

**ACTION SHEET – BOARD OF ADJUSTMENT**

**TO:** John P. Bohenko, City Manager

**FROM:** Jane M. Shouse, Planning Department

**RE:** Actions Taken by the Portsmouth **Board of Adjustment** meeting held on May 20, 2003 in the Council Chambers, Municipal Complex, 1 Junkins Avenue, Portsmouth, New Hampshire

**PRESENT:** Vice-Chairman Jim Horrigan, Nate Holloway, Alain Jousse, Chris Roger, David Witham, Alternate Arthur Parrott and Alternate Steven Berg

**EXCUSED:** Chairman Charles LeBlanc, Bob Marchewka

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**I. Old Business**

**A) Request for One Year Extension of Time for Portsmouth Casey Home Association** for property located at **1950 Lafayette Road**. Said land is shown on Assessor Plan 267, Lot 007 and lies within the Office Research zone.

As a result of such consideration, the Board voted to **grant** the one year extension, thereby extending the variance until May 20, 2004.

**B) Petition of Susan B. Parnham, owner** for property located at **1220 Islington Street** on remand from Superior Court Order Docket No. 01-E-0568 for reconsideration of all factors to be addressed in a variance request under *Simplex Technologies v Town of Newington*, 145 NH 727 (2001) wherein a Variance from Article III, Section 10-302(A) is requested to allow an existing 10,280± sf non-conforming lot with a single family residence to be subdivided into two non-conforming lots with: a) one lot having 5,000± sf of area and the other lot having 5,280± sf of area where 15,000 sf of lot area is required for each lot, b) continuous street frontage of 50' for each lot where 100' for each lot is the minimum required, c) to allow a 2' rear yard for the existing 10' x 16' garage where 10' is the minimum required; and d) to allow 23% building coverage for the existing dwelling and accessory building where 20% is the maximum allowed. Said property is shown on Assessor Plan 233 as Lot 6 and lies within the Single Residence B district. Case #4-4

The Board voted to consider requests a & b separately and c & d separately. As a result of such consideration, it was voted that **requests a & b be denied**. The Board felt that there would be a diminution of value to surrounding properties if the lot was sub-divided, based on the fact that it is one of the smallest lots in that area, especially for Lot #11 which is next door. It was contrary to the public interest as there was zoning for the purpose of allowing people to enjoy their properties with air and green space and making smaller and smaller lots in that area interferes with those rights. Although the restrictions on the specific property interfere with the reasonable use of the property, it also interferes with the reasonable use of the people who own the adjacent lot. The Board was concerned about setting a precedent for this type of request and did not feel that the variance was consistent with the spirit of the ordinance. It was not the structure itself that interfered with the spirit of the ordinance as they would be allowed to build a garage on this lot, however, it was the use of the structure. There was a relationship

between the purpose of the zoning and the restrictions on the property as the property was merged in 1982 for that reason. It was a non-conforming piece of property and by reducing the lots to 5,000 s.f. each they would be made into much more non-conforming lots and that was not in the public interest. The applicant suggested that the small lot would reflect the current character of the neighborhood however the Board disagreed. The majority of the surrounding lots are much larger than the requested 5,000 s.f. The applicant has had reasonable use of the property since 1979. The granting of the variance would injure the private rights of other individuals in that area.

As a result of such consideration, it was voted that **requests c & d be denied**. The Board agreed that these requests were moot as they could not grant a variance from a line that doesn't exist.

C) Petition of **B. J.'s Wholesale Club, owner, Monro Muffler Brake Inc., applicant**, for property located at **1801 Woodbury Avenue** wherein a Special Exception as allowed in Article II, Section 10-208(36) is requested to allow a motor vehicle repair garage where such use is allowed by a Special Exception. Said property is shown on Assessor Plan 215 as Lot 14 and lies within the General Business district. Case # 4-9

As a result of such consideration, it was voted that the request be **granted** with the following **stipulation**:

- That inoperable vehicles or parts thereof will not be parked or stored outside.

It was felt that this was basically a modification of what was already there. It will not be any noisier. Any changes will be improvements to the services. The only hazards that would be generated would be chemicals or by-products that would be dealt with properly. There would be no detriment to the property values, no creation of a traffic safety hazard, no excessive demand on municipal services and no significant increase of storm water runoff as it would be the same as what is currently there.

D) **Request for Re-Hearing**, concerning the Board's Stipulation, for **Robert Byrnes and Patricia Tobey, owners**, requested by Charles Allard and Joan S. Davis, for property located at **41 Salter Street**. Said land is shown on Assessor Plan 102 as Lot 30 and lies within the Waterfront Business and Historic A. Districts.

As a result of such consideration, it was voted that the "Appeal" be **denied**. The Board found that there was no new information presented that wasn't available at the April 15, 2003 hearing, nor did they make any errors in their decision. The Board understood the concerns, however that information was available at the time of the original hearing. The Appeal request asked for a bigger or more private fence and addressed aesthetics. However, those were not the issues brought before the Board. Delineation of driveways with a fence was the only issue before the Board and that issue was addressed.

## II. Public Hearings

1) Petition of **Stamatia S. Miminis, owner**, for property located at **17-19 Elm Court** wherein the following are requested: 1) a Variance from Article II, Section 10-208(45) and Article IV, Section 10-401(A)(1)(b) to allow an existing building with two grandfathered dwelling units to be converted into three dwelling units where such use is not allowed, 2) a Variance from Article XII, Section 10-1204 to allow 3 parking spaces to be provided where 5 parking spaces are required, 3) a Variance from Article XII, Section 10-1201(A)(2) to allow an 8' travel way where 24' is the minimum required; and, 4) a Variance from Article III, Section 10-304(A) to allow 0% open space where 15% is the minimum required. Said property is shown on Assessor Plan 164 as Lot 10 and lies within the Business district. Case # 5-1

As a result of such consideration, it was voted that your request be **denied**. The Board felt that the variances would be contrary to the public interest as this is a very congested neighborhood. They were requesting many variances and the only difference from the property owner's previous petition was that they were asking for 3 units, rather than 4 units. They were asking for alleviation of parking spaces, the travel way would only be 8' and there would be 0% open space. Air movement and light is very limited in this area. The restrictions as applied to this specific property do interfere with the reasonable use of the property but there is a relationship between the zoning ordinance and the specific restrictions on the property as the ordinance is there to decrease congestion. The rights of others in that area, due to parking and increased vehicles, would be injured. The variance was not consistent in the same respect with the spirit of the ordinance because the ordinance was there to allow less constriction of the area and to not make it more congested. There would not be substantial justice for granting the variance as it would injure the property values of surrounding properties as well as allow an area that was not particularly safe access for emergency vehicles. Snow removal would create a problem as there was no place to put it. One car parked on the street would block the whole area.

2) Petition of **Alan J. Watson, owner, David R. Lemeux, applicant**, for property located at **43 Cornwall Street** wherein a Variance from Article III, Section 10-302(A) is requested to allow the construction of a 32' x 80' 3 ½ story building for 4 dwelling units after the demolition of the existing building with 2,102.5 sf of lot area per dwelling unit where 3,500 sf of lot area per dwelling unit is required. Said property is shown on Assessor Plan 138 as Lot 42 and lies within the Apartment district. Case # 15-3

As a result of such consideration, the Board's **motion to grant failed on a 3-3 vote**. Those voting in favor of the motion did not feel that the variance would diminish the value of surrounding properties as various realtors had attested to that fact. Property values may go down because of the larger building that is being proposed but they will not go down because of the requested variance. Those voting in favor of the motion also felt that the requested variance was consistent with the spirit of the ordinance because the zoning ordinance allows 1,000 s.f. per unit for the conversion of the existing building. The proposed building would have 2,100 s.f. per unit so it was not seen that the property was lacking 1,500 s.f. but rather the property has well over what was required, with the unfortunate circumstance that the existing building can't be saved. The proposed 2,100 s.f. per unit was very consistent with what was going on in the area. Other Board members contradicted this point and felt that the zoning ordinance was very clear that four units were allowed in the existing building, however, if the building was torn down, the new standard would be 3,500 s.f. per unit. The fact that the building has to be torn down because it's not safe is irrelevant and does not mean that the standards of 1,000 s.f. per unit for conversion are acceptable for a new building. The restrictions as applied to this particular property do not interfere with the owner's reasonable use of the property.

Those voting in favor of the motion felt that the requested variance would not be contrary to the public interest, as neighbors have testified both for and against, and all neighbors have unanimously agreed that something positive needs to be done with the property. Simply because this property can legally accommodate a duplex does not render the application for four units without merit. Rather, Simplex looks at whether a reasonable use is prohibited by zoning and in this case a reasonable use is prohibited because the unique circumstance of the property, being the condition of the building and the lot size, stops the property from being used as a four family use. If the building could be salvaged, the building could accommodate four units or eight with a Special Exception so there is a fair and substantial relationship in this circumstance. The variance would not injure the public or private rights of others, nor would it set any type of precedent. Substantial justice would be done by granting the variance because this would be a much safer project regarding parking, access by emergency vehicles, and would provide more green space. This proposal would move towards a greater conformity as opposed to converting the existing building.

It was noted that the neighbors of this neighborhood have repeatedly spoken out on the issue of density and they did so for this proposal as well. It was felt that the petition failed on the criteria of no fair and substantial relationship existing between the general purpose of the zoning ordinance and specific restriction on the property. It was felt that the neighborhood clearly felt that density was extremely important to them and it would be unwise, based on the neighborhood testimony, to simply wave them aside. It was not the size of the building that was in question but, rather, the number of units.

3) Petition of **The Morley Company, owner, Dow's Automotive Services, applicant**, for property located at **909 Islington Street** wherein a Special Exception as allowed in Article II, Section 10-208(36) is requested to allow a 2,400 sf, 3 bay automotive service center with related office space and storage in a district where such use is allowed by Special Exception. Said property is shown on Assessor Plan 172 as Lot 7 and lies within the Business district. Case # 5-3

As a result of such consideration, it was voted that the request be **granted** with the following **stipulations**:

- All repairs and service work shall take place within an enclosed building.
- No vehicles in an inoperable condition are to remain on the site for more than a one-week period; unless, enclosed in a building; and
- Repaired or rebuilt vehicles shall not be sold upon the premises.

The Board stated that this was an entirely commercial district and its use would not cause any problems with anyone in the area except in the same building, and that would be up to the owner to deal with. It was felt that it met all of the criteria for a Special Exception.

4) Petition of **Irene Bartholomew, owner, Robin Bettencourt applicant**, for property located at **90 Gates Street** wherein a Variance from Article III, Section 10-302(A) is requested to allow 6' x 9' shed creating 35.5% building coverage where 30% is the maximum allowed. Said property is shown on Assessor Plan 103 as Lot 74 and lies within the General Residence B and Historic A districts. Case # 5-4

As a result of such consideration, it was voted that the request be **granted**. The Board indicated that this was a dense residential area with small yards and no garages. There is the need for some sort of out storage building. The hardship was having to get a variance to put up this necessary structure. The neighbors did not oppose the shed so it would not be contrary to public interest. The shed was an attractive design and was being placed in the logical corner of the yard. It increases the lot coverage by a very small amount and would not have any adverse impact on the property values. Substantial justice would be done by allowing a property owner to better utilize their property and stop the accumulation of yard equipment on the property. The variance was consistent with the spirit of the zoning ordinance as garden sheds were certainly consistent with what zoning had intended. The variance would not injure the public or private rights of others and the statements of the neighbors support that.

5) Petition of **Eleanor M. & Frank W. Collins, Trustees, Eleanor M. Collins Revocable Living Trust, owners**, for property located at **15 Clover Lane** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 7 ½' x 8' deck creating 23.2% building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 236 as Lot 42 and lies within the Single Residence B district. Case # 5-5

As a result of such consideration, it was voted that the request be **granted**. The Board felt that the variance was not contrary to the public interest. The variance was consistent with the spirit of the ordinance by allowing the property owners to make improvements to their property. Substantial justice will be done by the granting of the variance as the steps are currently a safety hazard. Rather than rebuild the steps, they are taking the opportunity to improve the property which results in the building coverage

exceeding the allowed amount by 3.2%. There is no reason to believe that this would diminish the values of surrounding properties in any way. The special conditions of the property create a hardship. The lot is small but consistent with the size of the surrounding lot sizes. The purpose of the zoning ordinance is to prevent the over-building of lots and that certainly is not what is happening here. This seems to be a cost effective solution to a deteriorating set of steps.

**III. Adjournment**

The motion was made and seconded to adjourn the meeting at 11:10 p.m.

Respectfully submitted,

Jane M. Shouse,  
Secretary

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