

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE**

7:00 p.m.

CITY COUNCIL CHAMBERS

October 18, 2005

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice-Chairman David Witham, Alain Jousse, Bob Marchewka, Arthur Parrott, Alternate Steven Berg, and Alternate Duncan MacCallum

MEMBERS EXCUSED: Nate Holloway

ALSO PRESENT: David Holden, Planning Director

Chairman LeBlanc called the meeting of the Board of Adjustment to order at 7:00 p.m.

I. OLD BUSINESS

A) Petition of **Patricia A. Card Living Trust, owner**, and **Joseph Lavin, applicant**, for property located at **off Islington Street** wherein a Variance from Article III, Section 10-302(A) is requested to construct a 24' x 36' two story single family dwelling with basement on a lot having an area of 6,610± sf where 15,000 sf in the minimum required. Said property is shown on Assessor Plan 233 as Lot 2 and lies within the Single Residence B district.

Mr. Berg stepped down for this petition.

SPEAKING IN FAVOR OF THE PETITION

Attorney Pelech, representing the applicant Mr. Lavin, stated that this is a non-conforming lot of record, predating zoning, located at the intersection of Islington and Rutland Streets. This was formerly two parcels merged into one. He stated the proposed single-family use was allowed in the district and the structure meets all dimensional requirements except for minimum lot size.

Attorney Pelech stated that the variance request meets the Boccia standard. This is a reasonable use of the property allowed by the ordinance. Most of the lots in the area are somewhat the same size and all have houses, many of which do not meet the setbacks. A hardship exists in that, without a variance, nothing can be done with the land without purchasing another lot. He stated that no public interest outweighs the hardship on the owner if the variance is not granted and noted the city would gain another unit of housing and increased tax base. The proposal satisfies the spirit of the ordinance with regard to adequate light and air, not contributing to overcrowding and emergency access. Situated on a corner lot, with streets on three sides, an attractive residential dwelling unit will not negatively negative impact the neighborhood or diminish property values.

In response to a question from Mr. Marchewka, Attorney Pelech indicated that the abutting lot was owned by the State of New Hampshire Department of Transportation and was a banking leading down to the bypass.

Mr. MacCallum asked Mr. Holden if the 15,000 s.f. limitation prevented any dwelling at all and, could this lot be used for any purpose other than a dwelling.

Mr. Holden replied that the ordinance addresses non-conforming lots of record in two ways: One, the lack of continuous street frontage, which is not a problem for this lot and, second, requires that a variance be sought for a minimum lot area requirement. In order to get a building permit to construct a house, you need that variance. Other than a residence, it could perhaps only be used for a garden.

Chairman LeBlanc asked if Attorney Pelech had any idea of where the lot lines were located and he responded that there was a purported survey done by the Bridge Authority when the bypass was built, and there may be a subdivision plan from the 1920's at the Registry of Deeds, but the applicants do not have one. He confirmed the house is of the stated dimensions and does not encroach on the setbacks. Attorney Pelech also reiterated that this is a merged lot which has been in the same family for years.

There was a brief discussion between Mr. Parrott and Attorney Pelech, who stated he believes the actual dimensions, which the tax map shows as 71' and 81' and he believes are consistent with the deed, a copy of which he passed to the Board.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Edward Hinson stated that denial would only result in self-imposed hardship for the applicant as he is only considering purchasing the property. There is nothing unique about the property and he could purchase another lot. Mr. Hinson stated that, if this variance were granted, the City would have to approve sub-standard lots. He stated granting would go against the purposes of the ordinance and diminish property values. He was also concerned about the consequences of a depression in the lot on drainage, which hadn't been addressed in the application.

In response to a question from Mr. Jousse, Mr. Hinson confirmed that his lot of 6,700 s.f., is located directly across the street at 1180 Islington, and his home was built in 1905. He clarified that the other option he felt the applicant had was not a lot in the area, but to seek a lot in another location.

Mr. Jeremy Colby of 43 Rutland Street stated the applicant has less than half the space required and, with Portsmouth's trend of overbuilding, we should stand behind the ordinance.

Mr. Kent LePage stated he lives at 45 Melbourne Street and is speaking in opposition for a number of reasons. He felt Attorney Pelech may have missed when the most recent survey was done on the property. A setback of the State Bypass fence happened in 1998 which lessened the amount of buildable feet allowed within that property. In 2002, the property was also

encroached upon by the Islington Bridge that comes over the bypass. He held that the State would have on record surveys prior to these events happening and notification would have been made to the owner of the property. He stated that in the seventeen years he has lived at 45 Melbourne Street, there have been three times the State has utilized the property, long-term, for eminent domain to store trailers. The City has also used the lot for storage. He challenged Attorney Pelech's assertion that there was no encroachment, stating that according to State statute, any intersection with a stop sign must have a minimum of 25' setback from that intersection. He questioned where the parking would be allowed if you take 25' away from the Rutland side, as you can't park on the street. The intersection has been controversial. He stated he was also confused because there was only one tax stamp on the property so has been considered for ten years as one lot. He concluded the applicant has no vested interest and no hardship. A true survey should be done.

In response to questions from Mr. MacCallum, Mr. Holden stated the 15,000 s.f. lot size had been effect since 1995 and, going back to 1975, the minimum lot size was 20,000 s.f.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Pelech stated this was not the same as the **Parnham** (sp.?) case which was to subdivide 10,000 s.f. into two 5,000 s.f. lots and is not an expansion of a non-conforming use. He clarified that the use of the lot was for storage and was not by eminent domain. He stated that the lot is unique because it doesn't have a house and that they are not proposing to park on the street. Regarding the status of the lot, it has been a single lot since 1946. He concluded that the owner and applicant have certain rights and, if denied a variance, the lot is useless.

Mr. Joseph Lavin stated he builds clean, neat projects, which would be an improvement. From his observation, currently the lot appears to be used for parking by one of the abutters appearing in opposition.

Chairman LeBlanc asked if the size is as represented on the tax map, which 95.7' on Route One Bypass, 81' coming up to Rutland, 102" on Rutland and 71' on Islington and Mr. Lavin stated he believed so.

Mr. LePage spoke again to say that eminent domain was involved previously. He stated this should be looked at as a single lot which does not conform. He thought it odd that the owner was not the applicant and disagreed with Attorney Pelech that the Parnham property was presented as two lots.

With no one else rising to speak, the public hearing was closed.

DECISION OF THE BOARD

Mr. MacCallum asked Mr. Holden what his understanding was of how long the property had been a single lot.

Mr. Holden stated that, normally if two lots are combined, two circles would appear on the tax map showing they were part of an original sub-division. Although it lacks that indication, the department doesn't dispute that what is shown as Lot 2 might have been two lots. He encouraged the Board to look at this as Lot 2, 6,600 s.f. where 15,000 s.f. is required.

Mr. Witham made a motion to grant the application as presented and advertised with a stipulation that the driveway be located on the right-hand side of the lot as viewed from Rutland Street, between the proposed dwelling and the abutting lot to the right. Mr. Marchewka seconded the motion.

Mr. Witham stated that this is definitely grantable. A zoning change took place to adjust the requirement from 20,000 s.f. to 15,000 s.f. to reflect the character of the area but it might not be enough. If you look at the tax map for the area, there may be 4 or 5 that meet the 15,000 s.f. requirement. The others are closer to the proposed 6,610. He did not see any adverse effect on abutters and felt it would not change the character of the neighborhood. He remembered the Melbourne Street case where the house was too close to existing homes, but felt this situation was different.

Following the Boccia analysis, Mr. Witham stated that a new home would be in the public interest. Special conditions are that the lot was created well before zoning and was intended to support a home. This is a corner lot abutted on three sides by roads and there is no other method to increase the size, shy of purchasing land from the State, which is not reasonably feasible. He stated it is in the spirit of the ordinance to allow light and air while creating no adverse effect on the character and scale of the neighborhood. It is substantial justice to allow the owner to be able to develop the property in a reasonable way. He added there was no evidence of diminishing values of the surrounding properties.

In seconding, Mr. Marchewka agreed with Mr. Witham's points. They are not trying to shoehorn a house ten feet from another. A house is allowed and fits on the lot and in the neighborhood. The benefit cannot be achieved by any other method. He felt it met all the other points of the Boccia standard.

Mr. Jousse stated he will also support. Glancing at the tax map, there are only four pieces of conforming property on that part of Islington Street. Addressing a statement by one of the speakers, he stated it was typical to have someone other than the owner apply for a variance.

Mr. Parrott stated he took a different view – that the City Council said this area was suitable for 15,000 s.f. lots. Planning is forward looking and they don't create tiny lots any more. He did not feel the lot was unique and there was no hardship in the property. He felt the owners had decades of opportunity to build and hadn't done so and now they want over 50% of relief.

Mr. MacCallum stated he has voted consistently for more open space, but he felt this would satisfy even the old standards. He agreed that, if a variance is not granted, the property owner can do nothing. He cited case law reinforcing that the property owner needs to be able to use the property.

A motion to grant, with the stipulation, passed by a vote of 5 to 1. Mr. Parrott voted against the motion.

II. PUBLIC HEARINGS

1) Petition of **James C. Lucy, owner**, for property located at **139 Dennett Street** wherein the following are requested: 1) a Variance from Article IV, Section 10-402(B) to allow a 16' x 20' 1 ½ story garage with: a) a 1' rear yard where 12' is the minimum required, and b) a 5' right side yard where 12' is the minimum required, and 2) a Variance from Article III, Section 10-302(A) to allow 33.8 % building coverage where 25 % is the maximum allowed. Said property is shown on Assessor Plan 142 as Lot 24 and lies within the General Residence A district.

Stating that he is an abutter, Mr. Jousse stepped down for this petition.

SPEAKING IN FAVOR OF THE PETITION

Ms. Kim Andrews Lucy stated she owns the property at 139 Dennett Street. They would like to enhance the appearance of a garage that needs repair and modernize for one vehicle and storage. She stated they had met with all the neighbors and received their written support, which she presented to the Board. The first letter is from Mr. Dennett whose property the garage would abut. She stated the abutters feel the renovation will improve their property values.

Mr. Philippe Favet stated he lives at 152 Dennett Street and is the builder for the proposed project. There is a real hardship in the property. The garage is beyond repair and undersized. He pointed out the property lines on photographs submitted to the Board and stated they have to take away some of the slope. They have to build a retaining wall and their idea is to push the garage back, using the back of the garage as the retaining wall. By moving back, space would be created between the garage and the bulkhead of the house for one car. There is no parking on the street.

In response to questions from Mr. Witham and Chairman LeBlanc, Mr. Favet stated that the earth was going to be filled in right up to the garage wall. The amount of slope to keep back is roughly 8' sloping down to the left side.

Mr. Marchewka asked how the garage would be maintained and Mr. Favet said it would be half underground, with only the top above.

Ms. Lucy stated she had permission from the abutter to step onto his property to maintain the eaves, but Mr. Marchewka mentioned he may not own the property forever and the variance goes with the property.

Mr. Parrott noted the dormer windows in the upper space part of the garage and asked the purpose of that space and why a window was needed.

Mr. Favet stated it was for storage. They needed some light and head room.

Mr. Parrott asked several times if they had had an analysis by a structural engineer to indicate that the wall of the garage could be used as a retaining wall and resist the rot which caused the present problems.

Mr. Favet stated they could build the back of the garage with concrete blocks.

Mr. Marchewka asked if there was some flexibility in the 1' setback, as it was 2'-3' back from the existing garage and Mr. Favet reiterated they would like to fit a car behind the bulkhead.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Chairman LeBlanc stated it might be a good idea to table until a structural analysis could be done and there was some discussion on whether the Building Inspector would review and whether it should be left to them.

Mr. Parrott made a motion to table the petition until the next month, or until more information could be obtained, which was seconded by Mr. Witham for discussion.

Mr. Parrott stated that the purpose of the retaining wall is to hold the severe slope at the back of the property and he was concerned that they hadn't been presented enough information on which they could reliably approve. The drawing they have been provided shows land stopping short of the garage and not butting up against it. Yet they're told verbally that it is, in fact, to be backed up against the wall. The slope is too steep to survive without a retaining wall.

Mr. Witham stated he seconded for discussion but would not support the motion to table based on a structural issue. He felt they should vote based on the setback and that the situation was not very different from a walk-out basement. Structurally it is a simple solution. A motion should be made on the merits.

Mr. Berg stated that he agreed with Mr. Witham – that there is an Inspection Department who will be sure it is up to code. He added he has the same situation so it can be done.

A motion to table the petition failed by voice vote.

Mr. MacCallum moved that the petition be denied, which was seconded by Mr. Parrott.

He stated he could see no hardship or uniqueness in the property and that granting would be contrary to the ordinance, one purpose of which is to prevent overcrowding. A garage is not a necessity and the property is already over coverage limits. The owners can renovate and remodel the garage on the same footprint. He mentioned cited Bacon vs. the Town of Enfield and his concern that granting could lead to a cumulative effect.

Mr. Parrott agreed, stating it was too much relief and he would support a replacement in kind.

Mr. Witham stated he would support the motion. The Board needs to vote on what the petitioners asked for, which is 1’ and that setback is his issue. If a fence went up between the properties, there would be a problem with maintenance. He stated they had to be careful about what happens in the garage and whether, with a window, it would end up as living space very close to the property line.

A motion to deny passed by a vote of 4 to 2, with Messrs. Berg and LeBlanc voting against the motion.

2) Petition of **Nancy Tulois, owner**, for property located at **120 Fields Road** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow a 12’ x 13’ 2 story addition with a 23’ front yard where 30’ is the minimum required. Said property is shown on Assessor Plan 166 as Lot 32 and lies within the Single Residence B district.

SPEAKING IN FAVOR OF THE PETITION

Ms. Nancy Tulois stated she is the owner of the property at 120 Fields Road; that they have outgrown the house and, after looking for a new home, have decided to try to expand where they are. The home has been in the family for years, with little done to the outside. The garage sits 12’ back from the house and they would like to add an addition which would extend the whole length of the garage to meet the front of the house.

Mr. MacCallum asked Mr. Holden when the 30’ minimum setback applicable to this property came into existence and Mr. Holden replied that it was with this ordinance, in 1995.

Chairman LeBlanc asked if the front of the addition was going to have the same projection as the rest of the house and Ms. Tulois stated it was.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Parrott moved that the petition be granted as presented and advertised, which was seconded by Mr. Marchewka.

Mr. Parrott stated that the house fronts on Fields Road and sits on a corner lot. He understands that the front and side setbacks of the existing structures are already non-conforming at 23’. This is a one issue variance, which doesn’t make the house any more non-conforming. It would not be contrary to the public interest and is not crowding anybody. The owner needs to generate

more space and can't build up as the structure is already two stories. If they convert the garage to living space, then they lose the use of the garage. It is in the spirit of the ordinance to allow this expansion as long as it doesn't intrude on the neighbors. The value of surrounding properties will not be diminished as the house will still look essentially the same.

Mr. Marchewka, stated he agreed. You are limited in building onto a non-conforming structure and lot. Where they are proposing to build will affect no one and no greater setbacks are being requested. The structures are in keeping with this neighborhood.

A motion to grant as presented and advertised was passed by unanimous vote of 7 to 0.

III. ADJOURNMENT.

The motion was made, seconded and passed to adjourn the meeting at 8:50 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary