

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE
CITY COUNCIL CHAMBERS**

7:00 P.M.

JUNE 17, 2003

MEMBERS PRESENT: Chairman Charles Le Blanc, Vice-Chairman James Horrigan; Alain Jousse, David Witham, Alternate Arthur Parrott and Alternate Steven Berg
MEMBERS EXCUSED: Nate Holloway, Christopher Rogers; Bob Marchewka
ALSO PRESENT: Lucy Tillman, Planner

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**I. Approval of the Minutes**

A motion was made and seconded to accept the minutes from the April 29 2003 meeting and it was approved unanimously with a 7-0 vote.

A change was requested to the May 20, 2003 minutes, on Page 5, 2<sup>nd</sup> page, "... ten minute rule for this particular hearing has it had been remanded" should be changed to "...ten minute rule for this particular hearing because it had been remanded".

A motion was made and seconded to accept the corrected minutes from the May 20, 2003 meeting and it was approved unanimously with a 7-0 vote.

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II. Public Hearings

1) Petition of **Diana M. Frye, owner**, for property located at **217 Myrtle Avenue** wherein a Variance from Article III, Section 10-302(A) is requested to allow the construction of a 6' x 26.8' front porch with a 16.5' front yard where 30' is the minimum required. Said property is shown on Assessor Plan 220 as Lot 92 and lies within the Single Residence B district. Case # 6-1

SPEAKING IN FAVOR OF THE PETITION:

Diana Frye, of 217 Myrtle Avenue, indicated that they were hoping to rebuild their porch which was currently a hazzard and unsightly. They would be rebuilding in the same style. Her neighbors were in support of the project. She presented pictures of the existing porch for the Board.

Chairman Le Blanc asked how long the porch had been there? Ms. Frye indicated that she purchased the house 5 years ago and for all intent and purposes it looks like it had been there 40-50 years.

DECISION OF THE BOARD:

Vice-Chairman Horrigan made a motion to grant the Petition as presented and advertised. Mr. Parrott seconded. Vice-Chairman Horrigan stated that the porch was old and it certainly would be in the public interest to replace it for safety and aesthetic reasons. The spirit of the ordinance allows this type of renovation and they would not be doing any justice by not granting the variance. They had a petition from the neighbors supporting this renovation. The renovation would enhance the value of this house and by implication enhance the value of surrounding properties. Concerning the hardship, they were dealing with a front yard setback and this was a street that was, for all practical purposes, a dead end street. It did feed into the Route 1 By-Pass but there were barriers to discourage general traffic other than the immediate neighborhood from using the street. A front yard violation would not seem to be a sufficient reason for denying the request. The property should have a front porch and to deny the petition would be denying the property owner full enjoyment of their house. For that reason, there was no fair and substantial relationship between the purpose of the Zoning Ordinance and the

restriction on the particular property. Again, he did not see anyone's public or private rights being interfered with and to the contrary everyone's rights in general would be improved.

Mr. Parrott agreed with Vice-Chairman Horrigan.

Mr. Witham indicated that when someone demolishes a porch and wants to rebuild it, they have to meet all of the criteria. It is his hope that in the future, they might amend the zoning in a situation like this where someone rebuilds so that they would no longer require a variance. He does not believe they would ever deny a variance request such as this.

Mr. Berg added that when someone is replacing identical non-conformity, he would like to see this sort of thing simply signed off by a Code Official.

A motion to grant passed unanimously with a 6-0 vote.

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2) Petition of **Wayne Semprini, owner**, for property located at **3510 Lafayette Road** wherein the following are requested: 1) a Special Exception as allowed in Article IV, Section 10-401(A)(1)(d) is requested to change a retail business to a construction/restoration company with associated business office and indoor storage space, and 2) a Variance from Article II, Section 10-206 to allow the construction of a 60' x 72' garage for the proposed construction/restoration company. Said property is shown on Assessor Plan 297 as Lot 8 and lies within the Single Residence A district. Case # 6-0

**SPEAKING IN FAVOR OF THE PETITION:**

Attorney Peter Loughlin appeared on behalf of the Semprini's, as well as Mike Brown, Tim and Neil Robbins, who were the option holders on the building. Attorney Loughlin had presented a letter to the Board members in the hopes of expediting the process and laying out all of the pertinent facts. This property was used as a restaurant for years and most recently was used for a retail Christmas Shop. The proposed use would be less intense than the other uses. This would be for business offices and a garage so that their trucks could be kept under cover and out of sight. The applicants spoke to the neighbors and they did not have any objections. Attorney Loughlin felt that they met all of the requirements for a variance, which he laid out in his letter. Michael Brown, Tim and Neil Robbins are all present to answer any questions.

Vice-Chairman Horrigan asked why the property seemed to be so difficult to put into use? It had been before them 5 times since he had been on the Board. Was there something peculiar about the property that made it unmarketable? Attorney Loughlin felt that the Christmas Shop wasn't appropriate but he felt the property may have a problem because traffic has to cross Route One several times. One of the benefits of this use was that the applicants would be entering the property first thing in the morning, not during peak times.

Vice-Chairman referred to an exhibit that said that the property was mis-zoned and asked if that was Attorney Loughlin's position? Attorney Loughlin referred to the surrounding uses which were the Wren's Nest Motel, which now had a new restaurant, which was zoned residential, there was Shepard's Antiques which had been fairly intensely used for commercial purposes for years, the subject property which had been used commercially for years and then they had two residential properties, all of it surrounded by industrial uses and business uses. He was not sure when the property was put in this category and created that zone but he felt the majority of the properties had been and continue to be used for non-residential purposes. He wasn't sure that a residential zone really fit at this point.

Chairman LeBlanc asked if the patio to the left of the building was going to be removed? Neil Robbins indicated that if there were a foundation, they would probably use it. If it doesn't have a foundation, they would tear it down.

Vice-Chairman Horrigan asked if any heavy equipment would be stored outside? Mr. Robbins indicated that there would not be.

Mr. Jousse asked if any materials at all would be stored outside the building? Mr. Robbins indicated no. Mr. Jousse asked what they would be using the rest of the parking lot for? Mr. Robbins said that was a good question. He indicated that they would not be using it for anything.

Gary Bowmar, owner of the Wren’s Nest, spoke in favor of the petition. He thought that the improvements sounded very nice and he felt it was a very good use of the property.

**DECISION OF THE BOARD:**

Mr. Parrott made a motion to grant the petition as presented and advertised. Vice-Chairman Horrigan seconded. Mr. Parrott stated that this was an unusual property and was surrounded by differently zoned properties and had been used commercially for a very long time. This was not a huge change in nature of the use. The requested variance would not be contrary to the public interest. In fact, no one was present to speak against the petition. Special conditions did exist due to the odd zoning, which could almost be called spot zoning. The requested variance was consistent with the requested variance. That section of Lafayette Road had widely varied uses, everything from business to residential. This was simply a continuation of the same nature of use of the property, but for a different purpose. Although there would be a larger attached building that would not have any impact on the use as the proposed building goes back further than the existing building. Mr. Parrott felt that substantial justice would be done by the granting of the variance if for no other reason than because a whole string of businesses had failed at that location, all of which were retail. He had not heard anything to the contrary and felt that this variance would not diminish the value of surrounding properties and was probably a neutral change.

Mr. Parrott felt that the same reasons would apply to the Special Exception in that it was an allowed use in this particular zone and he felt it was an acceptable and appropriate use of the Special Exception provision of the Ordinance.

Vice-Chairman Horrigan agreed with Mr. Parrott and added that the variance was being granted to build a garage on the property and, even if it were to go back to residential use in the future, he felt a house with a garage would be a more attractive property. Therefore, it would be in everybody’s interest for this kind of improvement. The hardship in part was the fact that retail uses did not work at this property. They were not looking at the same criteria for the Special Exception as they did for a variance but the best way to describe this was that the impact on the surrounding businesses, such as noise, heat, vibration, etc., would not be problems as a result of this type of use. As it was adjacent to some residential properties, this seems to be perhaps one of the better uses that could be carried out on this particular property. None of the Special Exception criteria come up negative on this, but rather come up positive.

The motion to grant passed unanimously with a 6-0 vote.



3) Petition of **Peter C. and Meg Middleton, owners**, for property located at **78 Lawrence Street** wherein the following are requested to build a 24’ x 24’ attached garage: 1) a Variance from Article III, Section 10-302(A) to allow: a) a 15’ front yard where 30’ is the minimum required maximum, b) a 7’ right side yard where 10’ is the minimum required; and, c) 28.1% building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 152 as Lot 46-1 and lies within the Single Residence B district. Case # 6-3

**SPEAKING IN FAVOR OF THE PETITION:**

Peter Middleton spoke on behalf of his petition. He indicated that they were hoping to put in a garage on their property and, after studying the property for some time, determined that locating the garage towards the front made sense. It also made sense to locate it out front due to the site elevations. The actual garage level would be the same as the basement. It would create more of a green space in the back as there was currently a driveway through the property and parking was in the back so this would create more lawn.

Vice-Chairman Horrigan indicated that the Planning Department had pointed out that if the garage were 21' rather than 24' a side yard variance would not be required and it would be less lot coverage. He asked if Mr. Middleton could talk to why it had to be 24' rather than a smaller width. Mr. Middleton indicated that the garage size was done by an architect and that was what he suggested.

Mr. Jousse asked about the breezeway measurements. Mr. Middleton did not know what the measurements were but guessed that it was probably 5' wide and was below grade.

**DECISION OF THE BOARD:**

Mr. Berg made a motion to grant the petition as presented and advertised. Mr. Parrott seconded. Mr. Berg indicated that the neighborhood was dense and it was difficult to meet all of the dimensional requirements in the older neighborhoods. Most of the houses have garages and very few of them meet dimensional requirements. Mr. Berg felt that was a special condition that existed and it was a reasonable request. The zoning ordinance, as applied to the property, would prohibit a use that was in complete harmony with the rest of the neighborhood. No fair and substantial relationship existed between the general purpose of the zoning ordinance and the specific restriction on the property. Mr. Berg did not believe that the intent of the ordinance was to deprive property owners of improvements and accessory uses as had been requested. It was not contrary to the public interest. That goes to the conformity question. As far as both public and private interests and diminution of surrounding properties, no one had objected after advertising this petition so he would infer from that that the neighbors didn't believe there was any adversity. Substantial justice would be done by granting the variance as it would allow the property owners to have a garage. The question was raised about the width of the garage and Mr. Berg indicated that typically a garage was built a minimum of 22' and if their storage and parking requirements call for 24' he did not see that as a problem. Therefore, he recommended that the Board grant the application.

Mr. Parrott agreed with Mr. Berg. He noticed that Unit #2 on the same property had a garage in the left hand corner so this would not be infringing directly on someone's house. He felt it was only proper that this unit, which is #1, be allowed to have a garage as well.

Vice-Chairman Horrigan visited the site and was surprised to find that there was quite a bit of traffic on Lawrence Street. He believed it would be in the public interest to get more parked cars off of the street in this neighborhood. Regarding the width of the garage, he agreed that 24' was a reasonable width. He pointed out that the sideyard variance in part occurred because the property line was angled and it was really at the narrowest point that it was 7'. They had the required 10' for most of the garage. He agreed with the Petitioner that it was another public benefit to have the long driveway ripped up and replaced with green space. That would enhance the immediate neighborhood.

Mr. Jousse indicated that he would not be supporting the motion. He believed that the garage could be moved to the left to abut the residence and give the right sideyard the full 10 feet that was required by the ordinance.

Mr. Witham indicated that he supported a garage on this property and that 24' was about the average these days and he didn't have an issue with the sideyard setback or the building lot coverage. He did have concerns with the front yard setback. He would rather see a 2' side setback and move the garage back further. In these neighborhoods, garages are usually to the rear of the property. He felt it was forced and awkward to have a garage of this size so close to the street and closer than most of the residences. A lot of cars were longer than 15' so if they were parked in front of the garage they would actually hang out beyond the property line.

The motion to grant failed with a 3-3 vote with Mr. Jousse, Mr. Witham and Chairman Le Blanc voting in the negative.

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4) Petition of **Dennis M. Moulton and Maureen A. Gallagher, owners**, for property located at **190 Hillside Drive** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 10.5' x 22' addition with a 25.5' front yard where 30' is the minimum required. Said property is shown on Assessor Plan 231 as Lot 38 and lies within the Single Residence B district. Case # 6-4

SPEAKING IN FAVOR OF THE PETITION:

Dennis Moulton addressed the Board. He handed out some renderings to the Board. He indicated that they were replacing their sunroom which was in very poor shape and was 9' in width and 14 ½ ' depth. They were asking for the same front yard setback. The old sunroom was a shed roof construction and was built on the original deck on the side of the house. They received a permit to demolish the structure as it was in very poor shape, had dry rot throughout and was sorely in need of replacement. They were proposing to construct an addition with a pitch style roof which would be less visually intrusive and the addition would be surrounded by plantings. They felt this would be a huge improvement over what previously existed. It was keeping with the style of the house.

DECISION OF THE BOARD:

Mr. Berg made a motion to grant the petition as presented and advertised. Mr. Witham seconded. Mr. Berg stated that there was no greater non-conformity than what was there. The property did not meet front setback requirements and the house more than likely was 50+ years old. It certainly was a long time existing non-conforming use. The addition, which required relief from setback requirements, was a little closer to the front and no other dimensional requirements were failed to be met. The requested variance was not contrary to the public interest. There was nothing about the application that would be contrary to the public interest. It was no more non-conforming than what was there now. It was an improvement to the property and would make it more attractive. Therefore, Mr. Berg did not see any diminution in surrounding properties. They had a letter which was presented by the applicant from his neighbor who did not object to the petition. The special condition existing with respect to property, for which the variance was sought such as literal enforcement of the ordinance resulted in unnecessary hardship, the non-conformity existed in the structure, the structure was removed, the permission to have the use was then gone. That was preventing someone from improving their property while still being no more non-conforming, which was an unreasonable burden. For that same reason, there was not a fair relationship between the purpose of the ordinance and the specific restriction. The purpose of the ordinance certainly wasn't to prevent people from improving their property which is what this was all about. It did not injure the public or private rights of others. That also goes to not being contrary to the public interest or diminishing surrounding property values. Substantial justice would be done by granting the variance as it was allowing the residents to improve their property, perhaps increase their property value and marketability and improve the appearance of the neighborhood.

Mr. Witham agreed with most of what Mr. Berg said. He felt this was a well thought out and well presented project, although it was larger than what was being torn down, they were being respectful of what the existing front setback was. He felt this was very grantable.

Vice-Chairman Horrigan stated that the front yard setback could be important for various reasons, one was to keep some distance between the houses and the traffic on the street. However, this street was essentially a cul de sac so the front yard setback variance of 22 ½ ' wasn't a major problem on this street. Many of the other houses in the neighborhood had similar setbacks so it would be unreasonable to insist that this property not be allowed to renovate. Vice-Chairman felt that these renovations were such an improvement over the current

appearance of the sunroom that it was going to increase the value of not only this house but the surrounding properties as well.

The motion to grant passed unanimously with a 7-0 vote.

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5) Petition of **Beth P. and Marc C. Griffin, owners**, for property located at **239 Broad Street** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 15' x 22' two story addition with a 2'6" left side yard where 10' is the minimum required. Said property is shown on Assessor Plan 131 as Lot 15 and lies within the General Residence A district. Case # 6-5

**SPEAKING IN FAVOR OF THE PETITION:**

Chris Cole appeared on behalf of Marc and Beth Griffin. This property was on a part of Board Street that had gone through a lot of changes over the past five years. They want to build a two story addition to accommodate their child which is expected soon. They came before the Board in March seeking three variances and they were now down to seeking one variance. They took the Board's advice and did a survey of their property. Rather than use the existing footprint of the garage their new plan moved the addition in 1'3" so that it was now 2'6" setback. This change in particular was of the greatest concern of the Board. They hired a design firm to simplify the plans. The Griffins provided the Board with numerous letters of support which demonstrated the absence of injury to public or private rights in the surrounding area. The improvements to the property were consistent with the overall trend of the area. There would be no intrusion on City property during the construction period. By pushing the addition back into the backyard space it would diminish their back yard and they would be close to the root system of the willow tree. The Griffins were committed to protecting the willow tree.

Mr. Parrott asked what the frequency of traffic on Bersum Lane was. Mr. Cole indicated that he lived at 260 Board Street and indicated that it was very infrequently used. They estimated 5-6 cars in the morning and 8-10 cars in the afternoon. It was only used by people who needed to get to their property.

**DECISION OF THE BOARD:**

Mr. Berg made a motion to grant the petition as presented and advertised. Mr. Jousse seconded. Mr. Berg indicated that they were requesting something that was less intense than what was there now, so it was not contrary to public interest. By denying the petition, they would be left with something that was more non-conforming than what they were asking for, which was not the intent of the zoning ordinance. In terms of hardship, by prohibiting them from improving their property which was less non-conforming was an absurdity. The restriction was unreasonable and not representative of the relationship of the ordinance and its application on this property. They were not building new. The variance would not injure the public or private rights of others. They met the Boards previous concerns so it was to the public benefit. This was an improvement to their home, making it a little bigger, more functional and that did not represent any adverse factor on values of the neighborhood.

Mr. Jousse indicated that the applicants were expanding their family and that usually means that you have to expand a small house. They followed the suggestion of the Board to have the property surveyed and have worked within their property. They could have gone to the back of the house but that would have interfered with the willow tree. It was a hard piece of property to do any work on and that was where the hardship was. The relief they were seeking was less intrusive than what was there now. Substantial justice definitely would be done by allowing them to expanding their living area on this piece of property.

Vice-Chairman Horrigan indicated that his original concern about this property was Bersum Lane. It was quite narrow and his concern was with what the impact would be on the people using Bersum Lane, which appeared

to be the immediate neighbors. They have all indicated that they are in favor of this petition so that particular public interest has been satisfied. The back yard of this property is magnificent and has some mature vegetation which should be saved if possible.

Mr. Parrott indicated that the lot line coverage figures were backwards on the plan, which the Griffins indicated they would correct prior to recording.

The motion to grant passed unanimously by a vote to 7-0.

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6) Petition of **Jerry and Brenda Duberstein, owners**, for property located at **49-51 Lawrence Street** wherein a Variance from Article III, Section 10-302(A) is requested to allow the replacement of a 563 sf deck with a 7' left side yard where 10' is the minimum required. Said property is shown on Assessor Plan 152 as Lot 43 and lies within the General Residence A district. Case # 6-6

SPEAKING IN FAVOR OF THE PETITION:

Jerry Duberstein addressed the Board relative to his petition. His deck was there for 15-20 years however this past winter some heavy snow came off of the roof and crushed the deck. He was looking to replace what was already there. They were using the same concrete feet that are in the ground.

Vice-Chairman Horrigan asked if it was 7' from Boss Avenue, as it looked a lot more than 7' to him. Mr. Duberstein measured from the property line, although there may be some city street property that was not being used.

Peter Loughlin, of Thaxter Road, spoke in favor of the petition. It had been a deck that had been there forever and if it were set back the entranceways wouldn't line up properly. He felt that all of the reasons to grant the variance were satisfied.

DECISION OF THE BOARD:

Mr. Berg made a motion to grant the petition as presented and advertised. Vice-Chairman Horrigan seconded. Mr. Berg indicated that Mr. Duberstein was putting the same deck back that was there before and had the same setback requirements. He felt that a great number of residents were in the same situation where their decks were a little closer to the street than the zoning now permits. He did not see it being contrary to the public interest as there was no harm in allowing the applicants to put back what was there. The fact that the zoning ordinance as written prohibits them from replacing what had become a safety hazard was an unreasonable hardship showing that the zoning restriction interfered with the reasonable use of the property. There was no fair and substantial relationship between the ordinance as it certainly was not the intent of the ordinance to prevent people from repairing a damaged deck. The variance doesn't injure the public or private rights of others and there would be no loss in value to the surrounding properties simply because nothing was going to be changed.

Vice-Chairman Horrigan agreed with Mr. Berg. He felt it was difficult to perceive that this deck was going to impose some impact on Boss Avenue. The house itself was already 7' from Boss Avenue so it wasn't extending the setback violation. He also felt that a deck made very good sense for this property. There was a fairly pronounced downward slop in the backyard and the only way that the homeowner could enjoy the backyard was to have some sort of porch or deck which was fairly high. In the absence of the deck the property would look peculiar and would have a downward impact on property values in the immediate neighborhood.

Mr. Parrott noted that the Board's approval was for the setback only and the construction details that were provided to them were outside their purview and they were not certifying that those were adequate or correct or complied with code.

The motion to grant passed unanimously with a 7-0 vote.

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7) Petition of **Jennifer S. Benjamin, owner**, for property located at **180 Sherburne Avenue** wherein Variances from Article IV, Section 10-402(B) & Section 10-401(2)(c), and Article III, Section 10-302(A) are requested to allow a 230 sf L-shaped arbor and 1' x 4' porch steps creating 26.3% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 112 as Lot 31 and lies within the General Residence A district. Case # 6-7

**SPEAKING IN FAVOR OF THE PETITION:**

Jennifer Benjamin addressed the Board. She was seeking relief so that she could build an arbor. She did not feel the arbor would be contrary to the neighborhood and the abutter. She had letters of approval from the abutter and she distributed a petition signed by the surrounding neighbors showing their support. A special condition was that this would allow her to accommodate an additional off-street parking space. It wouldn't disturb an 80+ year old chestnut tree in the front which restricted any additional parking. The arbor was an open air arbor and was permeable.

Mr. Witham asked Ms. Tillman if the arbor was considered a structure and Ms. Tillman confirmed that it was, even though it was open to the air. Dimensional requirements apply.

Mr. Parrott asked what the dimensions of the steps were. Ms. Tillman indicated that anything under 18" did not apply to the lot coverage so Ms. Benjamin was only asking for coverage for the steps that were over 18".

Vice-Chairman asked if she planned to grow anything on the arbor and she indicated that she was.

Mr. Parrott asked what the street frontage was. Ms. Tillman confirmed that it was 52 1/2'.

**DECISION OF THE BOARD:**

Mr. Parrott made a motion to grant the petition as presented and advertised, with the stipulation that the structure be open-framed on the sides, to allow air to go through it. Mr. Witham seconded. Mr. Parrott stated that the lot was very small and had a very desirable and old tree that the owner wanted to preserve. The variance requested would certainly not be contrary to the public interest as it will be an attractive addition to the property. Signatures of neighbors were provided reflecting their support. Special conditions exist due to the small lot frontage and that the large tree was right in the critical open area, which would be the logical place for a structure. The zoning restrictions did restrict the construction of an attractive addition to the house. There was no fair and substantial relationship between the purpose of the zoning ordinance and the specific restriction on the property. A letter was provided by the abutter who requested that the arbor remain open framed. Mr. Parrott felt that substantial justice would be done by granting the variance. The granting of the variance would only enhance surrounding properties and would not hurt them in any way.

Mr. Witham agreed with Mr. Parrott and added that in this situation the zoning article that they were granting the variance for were established to control density, scale and volume on a property. Just the nature of this project, being an open air arbor, in and of itself does that. It has less density than a stockade fence. This arbor does not negate the purpose of the ordinance.

Vice-Chairman Horrigan pointed out that by allowing the arbor they were implicitly providing another off street parking space which was a benefit to the neighborhood and a very large mature tree will be saved also for the same reason.



The motion to grant, with the stipulation, passed unanimously with a vote of 7-0.

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8) Petition of **Benoit R. and Andrea M. St. Jean, owners**, for property located at **54 Humphrey’s Court** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow a 320 sf deck with a 6’ right side yard where 10’ is the minimum required. Said property is shown on Assessor Plan 101 as Lot 46 and lies within the General Residence B district. Case # 6-8

The petitioner asked that this matter be tabled until the next week. A motion to table at the owner’s request was made by Mr. Witham. Mr. Jousse seconded. The motion passed with a unanimous vote of 7-0.

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9) Petition of **Wentworth-Gardener House Association, owner**, for property located at **49-51 Mechanic Street** wherein a Variance from Article II, Section 10-206(29)(b) is requested to conduct once a month (July, August and September 2003) events including outdoor music concerts in a district where such use is not allowed. Said property is shown on Assessor Plan 103 as Lot 41 and lies within the General Residence B and Historic A districts. Case # 6-9

**SPEAKING IN FAVOR OF THE PETITION:**

Chairman Le Blanc indicated that he was a past President of the Association and he felt he could be impartial, however, if anyone had any doubts he would be willing to step down. There were no objections from the Board. Chairman Le Blanc sat for the hearing.

John Baybutt, Pro-temp Chair of the Board of Directors of the Wentworth-Gardner House Association, spoke on behalf of the Association. He indicated that the purpose of the variance was to allow outdoor music entertainment and they would insist on the following conditions:

- A very limited use of a sound system;
- The accumulated sound shall be audible no more than 50 to 70 yards from their premises;
- The instrumentation shall contain no amplified percussion devices; and
- Lyrics of the selections shall be of a “family-type” character.

They would control the size of the audience and would not exceed 100 persons at the concerts. They would ask the attendees to park on Pierce Island and not clutter the local streets with their cars. They felt that they had a very fine relationship with virtually all of their neighbors and they wish to maintain that good feeling. Their reason to conduct the concerts is solely to create an added awareness of their museum. They are off of the beaten track of the other historic houses. They are attempting to draw more attention to their property. They were anxious to work with both the Board of Adjustment and their neighbors to ensure the granting of the variance.

Vice-Chairman Horrigan indicated that Mr. Baybutt indicated that no food or beverage would be served. Would the patrons be allowed to bring something? Mr. Baybutt did not believe they could prevent the patrons from bringing a typical plastic bottle of water. There would be no alcoholic beverages. Vice-Chairman Horrigan asked which direction the noise would be directed? Mr. Baybutt indicated that the musicians would be on a platform inside the barn, which is one of their three buildings, and they would be facing south. The patrons would be seated on the grass on blankets or in folding chairs. They would like to reserve the use of a sound system but it would not carry beyond 50’ – 70’. It would have one or two microphones and probably 2 speakers.

Mr. Jousse asked what the hours of operation would be? Mr. Baybutt indicated the concerts would start at 6:30 pm and would close down just before dark.

Mr. Parrott asked Mr. Baybutt to comment on the relationship of the closest neighbor with respect to the folks who signed the petition in favor of the concerts because the tax map that they refer to does not have the street address on it. He was interested in the attitudes of the neighbors closest to the Wentworth Gardner House. Mr. Baybutt indicated that they had two signatures from residents of Mechanic Street. They had two signatures from residents of Hunking Street. Mr. Parrott asked about the folks immediately behind them, on Gardner Street, and whether they had signed the Petition and the folks on the corner of Hunking and Mechanic and the corner of Gardner and Mechanic. Mr. & Mrs. Gregg, who live on the intersection of Mechanic and Hunking, signed the Petition. Mr. & Mrs. Webb who are one door up on Mechanic Street also signed it.

John Grossman, of 170 Mechanic Street, 75' away from the property, was concerned about a rumor that was going around the neighborhood that if the variance were granted, it would go with the property and be good for 9,999 years. He asked for clarification from the Board. Chairman Le Blanc indicated that it was written for July, August and September of 2003 and there was no provision for 2004, 2005 and beyond.

Barbara Gregg, of 69 Hunkins, backs up to the Wentworth Gardner House and are it's closest neighbors. She is also a member of the Board. She supported the amplification and has spoken to many of the neighbors in the last few days and some of them supported the petition and some of them had reservations that they shared with her. She wanted the neighbors to be aware that the variance was very limited. She and her husband feel a responsibility to the two historic houses in their neighborhood because they are a value in their own right but also it is in self-interest as they raise property values as long as they are vital and well maintained. The historic houses cannot support themselves if they don't have visibility in the community and that is what the concerts were all about. It was not to raise money but to build a support base in the community. She felt the concerts had the potential to be a very good thing for the Association. She was in support of the petition and hoped that the Board would give the Association the opportunity to try the concerts this summer.

Chairman Le Blanc indicated that they were going to control the number of people coming to the concerts and asked how they were going to do that? Mr. Baybutt indicated that the audience will be charged per person, to defray the cost of the expenses, and they will only issue a certain amount of tickets. Chairman Le Blanc asked about people standing on Mechanic Street or just off the property and how they would control them? Mr. Baybutt indicated that they had not addressed that issue yet and were assuming that those interested in attending would be quite civilized. If there was a problem they would simply call the police. Chairman Le Blanc asked how many parking spaces they had on Mechanic Street. Mr. Baybutt indicated that they had 10-11 useable parking spaces.

Patrick Stevens, who was also a Board Member of the Wentworth Gardner Tobias Lear House Association, spoke in favor of the concerts. Mr. Stevens stated that the purpose of the concerts was not to raise funds but to raise awareness of the property and to have an enjoyable cultural event. Mr. Stevens gave some background on the history of the houses. The setting for the concerts would be beautiful. They would schedule concerts on Tuesday evenings so that they wouldn't conflict with Prescott Park. The selections of musicians and their music would be tasteful and family orientated. Parking is always a problem in the south end whenever there is a gathering. They were only expecting 100 people to attend their concerts as opposed to the thousands who attend Prescott Park. They would encourage people to park on Pierce Island. He believed the John Langdon house has similar events during the year. Prescott Park held 96 events, totaling 192 hours over three months. In contrast, they were talking about 3 two hour long concerts for a total of 6 hours of programming.

John Grossman, of 171 Mechanic Street, indicated that the Portsmouth Herald ran an editorial recently that non-profits should quit looking to the cities, states and federal government for funds. This organization is attempting to be creative. Mr. Grossman lives 75' away from them. Last year they had a concert which he could see from his office but couldn't hear. The music doesn't reverberate throughout the neighborhood. Lawn cutting makes more noise. Mr. Grossman felt that a vote for this application was a vote in favor of supporting the arts, which is all very essential to the city.

**SPEAKING IN OPPOSITION TO THE PETITION:**

Greta McEvoy, of Gardner Street, indicated that the concerts would be in her backyard. Her concerns were parking and traffic. Their street is constantly filled with cars and they were recently trapped for 1 ½ hours in their own driveway. She feels it has already gotten out of hand.

Hugh Jencks, of 25 Hunking Street, lives two doors down from the applicant's property. He opposed the concerts. His property is zoned residential and the Wentworth Gardner House was a non-conforming use in a residential district until 1995 when the statute was amended. The proposed use would be a new non-conforming use of the property, with considerable impact on the neighborhood. The historic houses were built as residences and were never intended to be used as musical performance spaces. He felt it would diminish surrounding property values. Once the precedent was set, the applicant would request additional relief. He did not believe the request met the case law standards necessary to grant the variance.

John McVay, of 42 Hunking Street, lives directly across from the Wentworth Gardner House. He signed the original Petition that was presented to him but he has since decided that he wanted more details. He does not feel that the details have been addressed at all – parking, handicap accessibility, toilet facilities. It seems to be an open-ended event.

Thanasis Tournas, of 114 Mechanic Street, spoke in opposition. He lives two doors down from the Wentworth Gardner House and has lived there for 20 years. He believes the Wentworth Gardner House is an attractive and well maintained historic museum in one of the City's most historic neighborhoods. The applicant is not recognizing the factor of its neighborhood status and is being unfriendly to the neighbors by doing this. There would be a traffic, parking and noise problem. He believes the Wentworth Gardner House should enlarge their signage so that tourists can find them. He also believed that most of their ten parking spaces were rented out.

Joanne Berg lives directly across the street from the Wentworth Gardner House. She has a deep appreciation for the issues relating to the stewardship and the maintenance of historic houses. She has a graduate degree in historic preservation and she is currently the Vice President for the development of the Strawberry Bank Museum. She believes it is very questionable about what three concerts would do. The word event is very ill defined and she is concerned about how it will be interpreted in the future. She believed the parking would have a major impact on the neighborhood. She would like to see the Wentworth Gardner Board work with the neighbors to explore other possibilities to help them raise funds.

Evelyn Marconi, of 177 Mechanic Street, addressed the Board. She has lived in the neighborhood her entire life. She felt the historical integrity of the building was being missed. She was on the Board for the Wentworth Gardner House for 10 years. She felt it was a magnificent house. She has not objected to her neighbors requesting variances to put additions on their homes. She feels this variance is different. She does not believe concerts will enhance the house. The historical integrity of the property must come first.

Dennett Page, of 25 Hunking Street, opposed the use of the Wentworth Gardner house as concert venue. She has lived in the South end for 17 years and she loves the historic houses in the neighborhood. They bought their house in 1995 in the hopes of living on a quiet street with no traffic. Their outdoor yards are very close together and neighbors are very considerate of each other's presence. Large gatherings are usually held indoors. All of this, along with the privacy of the neighborhood would be forfeited by allowing the variance. She also felt this would violate a homeowners right to peaceful enjoyment.

Donald Coleman, of 122 Mechanic Street, indicated he was a next door neighbor. He was a supporter of the Wentworth Gardner Association and has been a member for 9 years. He is not speaking against the Wentworth Gardner House but he is speaking against a bad idea. He is concerned about traffic and parking, as well as inadequate restroom facilities on the property. He believes a policeman would be necessary for a function like this.

Francesca Fernald, a business owner at 177 Mechanic Street, spoke in opposition. She indicated that she was familiar with the house and enjoyed it and loved having it next door. She understands that the Wentworth Gardner house needs more exposure. She does not believe that this petition would provide any relief to the property owners and in fact would create problems. She asked that the Board deny the petition.

**REBUTTAL:**

John Baybutt indicated that two or three speakers mentioned that most of their ten parking spaces were rented and he wanted to clarify that that was false. They have not collected any money for renters and only one space is used by the caretaker.

Mr. Berg asked if they had any plans to have a police officer at the event? Mr. Baybutt indicated that they would be happy to have a police officer present if that was part of the variance.

Mr. Berg verified that their application was for July, August and September of 2003 and not forever? Mr. Baybutt confirmed this.

Donald Coleman indicated that he lives directly across the street and he knows what spaces are occupied. They may not be rented but they are permanently assigned. One to the caretaker and two spaces to two neighbors.

**DECISION OF THE BOARD:**

Mr. Witham made a motion to deny the petition as presented and advertised. Mr. Jousse seconded. Mr. Witham stated that his opposition was in no way a reflection of his interest of the arts or the preservation of this house. He just feels it is a bad idea. He felt it was a good idea at Odiorne Point at the Seacoast Science Center where they have a good parking plan. He did not feel it could be duplicated here or be successful. The Board has two powers – one to grant a variance and one to grant a special exception. By in large it is much easier to get a special exception than a variance and he doesn't see how this petition would even meet the special exception criteria.

Mr. Witham indicated that if they failed to meet only one of the five criteria then the variance would have to be denied. He felt that the variance would be contrary to the public interest. Introducing a concert series into a residential neighborhood was not in the public interest. He did not see anything unique about the setting of the property to allow the variance request. Especially in terms of music, there is nothing about the property that makes the set up of music appropriate as opposed to any other property. The variance would injure the public and private rights of others, as many have indicated tonight. Most were concerned about noise and traffic. There was the issue of whether the Board would be setting precedent and Mr. Witham felt it should be looked at very carefully before it was allowed because they do tend to come back for more. Mr. Witham did not feel that this was consistent with the spirit of the ordinance. Although he felt there was a section in the ordinance to promote the arts and the well being of the community through events like this, he did not believe the spirit was to allow them in residential neighborhoods. He did not see any substantial justice being done by granting the variance. There are many other museum homes that are finding ways to make ends meet without having a music series. Again, referring to the Seacoast Science Center, they were hoping to get 100 people and they get well over 500 –800 at their concerts, but he didn't believe it did anything for the membership of the Seacoast Science Center. It was a nice idea but it didn't accomplish what the goal was. In regards to diminishing the values of surrounding properties, he could see how this would diminish the values.

Mr. Jousse did not believe that the application met even one of the five criteria necessary to grant the variance. The public has made their opinion quite clear that the neighbors are against it, some of which are present and past members of this Association. No hardship has been presented as to the special circumstances or the zoning restriction that applies to this piece of property. Nothing has been presented that suggests that they should approve this variance.

Mr. Berg was appalled at some of what he heard. He read from the Zoning Ordinance “The purpose of the Zoning Ordinance is to promote the educational, cultural, economic and general welfare to the preservation and protection of historic buildings, structures of architecture value and places in districts of historic interests”. There is a tremendous amount of history in the City of Portsmouth and a great deal of that history lies in the historic residential structures. The key word is residential and the curse that almost every historic residence has is that it is located in a residential district. Therefore, to go with the philosophy of what we are advocating in the Zoning Ordinance, we sometimes have to take a broader view and look at the bigger picture. Members of the Wentworth Gardner Board indicated that the purpose of the event was not to fund raise however numerous neighbors, through inference, indicated that they were. Mr. Berg was going to go with what the museum said which was that it was not to raise funds but to raise awareness and Mr. Berg stated that he did not have the degree of egotism to say that this was a bad idea. These people have a fiduciary obligation to promote the museum and protect its welfare and if they believe that this is a good idea then Mr. Berg is going to defer to that. He felt that if the museum wants to promote itself and this is the way to try doing that then he felt the community benefits at large. He felt it was not contrary to the public interest. He felt it was consist with the spirit of the ordinance as indicated by the quote that he read. He did not feel that is would diminish property values. He is a real estate appraiser and people sitting in a communal setting, enjoying music for 2 hours with the controls that the museum said it was going to impose, would only be a benefit to the community. What the Board of Adjustment does is interesting in that everything that comes before it is permanent. The museum Board is asking for two hours per night, once a month for three months for this year only yet everyone else came forward and indicated what might happen. Mr. Berg wanted to see how this works and whether they can pull it off. The Board of Adjustment has a chance to test something to see if it works and if it does that great and if it doesn't work he will be the first one to say it's a bad idea. The special condition is that it's a residential neighborhood. This is a permitted use by Special Exception. Because this is a residential neighborhood the zoning gets in the way. Mr. Berg indicated that he would not support the motion.

Mr. Parrott found this an odd variance and was having trouble applying their traditional criteria. He felt that the applicants were speaking with the best of motives, with sincerity, and he has no reason to disbelieve their motives when they say they are trying to promote the house. Therefore, you can't very well have the concert somewhere else as some people have suggested. This is clearly a short term, temporary situation and is not creating a new venue for performances of any kind and obviously it would be an appropriate place to do it for many reasons. Total performance time would be 6 hours which is a miniscule amount of time. Mr. Parrott would like to see a Police Officer on duty. He felt that if someone was a neighbor to a facility like this, which is not a residence, you might have to expect that there are some things happening on occasion which are not of a pure residential nature. This is an attempt to see if this would work. If it were approved and if it happened, everyone could form their own judgment instead of speculating about whether it was a good idea or both the historic house and for the neighbors. The City of Portsmouth does have a noise ordinance and that would be taken into account. They have addressed the parking situation by asking people to park on Pierce Island and the police officer could assist with that. It seemed to Mr. Parrott that if someone in a private home in that area wanted to have a family reunion for 100 people, which would not be unreasonable, or perhaps a wedding reception, there wouldn't be any objection. Those events would have music and would go a lot later than 8:00 pm. Mr. Parrott also pointed out that not everyone was opposed to it as there was a petition in support presented with many signatures on it.

Vice Chairman Horrigan pointed out that, in regard to the nature of this variance, they have had at least one similar at the YMCA for two summers in a row. Those turned out to be temporary variances and he just wanted to assure those who felt that if this variance were granted it would be permanent. This is a one time variance that would have to be renewed if they wanted to continue in subsequent seasons. Vice Chairman Horrigan agreed with Mr. Berg and Mr. Parrott regarding the question of public interest, the spirit of the ordinance and substantial justice and the question of values of surrounding properties. He is wrestling with the criteria in regard to the hardship. Since the Simplex case, they have to decide whether or not they are interfering with the owners reasonable use of the property considering its unique setting in its environment, whether the zoning ordinance restrictions involve a fair and substantial purpose and the question of public and private rights of

others. There is a museum which is grandfathered in a residential neighborhood and the building itself looks like a residence but is there something unique about its setting that says concerts would be a great idea for this property. Vice-Chairman Horrigan stated that he felt the variance met the first four criteria however he was unsure about the hardship criteria.

Mr. Witham indicated that he was looking at what one event's impact would be on the neighborhood. He did not feel that he was in a position to be part of a Board that grants experiments. The Board has five criteria to go by and he is not interested in having people before them a year from now to get their opinions of whether it worked or not. He is simply going by the five criteria and he does not believe that a museum house in a residential neighborhood has any special rights over anyone else.

Mr. Berg commented on Vice-Chairman Horrigan's remarks. Concerning the hardship setting, he felt there were two things at work here. One is that this is a non-residential entity in a residential setting. Therefore in exercising their rights and their obligation to that non-residential use, being a museum, if they see fit to have an event which, because they are not a dwelling or a home, they have to ask permission to do that. Taking that one set further, if this were a family having a wedding reception they would not have to ask permission to have the very same event.

Chairman Le Blanc agreed with both sides of the argument. He felt it was an enchanting place to have some very quiet acoustical music, however, if he were living in that neighborhood which is one of the prime jobs that the Board of Adjustment has to look at and assess the impact of an event like this on the people who live there, he could see where this would not be a good thing for the neighborhood. It may put a crimp in the style of the Museum Board to attract members and grow their organization, but the Board of Adjustment must look at the bigger picture. He will support the motion to deny. He felt they had to look at the quality of life of the people that live in that neighborhood every day of the year, all year long, and how something like this could impact their lives in that particular setting.

The motion to deny failed on a 3-3 vote, with Mr. Berg, Mr. Parrott and Vice-Chairman Horrigan voting in the negative.

Mr. Parrott made a motion to grant the petition as presented and advertised, with the stipulation of a Police Officer. Mr. Berg seconded. Mr. Parrott stated that he did not feel that the variance applied in this unusual situation, however, that was what was presented to the Board so they had to deal with it in that format. He felt that the granting of the variance would not be contrary to the public interest as it will have such an extremely limited duration. Special conditions exist with respect to the property as their purpose is to draw attention to the property so this would be the only logical place to hold such an event. The zoning restriction is that the museum is where it is and probably pre-dates a lot of the adjacent property. No fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific restriction on the property because it is of such a temporary and limited nature he didn't think there was any hardship applied. The variance would not injure the public or private rights of others. If they were to injure any, it would be for a total of 6 hours and he did not feel that was what their variances were aimed at. The requested variance is consistent with the spirit of the ordinance as Mr. Berg pointed out. Historic properties located within the city are a great feature of the city and bring in thousands of visitors and huge amounts of money. This is a small attempt to assist the development of one of them. Allowing these limited concerts would be entirely consistent with the spirit of the ordinance, to support the historic non-profit properties in the city. Where it is off of the beaten path it is hard to draw attention to it and this benefit may help them with that. Substantial justice would be done in granting the variance. It is an attempt to see if this is going to be of value to them. If it were, they would have to come back and have a strong case next year and the neighbors would be able to come and speak with personal experience. Lastly, granting the variance will not diminish the value of surrounding properties. Mr. Parrott could not conceive of how something of a temporary nature, 6 hours out of the year, is going to diminish the value of any surrounding properties. Most variances change something of a permanent nature however this is of a transient, temporary nature.

Chairman Le Blanc asked if Mr. Parrott would be willing to accept some stipulations to his motion:

- That no more than three concerts for the year 2003 be allowed;
- The hours be limited from noon to 8:00 pm;
- A maximum of 75 people be allowed to attend;
- No amplification of music;
- No wine, beer or liquor;
- This approval is for 2003 only;
- That a Police Officer be hired for each concert.

Mr. Berg agreed with Mr. Parrott. He felt that when you live in a city that is 400 years old, there are very unique issues and this is a great example of one of them. He is a fan of the arts and he is standing on the principal that something like this is one of the City's many jewels. That fact that it is in such a dense neighborhood means that we have to look at this with some skepticism but with enthusiasm. Mr. Berg was fine with all of the stipulations which were added to the motion.

Vice Chairman Horrigan pointed out that the Board of Adjustment now works with a new set of hardship rules since the Simplex case and one of the major parts of that decision is if the use of the property is a reasonable use given the setting they are more or less obliged to grant the variance, as long as other criteria are met as well. The hardship criteria was the one that he was wrestling with. He felt the fundraising events of a non-profit property was a reasonable use. Wedding receptions are held at other historic properties in the city and other types of outdoor events. There seems to be a non-existent dividing line between the proposal before them and events such as wedding receptions and the like. He felt that it had to be concluded that this was a reasonable use.

The motion to grant failed on a 3-3 vote with Mr. Witham, Mr. Jousse and Chairman Le Blanc voting in the negative.

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III. Adjournment

There being no further business to come before the Board, the Board acted unanimously to adjourn at 10:00 pm and meet at the next scheduled meeting on June 24, 2003 at 7:00 p.m. in the City Council Chambers.

Respectfully submitted,

Jane M. Shouse
Secretary

/jms