively large structure that long predates the code and the parking needs, so it is reasonable to have parking.

Chair Carley agreed with his colleagues.

A **motion** to grant the variance was made by Ms. Spector-Morgan given the points previously articulated, seconded by Mr. Evans; passed with a unanimous vote.

0108-2023 30 River Road; RM – Medium Density Residential District, 30 River Road Properties LLC, Owner

The applicant seeks to renovate an existing single-family dwelling that resides in the 100-year floodplain and seeks a variance to Article 28-3-2(j), Substantial Improvements to Existing Residential Structures within the 100-Year and 500-Year Floodplains.

Attorney John Cronin and Peter Grenier testified. Attorney Cronin mentioned that in 2021 Mr. Wroblewski purchased the property, stating that the house was built prior to FEMA regulations. Mr. Wroblewski pulled a permit which was issued and commenced work. Some of the repairs were not appropriate, i.e., the stoop and driveway. Mr. Wroblewski worked on the property for two years and could not finish. Mr. Faria was interested in the property and subsequently acquired the property. He was advised that he would need to reapply for the permits. The original permit was posted and never paid for prior to being issued. Looked at the FEMA desk reference and how to work around the problems. The building has been long existing and will continue to be. The goal of the FEMA floodplain ordinance is to prevent financial impacts from buildings that are close to the waterways that may rise up from hydrostatic pressure or float away causing hazards, as well as impacts to human safety and property damage. The first floor living area is about one and a half inches above the base elevation and the City states that the base standard should be about two feet above the flood elevation. Mr. Grenier is willing to build up the structure by adding height to the floor, however the basement is an issue. The ordinance talks about the basement as a closed structure. There is a three to four-foot crawlspace, with a concrete floor, filled with gravel, and is waterproofed outside. It can be waterproofed all the way to the sill. One condition could be to fill the four-foot crawl space entirely and remove the bulkhead. The FEMA desk reference talks about storage, but not living space. This crawl space will never be living space with no mechanicals as they are above the floodplain.

Atty. Cronin talked about the special criteria for the floodplain, stating that the level of flooding would not be increased in any way and the building has been there and is there and will exist. If the floor is raised by two inches, it will take the living area out of the floodplain and begs the question if whether the variance is even needed. This is an unusual circumstance. Looking at the substantial improvement piece, it is determined by 50% of the value of the property. If the assessor says the home is worth \$84,000, or maybe \$100,000, then owners are

only allowed to do \$50,000 in improvements. Worried that this would only allow the bare minimum to be done to improve the property.

The interest and spirit is to prevent flood damage and impacts. The essential character of the neighborhood will not change as it will still be a single-family house. Public interest meets same standard, and substantial justice is the building is there, and the city had issued a permit and people looked at it with good faith and purchased it to finish it and now they are stuck in this Pandora's box at a great expense. If the home is lifted and improvements are made, there should be no impact to the public. The improvement would not diminish any neighboring values. As far as the hardship, we would be taking away any of the risk to the basement, which is unlivable, by installing flappers making it no longer a closed structure so the building doesn't flood. Use is reasonable, making the house better. The abutter said it looks better than it has in 10 years.

If you look favorably on this request, they are happy to accept the conditions, such as filling in the crawl space with two-three feet of gravel if needed, installing FEMA compliant flappers on the foundation, and to increase the floor above base flood elevation. Also, as far as the concerns around the driveway, Mr. Grenier will restore the driveway to where it was and bring the plantings back to what they were. Granting the variance is the best-case scenario, but the building is existing and going forward and finishing would benefit everyone.

Ms. Spector-Morgan asked a clarifying question that the crawl space exists, and that they will be waterproofing to the top of the foundation.

Atty Cronin answered yes to both.

Mr. Winters asked for an explanation of the 50% rule. Asking if the improvements were less than 50%, no variance would be needed.

Atty. Cronin stated that the 50% rule was to limit substantial improvement of a structure in the floodplain. It is a debate on value. The assessed value would not be enough to actually improve the structure at the 50% rule.

Mr. Winters asked about the footprint and if it had increased.

Atty. Cronin agreed that the structure's footprint was increased, as the front stoop was enclosed, which is on footings. This will be reviewed next month.

Mr. Evans asked how they will raise the floor.

Atty. Cronin stated that they will be building it up. Mr. Grenier stated that they will use two layers of plywood.

Chair Carley asked Code if that would be sufficient.

Code: Dr. Hutton explained that the additional inch and a half will get them to the one foot above the base flood elevation to be compliant for the first floor, however, this still leaves the issue with the basement, where the floor of the basement also needs to be one foot above.

Mr. Evans asked if they filled the basement with gravel, what happens between that and the floor system.

Atty. Cronin stated when you install the flappers and if the water comes to flood level, the water flows through the flappers with no increase in hydrostatic pressure. This home has been here for a very long time with no water issues. We would prefer not to put the gravel in which is a workaround the basement issue. The basement definition is an enclosed structure. The flappers open up the area to allow the water to flow through, so therefore it is not enclosed.

Mr. Evans asked what the purpose was to waterproofing above the grade.

Atty. Cronin stated that you can do either or, but they are willing to do both, fill with gravel if needed, and they will be waterproofing to the sill.

In favor: none

In Opposition: Abutters David Belser and Roseanne Beaurivage testified. They mentioned that this project has been a thorn in their side since it started. In December of 2019, Mr. Grenier bought the property, then sold it a few weeks later to Mr. Wroblewski, who claimed that he would live there for the rest of his life. However, he ran his business out of the property, disregarded the neighbors, and did not get the appropriate permits. They were not sure why Mr. Grenier bought the property back. All of the improvements were done improperly and now Mr. Grenier wants to continue with those while stating that he was not responsible. The existing porch dimensions are much larger than what was reported. There is no foundation under the porch, there are just piers. It was an addition to the house. The other improvements to the inside include a three-season porch that was finished, as well as the entire front of the house being removed. Complete rebuild of the house for several years. They are not sure what a good solution is.

Ms. Spector-Morgan stated that she hears their frustrations, however, the basement has always been there. She asked if Mr. Belser would agree the basement has always been there.

Mr. Belser mentioned that he installed the basement in 1990, and it had a working sump pump. That improvement was to give the house solid foundation at the time. Additionally, at that time, however, Mr. Belser was interested in doing improvements and came to the Board and the request was flat out denied. They did not want a more substantial house. He stated the fact that there are properties that have abided by the rules. He requested if Mr. Grenier is going to remedy the driveway, he would like to review the plan prior to being done. The right-of-way goes through Mr. Belser's property. This lot has a significant portion that is in a floodway, not just the floodplain.

Code: There have been past discussions with the applicant's counsel, and they are aware that if they install the flappers that they will need certifications from an engineer that the basement is not structurally compromised, and they would need certification for the waterproofing. She wanted to make sure the applicant was aware of these requirements.

Atty. Cronin stated that the abutter was candid and that his concerns about the driveway and the porch are understandable. The owners are willing to modify to make it right.

DECISION: Chair Carley stated that there is a request to grant a variance concerning the height of the floor of the basement. The basement is not habitable. The owner is willing to reconfigure it to flood proof it, addressing the liability it could pose downstream if there was a flood. Also noted that the neighbors have been frustrated.

Mr. Winters reviewed that they need a variance to substantially improve, and will need to elevate the first floor. Has sympathy for both the applicant and the abutter, however, strikes him concerning that the abutter has more knowledge than the applicant. The plan does not seem very specific. Disagreement over how much floor space was added. He would tend to be inclined to approve, but details are not clear.

Mr. Wallner mentioned that substantial improvements are typically looked at in a favorable way, but it's a very complicated situation. Inclined to agree with conditions.

Ms. Spector-Morgan would agree with a lot of conditions.

Mr. Evans would agree, however if they agreed with the abutters and denied the variance they would end up with a less glamorous property. Why would they deny and have the property be less aesthetically pleasing, which would not benefit the neighborhood.

Chair Carley is inclined to agree that it should be granted, mentioning that the question does not address the addition. Would need to rely on Code to review that. Mentioned that they do have a hardship as the basement is existing, and you need a basement to hold up the house. Hazards will be mitigated under the conditions which speaks to the intent of the ordinance.

Ms. Spector-Morgan moved to grant the requested variance because there are special conditions that the house exists, and the crawl space was installed prior to the adoption of the floodplain ordinance. There would be no alternation to the character of the neighborhood from allowing the house to continue with the basement, and no gain to the public with a denial. The city had issued the building permit, and it will not result in a loss of property values. In addition, it will not result in increase in flood heights, or additional threats to public safety, no increase in flood levels, and it is the minimum necessary for flood hazards. The conditions of approval are as follows: The first floor living space needs to be raised so it is above elevation. Fill the basement with gravel, install flappers, and waterproof the entire thing. Get certification from engineer that it does not affect the structural integrity of the house, and certification from an engineer that it resulted in the basement being approved. Also, add the condition that the

driveway be restored to its original state along with adding the plantings, and that it is done in consultation with the abutters and to Dr. Hutton's satisfaction. Mr. Wallner seconded.

Chair Carley asked about the need of the gravel.

Ms. Spector-Morgan mentioned that they offered the gravel, and it makes sense. However, she is perfectly happy to hear more about that.

Chair Carley mentioned that the gravel was to remove the basement designation, and that he can see a rationale to allow the water to move freely.

Ms. Spector-Morgan agreed to withdraw that condition.

A **motion** was restated by Ms. Spector-Morgan, with the conditions mentioned exception of the gravel as follows:

1. Living space must be elevated two feet above the base flood elevation.
2. Wet Floodproofing (Flood vents) must be installed.
3. Must obtain structural certification for the basement walls and floodproofing certification for the flood vents from a Licensed Professional Engineer (PE).
4. Driveway must be restored and planning restored to the satisfaction of David Belser and Rosanne Beaurivage (34 River Road) and the Zoning Administrator.

The motion was seconded by Mr. Wallner; passed with a unanimous vote.

0113-2023 ***315 S Main Street; UT – Urban Transitional District, Jonathan and Jacqueline Ruggles Rev Tr, Owners:***

Applicant seeks a variance to Article 28-6-8(a)(1), Signs Permitted in Residential Districts, to allow replacement of an existing sign with a new sign of 33.25 s.f. vs. 20 s.f. allowed.

Josh Messenger, Connor O'Keefe, and Tynan Flanagan testified. Mr. Messenger explained that they were before the Board for approval for their new sign that will be 13 sq. ft larger than allowed. The existing sign was 33 sq. ft. which has been there for over 40 years. This part of South Main Street is on the more commercial side and similar buildings have similar sized signs.

Ms. Spector-Morgan asked why they need the variance.

Code: Dr. Hutton explained that when you replace or reface a sign, you must make is conforming to the ordinance.

Mr. Winters asked if there is there anything unique about the lot.

Mr. Messenger explained it is not a unique lot, however the frame was made for the existing sized sign.

In Favor: none

Opposed: none

Code: none

DECISION: Chair Carley stated that before the Board is a request to replace a non-conforming sign with a new non-conforming sign, requiring a variance.

Ms. Spector-Morgan is unsure that it needs a variance, however, replacing the sign with an identical sized sign will not alter the essential character of the neighborhood. The replacement is in the spirit of public interest, there will be no diminution of neighboring property values, and no gain to the public from denying the variance. The unique characteristics of the property is that the sign already exists.

Mr. Wallner agreed and offer a second.

Mr. Evans agreed.

Mr. Winters agreed

Chair Carley agreed and felt everyone was in agreement.

A **motion** was made to approve the application by Ms. Spector-Morgan, seconded by Mr. Wallner; passed unanimously.

0117-2023 ***92 Portsmouth Street; RS - Single Family Residential District, Selina and Ryan Blaine, Owners:***

Applicant is looking to construct an addition along with a garage to their existing house and is seeking a variance to Article 28-4-1(h), Table of Dimensional Regulations, to allow an 11-foot setback vs. 15-foot setback allowed for the northeast corner of the proposed garage.

David Scott, representing the builder for the owners, testified. Looking to construct a garage that is 24-feet by 24-feet, however due to the irregular shape of the property, it encroaches the 15-foot setback by four feet.

Chair Carley asked why he felt it met the criteria for a variance.

Mr. Scott stated that it does not diminish the surrounding properties and the nearest building is approximately 200-feet from the boundary line. They have exhausted many options as to where to place it and they reduced the original plans to 24 feet x 24 feet.

Ms. Spector-Morgan clarified that the addition is not in the setback.

Mr. Scott stated that there will be an 8-foot breezeway in between the garage and the house and that if they reduced the breezeway any further it would not be very usable, safety issue.

Mr. Winters asked if they could move the garage to the back.

Mr. Scott stated that was not very practical for easy passing.

In Favor: none

Opposed: none

Code - none

DECISION: Chair Carley stated that there was a request to add a garage and addition, with the garage four feet into a setback.

Mr. Winters stated that it is persuasive that it's heavily wooded in between the garage and the abutters structure. With the angle, the four feet quickly becomes an obstacle. Having a breezeway with a garage is a reasonable use of the space. He is inclined to grant.

Ms. Spector-Morgan stated that she would not be voting for the variance because it was a design choice and not a special condition of the property.

Mr. Evans stated that it meets all conditions except hardship. Pretty typical construction, inclined to agree with Ms. Spector-Morgan.

Mr. Wallner stated that characteristics of the lot with the angled lot line is the hardship. Inclined to support.

Chair Carley mentioned it is very close to the edge as to whether it is the minimum variance. He does not fully understand the layout. The impact of this variance is very slight. It doesn't run the full width of the building, the neighborhood would not be affected, and there are trees on property line. Would most likely approve.

A **motion** was made to approve the application by Mr. Evans, seconded by Mr. Winters. The motion passed with a 4-1 vote, with Ms. Spector-Morgan in the minority.

0121-2023 **5 Pine Street; RN – Neighborhood Residential District, Concord Whyte Properties 6 LLC, Owners:**

The owner requests an Equitable Waiver for Frontage and Parking as it pertains to the multi-family dwelling.

If the Equitable Waiver is not approved, applicant is requesting the Zoning Board of Adjustment to reverse the Zoning Administrators determination that the residential dwelling on the property contains 2 units and is not a legally existing Multi-family dwelling. (ZBA-0101-2023)

Daniel Whyte, owner, and Attorney John Arnold, Orr and Reno, testified. Atty. Arnold stated it is a single-family house, built in late 1800's. In 1984, the Seymore family converted to three units. It was done by the book, with a professional contractor, financing through a lender, and the appropriate permits. They did extensive renovations. This led to litigation (Supreme court). Inspections were done and the work was approved by a final building inspection in 1984. Forty years later, Mr. Whyte bought the property as a legally recognized 3-unit building. Dr. Hutton issued several determinations that stated that the City should not have issued the building permits in 1984 because the property didn't comply with frontage and parking requirements. of the 1984 ordinances. Dr. Hutton's ruling stated that in 1984 the RN zoning ordinance for frontage was 80', where the property only had 60' of frontage, and that three units required five parking spaces and Dr. Hutton believes that there are only two stacked parking spaces at the property. Atty. Arnold disagrees with both of the determinations as the subject of this administrative appeal. The application for the Equitable Waiver presumes that Dr. Hutton's rulings are correct.

The perceived violations are over 10 years old and under the Equitable Waiver criteria, we need to prove that the physical and dimensional violation does not constitute public or private nuisance or diminish the value of other properties in the area, nor interfere with the present of future permissible uses of the property. Also, we need to prove that due to the degree of past construction or investment made, that the cost of corrections far outweighs any public benefit to be gained that it would be inequitable for the violations to be corrected. The property has 60 feet of frontage since the 1800's. The deficiency is 20 feet. The structure has not caused any public or private nuisances and has not diminished any property values and has not interfered with current or permissible future uses. The frontage is purely a function of age. On the GIS map, there are a number of other properties that do not have 80 feet of frontage. In 1984, the cost of renovations came in at \$50,000, the present value would be over \$150,000. There are separate dwelling units and it would be a significant cost to remove a unit. Dr Hutton's position is that it is an illegal duplex. Duplexes require enhanced frontage requirements of 120 feet. Converting back to a duplex would make the frontage less compliant.

As for parking, in 1984, three units required five parking spaces, same as today. The property has a fairly long driveway of about 90 feet long. More than enough room for two cars in the

garage and three cars in the driveway. The layout has existed for decades without causing nuisance. This layout is a very similar layout of other properties in the neighborhood.

The GIS map shows similar multi-family properties in the surround blocks, and is very common. The dwelling unit does not diminish values or interfere with the use of other properties. These improvements were already done. It was expensive to do and would be expensive to undo. Reducing from five spaces to four spaces, presents the same stacking issues. Sometimes these zoning violations happen because homeowners do not get permits, but this family went through all of the proper permits required. It would be inequitable to remove a unit.

Chair Carley asked for clarification around a three-family unit requiring 80 feet and a two-family requiring 120 feet.

Atty. Arnold explained that it has to do with converting a residential building to multiple units, and in the Use category a three family requires 80 feet. A duplex has a subset of enhanced requirements, which requires 120 feet of frontage, and this only applies to a duplex in both ordinances for 1984 and now.

Chair Carley asked how getting an Equitable Waiver solves the legal problem.

Atty. Arnold explained that the legal problem is that the City made a determination that the property is non-compliant, and it was non-compliant from day one in 1984. The Equitable Waiver would excuse the perceived non-compliance for the frontage and parking.

Chair Carley asked how that affects the parking.

Atty. Arnold explained it would allow the existing layout of the driveway to remain the same, if it was a violation in 1984, it would excuse that violation since it has been there for years with no problems.

Chair Carley asked how the Equitable Waiver relieves the violations and allows for a grandfathered use.

Atty. Arnold stated it would excuse the violation from 1984 ordinances.

Code: Dr. Hutton said that there was no objection to the Equitable Waiver.

Ms. Spector-Morgan asked why it was perceived as a duplex and not a three-family.

Code: Dr. Hutton explained it has been used as a duplex, but there are discrepancies to the use of the third unit.

Mr. Winters asked if this has no direct connection to previous construction plans.

Mr. Whyte stated that the previous construction plan has been abandoned.

In Favor: Jenny Boesch testified. She is the abutter at 7 Pine Street. She has lived there for 22 years. During the 22 years she has lived there 5 Pine Street has never been used as a multiunit house. The Seymore's lived on the ground floor, and their son lived on second floor. To say parking was not an issue is not reality because there was only one vehicle used there during that time. She had no knowledge of the rules in 1984. She knows Mr. Whyte to be a builder/contractor and she was surprised he would not have looked into this prior to purchasing. From the moment he bought the property he went into full speed mode. If we go ahead and replace windows and add structures, and then claim we didn't know, that was disingenuous. We do have to play the driveway shuffle on our own property. This is our third trip down here, hoping that we can resolve it. She does feel there is a diminishment to her property value. She is concerned because he is removing trees from other properties that he owns.

Mr. Schweiker testified that unfortunately it was approved in the past and should be allowed to continue. Greatly emphasize the issue of stacking driveways.

Opposed:

Code: Dr. Hutton stated no comment on the Equitable Waiver.

Atty. Arnold and Mr. Whyte reemphasized that they are talking about one car space.

Ms. Spector-Morgan stated that there are three units.

Atty. Arnold agreed.

Chair Carley noted that there is a garage.

Atty. Arnold stated that there is a two-car garage and that the driveway is 90 feet long so there is room to stack at least three cars.

DECISION: Chair Carley stated that the building was rendered a three family in 1984 legally at the time and the appellants are looking for the Board to bless that status with the Equitable Waiver.

Mr. Evans stated concerns about the stacking of cars, but not sure what to do about that. These were granted permits, inspections were performed, leads me to approve.

Mr. Wallner stated that it was three units in 1984 and they took all the steps required, the city approved it, and they shouldn't have, but we need to live with it. Inclined to approve.

Mr. Winters stated that it is pretty fortuitous that this is a three unit and hard to dispute. Maybe not completely used, and since it was approved, they meet the Equitable Waiver standard.

Ms. Spector-Morgan agrees.

Chair Carley agrees.

A **motion** was made to approve the Equitable Waiver by Mr. Evans, seconded by Mr. Wallner; passed unanimously.

Chair Carley advised the Board that the applicant wishes to continue case #ZBA-0101-2023 for two months in case the decision on ZBA 0121-2023 is appealed. If no appeal is filed, the applicant wishes to withdraw the application.

A **motion** to open and recess case #ZBA-0101-2023 to February was made by Mr. Evans, seconded by Ms. Spector-Morgan; passed unanimously.

0123-2023 **54 N. Main Street; CBP – Central Business Performance District, Ciborowski Associates LLC, Owner:**

Applicant is proposing a complete redevelopment of 44-52 N Main Street (CVS) and 54-56 N. Main St (E&P Hotel) along with a connection to and renovation of 34-42 N. Main Street (Phenix Hall) and is requesting variances to:

1. Article 28-4-1(h), Table of Dimensional Regulations, to allow a portion of the proposed building to be constructed to a maximum height of 88 feet whereas 80 feet is allowed.
2. Article 28-4-1(g)(2), Dimensional Standards, to allow a partial obstruction of views of the State House Dome from Interstate 93.

Attorney Ari Pollack, owner Mark Ciborowski, Architect Anthony Mento, and Engineer Jeffrey Lewis testified. The project is a complete redevelopment of 44-52 North Main Street, the CVS building and the E&P hotel. Along with a connection proposed to the renovated of Phenix Hall at 34-42 North Main Street. The subject property is in the CBP District. The preservation of the historic Phenix Hall includes unique performance history with presidential visits, presidential candidate visits, along with multiple additions for decades. The demolition of the former E& P hotel is necessary for this project. The project recently received unanimous approval from the Concord Heritage Commission, which is a rare endorsement. The applicant has filed conceptual plans and is seeking two variance requests. The first request for building height relief. The table allows for 80 feet in the CBP District, and they are seeking a variance to build to 88 feet. The second request is for a variance from narrative language in Article 28-4-1(g)(2), allowing a partial obstruction of the views of the State House dome from Interstate 93. We believe other aspects of the proposed development can be accomplished in compliance with the terms of the ordinance, subject to appropriate review.

Building height is measured from average mean grade to the highest point of the building. Atty. Pollack pointed to the proposed plan explaining where they are seeking the variance on height. The subject property base grade varies 10 feet at the front, to the rear, which falls away from rear east to west. He mentioned that the street is called Low Avenue for a reason. The grade differential means that the proposed height at Main Street is actually 83 feet. Measured from the back of the building it would be 93 feet, which gets to the average of 88 feet. Additionally, the height restriction falls in the midst of the proposed top floor. They are seeking a minimum variance to complete that partial floor. The seventh floor is intended to be a rooftop restaurant, which will be accessed by elevators. The restaurant could be one level lower, however, the meat and potatoes of the project will be market value residential properties and without the four floors of residential units, it would not be fiscally feasible.

The variance allows for a reasonable use for building height, with a variance of eight feet, which is only a 10% variance. Additionally, the proposed height is consistent with other structures in the corridor. The Kennedy Building has nine floors and is 85 feet high, which is on the west side of the street. Built on federal property and possibly not a performance district at the time it was built. The public interest in granting the variance is a redevelopment of underperforming elements on Main Street. The CVS building has at times been shuttered, but clearly not what the Performance District is seeking. The rooftop view wouldn't be visible from Main Street because it would be set back. It is about 40% of the total of the building and they are asking to cover 40% of the footprint with the 8-foot increase. The spirit and intent of the ordinance is to develop a mixed-use property and facilitate a conforming and desirable project. Substantial justice would be serviced, and the requested variance of 10% constructed by right, but only half of that on Main Street at 83 feet. As far as surrounding properties, there is no evidence to suggest any devaluation in the 10% height variance. Additionally, the replacement of the former CVS will likely enhance property values providing an anchoring property.

The hardship is in the grade difference from Main Street to Low Avenue by 10 feet. If it was on the other side of the street, it would only be three feet higher than allowable. 60% will be under 80 feet, and 40% will be over 80 feet.

Mr. Winters asked if the proposed structure would be higher than what was there now.

Atty. Pollack reviewed the proposed plan. The variance is for the 40% on the roof. Atty. Pollack then spoke about the view scape variance. The request to allow a partial obstruction of the State House dome from Interstate 93. Atty. Pollack showed pictures of where the obstruction would occur. The language of the ordinance, says you should not obstruct the State House dome as can be seen from a passenger vehicle from Interstate 93, making a reference to passenger vehicles. The degree of obstruction, in time, is in seconds as you move north. Stated that currently there are trees that obstruct the view of the dome. Mr. Ciborowski

stated that there is a good stretch of the tree line that blocks the view compared to the proposed building.

Mr. Winters asked if there are any other buildings that obstruct it.

Chair Carley mentioned that there is one building.

Atty. Pollack explained the degree of partial obstruction is intermittent. Mr. Ciborowski explained the even the shopping plaza, if it were even one floor higher, would obstruct it. There is proposed language to drop the requirement. Atty. Pollack stated that the hardship comes with the viewscape requirement that is in conflict with the permitted height that is allowed in this District. On the one hand, you can have an 80-foot tall building, but don't block anything. Trying to live with both, compromising with a partial obstruction. The variance would allow us to compromise with competing portions of articles in the ordinance. Reasonable use, is for a partial obstruction with a generational opportunity where these types of projects are embraced. The viewscape is already impacted from other structures. The DOT is proposing the redesign of most of this corridor, even though it has not been passed, the viewscape will change in the future. It is hard to live with this type of restriction. As far as intent, it is noteworthy, but not sure if it should be enforced to nullify an otherwise desirable project. There is no evidence that a partial obstruction would affect any surrounding property values. A nice redevelopment to downtown will most likely result in a positive impact to surround values.

Mr. Wallner asked if they would ever consider putting the restaurant on top of Phenix Hall.

Atty. Pollack and Mr. Ciborowski stated that the existing structure would not support another floor.

Mr. Winters asked if this would make it the tallest building in the City of Concord.

Mr. Pollack stated that depending on where you measure from. 80 feet by right, measured by the average mean grade on the bottom.

Mr. Mento explained that the Capital Commons building's height is very close to what we are proposing. Average mean grade is in question because of the way the grade slopes. Mr. Ciborowski stated that the project is very challenging, even with the additional floor the project is financially upside down, with construction costs and interest rates, but it would be incredible for our downtown.

Mr. Evans asked about parking.

Atty. Pollack stated it is an issue. Mr. Ciborowski stated that there are 21 spaces in the lowest level of the building, then there is a surface lot that he owns, with public spaces available across the street at the School Street Garage.

Mr. Winters asked what the hotel is being used for now.

Mr. Ciborowski stated that the upper floors are completely dilapidated. Ground level is being used for commercial uses. There was a fire in 1956, and the egress got cut off in CVS. Project would bring up a very underutilized lot.

In Favor: Mr. Schweiker. This would be a great benefit to downtown. First off, as far as the maximum height, it seems to be a random number. As far as visibility, the Concord Hotel was controversial at the time. Not that long ago they talked about Interstate 93 being underground. As far as adjoining properties, issues are less than the desirability of the success.

Opposition: Joseph Conway of Berat Holdings, abutter on north end of the project testified. Not in support of the 88' height variance. The principal reason is the current zoning regulations that are on the books. If you are designing a building, you should meet those requirements. That you need to add a floor to make it feasible, should not be a criterion for zoning. Should be done within the confines of the zoning regulations. A number of factors negatively affects our building. There is concern about parking. Also, the three-tier parking lot to the east, is full. Low Ave on any given day, is a nightmare to navigate. Adding 50-100 cars a day, the impact will be negative. The building will abut Berat's current building with a party wall that will affect snow loads. Mr. Conway reels it is great that he wants to build a wonderful structure but should be within the confines of the zoning ordinances. Berat Holdings is not in support of the variance. They strongly disagree that it won't affect the abutters.

Chair Carley asked if the impact doesn't reach over to the far end.

Mr. Conway explained that the hotel shares a common wall. That wall can't be taken down. The carrying timbers cannot be take down. If the building now goes 20 feet above, it will affect their building.

Mr. Wallner asked what is the height of his building.

Mr. Conway stated that his building is four stories, maybe about 55 feet.

Allan Herschlag testified. Feels it is a wonderful project, however, current zoning is in the way of the project. There is concern about the accuracies of the statements. The Concord Hotel building was delayed a month. At the time, the Planning Board Chair closed the public meeting, with no additional testimony, ruling that the hotel did not obstruct the dome. He made a plea that was not considered at the time. Yet, ultimately, there was an obstruction of the dome by a lack of due diligence. As far as the current application, he discussed that he

believes there are no conflicts between the height and the blocking of the view, as there are provisions that protect the view of the dome. The ordinance states that in all instances, development shall not obstruct the dome. There is no contradiction to the height requirement and the requirement to not block the view. The fault is with the City's inability, with the zoning code, to allow a project to move forward. Currently, the Planning Department is trying to address this, but the proposed zoning doesn't exist yet. It's unfortunate, as he doesn't know how this Board second guesses the zoning. Excessively clear that it is not allowed. There is no hardship. City bodies have failed to act in the Master Plan.

Scott Justin Hardy testified. He stated he was born in 1955, and a military brat. He has been in Concord since 1970, and has come to love the city over time. Please hold the line on the 80 feet. This sounds like a great project. Capital Commons should never have happened. Have more respect for the history of Concord and the view of the dome. Please don't keep violating the rules.

Maureen and James Dagle testified. They bought 1-5 Depot Street seven months ago. Concerns of substantial loss of value in their property. The final project will result in a stairwell that will permanently block seven of our windows and a second egress to a commercial unit, which will substantially impact our value.

Chair Carley asked where their unit is on the map.

Mr. Wallner asked what is in the building now.

Mrs. Dagle stated that Castro Cigar and other retail. They are concerned that it's hard to stop that ball rolling, especially how it affects them.

Chair Carley asked how the extra eight feet would affect their building.

Mr. Dagle explained that it's the entire project that they are concerned with and this variance is the first step. The proposed secondary staircase will affect their building.

Chair Carley explained that the Board has no jurisdiction to help them with their concerns, but that there are other avenues in the City where they can address their concerns.

The Dagle's stated that they can't support this project.

Code: none

Atty. Pollack stated that certainly they are aware of the zoning metrics. They skinned this project down. Variances exist to provide relief. If the ordinance were a static document then we would not have a project and we would not be here. There is a mechanism to apply for relief. They are not looking to make precedence. Not sure if the Concord Hotel required a variance. Ours would be one of several large buildings on Main Street.

DECISION: Chair Carley reviewed the request.

Ms. Spector-Morgan stated that she loves the project. So excited to see it coming forward. However, she cannot vote for a variance as she see no hardship.

Mr. Winters stated that he feels similarly, great project. The view is not that important to him, however it is important to some people. It is important for the City to address the issue. He stated he would love for the height to be 100 feet, but this needs to be looked at by City Council.

Mr. Wallner agreed on the hardship, as far as the height. However, he feels the State House dome is very important and unique, as there are not that many that have gold domes.

Mr. Evans stated that he understands that there is some aspect to the lot as far as the measurement, but sees this as more of a financial hardship. View issue is subject to a variance.

Chair Carley said it was a tough one. The project is a terrific one and would be a great addition to the downtown. He feels that the effect on the view is minimal. On the subject of the height, you could make an argument that the topography of the lot makes a hardship, but that only gets you to 83 feet. There is the fact that the higher portion is set back, which is a mitigating circumstance. The effect on the neighboring properties is not something the Zoning Board can address. He could vote to grant the appeal of the view of the gold dome, as well as the forgiveness of the height. It has to do with the scale of the building. Although, it is walking a fine line, he would probably vote in favor.

A **motion** to deny the variance on the height, as there is nothing unique about the property, was made by Ms. Spector-Morgan, seconded by Mr. Winters. He reiterated that he hopes that the City addresses this issue. By a vote of 3-2, the motion passed, with Chair Carley and Mr. Evans in the minority.

A **motion** to deny the variance, on the grounds that there is no specific hardship to this lot, was made by Mr. Winter, seconded by Mr. Wallner. Ms. Spector-Morgan added that if they had a building that was 80 feet high that blocked a portion of the dome, she would be in favor of that. By a vote of 3-2, the motion passed, with Chair Carley and Mr. Evans in the minority.

0125-2023 ***17 Rockland, RS – Single Family Residential District, Christopher Aslin and Rachel Goldwasser, Owners:***

The applicant wishes to remove an existing attached garage and replace it with a new attached garage with living space on the second floor and requests a variance to Article 28-4-1 (h), Table of Dimensional Regulations, to permit a building setback of 3 foot 8 inches +/- from the easterly property line where a 15-foot setback is required.

A previous variance request was approved in Feb 2020 but has expired due to the construction not having been started.

Christopher Aslin testified. Stated that he is replacing an existing non-conforming garage, in the same footprint, with the exception of seven inches on the shed portion, with an addition of five and a quarter foot of encroachment on the side setback. The current garage is substandard, as you can't open the doors. The criteria of the variance has been met, as the lot is very narrow, and it has been challenging to have parking in the garage. The existing structure has been there for years. Not changing the essential character, consistent with other structures in the neighborhood, there will be no impact to the public, and it won't diminish the values of the properties. Variance was previously issued, but the pandemic got in the way.

Chair Carley asked if the design changed from the expired variance that was granted.

Mr. Aslin stated the design is the same. He was not sure of the current width of the garage.

Mr. Winter asked if he is taking away part of the garage for the breezeway

Mr. Aslin stated that the current mudroom will be cut back to enlarge the garage.

In Favor: none

Opposed: none

Code: none

DECISION: Chair Carley reviewed the request.

Mr. Wallner stated he is persuaded to approve.

Mr. Evans stated it is approvable.

Ms. Spector-Morgan stated that given they are replacing an existing garage, only creating an additional five sq. ft. of encroachment, it meets the criteria as it won't alter the essential characteristics of the neighborhood, or the surrounding property values. The lot is unique both in size and in the existing development.

Mr. Winters stated it is a very narrow lot, not an unreasonable sized structure. One car garage is reasonable.

A **motion** was made to approve the application by Mr. Wallner, seconded by Mr. Evans; passed unanimously.

0126-2023 ***41 Bradley, RN – Neighborhood Residential District, David Leidy,***
Owner:

Applicant is requesting a variance to Article 28-4 1(h) Table of Dimensional Regulations to allow a shed to be two feet 10 inches from the property line where 10 feet is required.

David Leidy testified. Owned 41 Bradley Street for 20 years. The house was built in 1887. He stated he is an autistic man and he will be different. Stated that he built a shed. It's a unique little space. It's a Bradley Street address, with more frontage on the Walker side. It is on a 10th of an acre. All of his neighbors have sheds and garages right up to the property line. He built the shed on cinder blocks. He set it back enough so he could walk around the shed. He stated that he did not realize that he was required to have a permit. The setback must be 10 feet, which would put it in his driveway. He talked to his neighbor, which she said she did not have a problem. He doesn't like to have gasoline in his house and he has machines that use gasoline, a chainsaw, snowblower, and a lawn mower. He had to keep the gasoline in my basement, so he decided to build a shed. He would like to complete the shed and noted that there will be no electricity. It is two feet and eight inches from the property line.

Chair Carley mentioned it is a 96 sq. ft. building, which is an accessory structure.

Code: Dr. Hutton stated that it was. The setback for an accessory structure could be reduced down to five feet, if less than 250 sq. ft. of the structure was in the side setback. But the structure would need to be more than 50 feet from the front (road).

Mr. Winters asked about the other neighbors.

Mr. Leidy stated that he did not speak to them about it. He stated that the neighbor has a shed and you can barely walk behind it. Stated that he is asking permission to keep his shed where it is so he can leave his equipment in the shed. It would be a hardship to move it and it would be a hardship for it to be in his driveway. He does not want to lose any parking.

In Favor: none

Opposed: none

Code: none

DECISION: Chair Carley reviewed the request.

Mr. Wallner stated that in this neighborhood it seems that many neighbors have garages or sheds and he would have neither if it was denied. The hardship is that he has a small lot.

Ms. Spector-Morgan agreed.

Mr. Winters agreed, stating that he does have an odd lot and storage of the gas is a problem.

Chair Carley agreed.

A **motion** to approve the variance was made by Mr. Wallner, seconded by Ms. Spector-Morgan; passed unanimously.

Minutes of November 1, 2023: Mr. Wallner made a **motion** to approve the minutes of November 1, 2023, seconded by Ms. Spector-Morgan; passed unanimously.

Minutes of November 8, 2023: Mr. Wallner made a **motion** to approve the minutes of November 8, 2023, seconded by Ms. Spector-Morgan; passed unanimously.

Draft Findings of Fact from November 1, 2023: Mr. Wallner made a **motion** to approve the Findings of Fact of November 1, 2023, seconded by Ms. Spector-Morgan; passed unanimously.

Draft Findings of Fact from November 8, 2023: Mr. Wallner made a **motion** to approve the Findings of Fact of November 8, 2023, seconded by Ms. Spector-Morgan; passed unanimously.

A **motion** to adjourn the meeting at 9:10 pm was made by Mr. Wallner, seconded by Ms. Spector-Morgan; passed unanimously.

*Respectfully Submitted by
Deborah Tuite*