

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

7:00 p.m.

CITY COUNCIL CHAMBERS

**SEPTEMBER 26, 2006
Reconvened From
SEPTEMBER 19, 2006**

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice Chairman David Witham, Steven Berg, Alain Jousse, Arthur Parrott, Alternates Henry Sanders and Carol Eaton

EXCUSED: Robert Marchewka, Duncan MacCallum

ALSO PRESENT: Lucy Tillman, Chief Planner

I. OLD BUSINESS

Approval of Minutes – January 18, 2005

It was moved, seconded, and passed to approve the Minutes as presented.

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**II. PUBLIC HEARINGS**

5) Petition of **Helen W. Stearns, owner, and Power Pro Electric, applicant**, for property located **off Maplewood Avenue** wherein a Variance from Article II, Section 10-206 is requested to allow a tradecraft business with associated warehouse in a 100' x 100' proposed building with 18 parking spaces in a district where such use is not allowed. Said property is shown on Assessor Plan 220 as Lot 90 and lies within the Single Residence B district.

Mr. Berg stated that he agreed with the Planning Department memorandum that this was not really a complete submission. He requested the Chair ask the applicant if they were going to submit further details that evening and, if not, the Board should consider tabling.

Chairman LeBlanc suggested proceeding with the public hearing and then table, if necessary, allowing people attending to give their testimony and not have to return. The testimony also might provide clarification.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech submitted a letter with a revised survey plan showing the building as 70' x 100' rather than 100' x 100'. They were not proposing to submit floor plans or elevations as those would be dealt with when the project went to site review. The proposal met all the zoning requirements other than use and a variance for a tradecraft use was what they were seeking that evening. He stated that Power Pro Electric has been located on Sagamore Avenue for the past four

years and would like to expand their operation. The company had approximately 14 employees, most of whom work off-site, with two in the office. There are 6 small vehicles and a bucket truck. No vehicles are left on site at night and the truck was stored. They plan to use the site for their offices and storage of materials and, initially, may lease out a small portion. He stated that the parking meets requirements. The plan shows parking for 22 vehicles, with a one-way travel aisle around the building. He noted that the adjoining lot #89 also was under agreement to the new owners.

Attorney Pelech stated that the Board had a copy of a survey, done 2 ½ - 3 years ago with the building superimposed. The property abuts a commercial use, on one side and I-95 on the other. He identified the location of a PSNH power line easement and other nearby properties. He stated that the noise from I-95 was deafening and a severe impediment to a residential use. The fact that Seamans, a wholesale electrical supply house, abuts the property also makes it less than attractive for residential use.

Addressing the Simplex criteria, Attorney Pelech stated that the zoning restriction as applied to this property interferes with reasonable use. The property was over an acre and a half, 6 times the size required in the Single Residence B district. With little frontage and surrounded by I-95, a PSNH easement and a business district, the site was not suitable for residential use. Consistent with the spirit of the ordinance, the applicant's proposed use would be more appropriate, given the surroundings and the noise. The use would not negatively affect abutting properties and screening would be provided where needed. At the present time, there is heavy wooded growth around the lot which would screen the Moretti property. The demand on municipal services would be less than from a single family residence. There would be no increase in traffic or congestion as, often, the only employees on site would be the owners and two clerical staff. The traffic would be less than that generated by the electrical wholesaler next door. No smoke, odor, fumes, etc. would be generated. The hardship on the property owner was not outweighed by any benefit to the public.

Mr. Jousse asked for clarification on the part of the structure that would be leased.

Attorney Pelech stated it would probably be to one party. If Power Pro continued to grow, they would use the entire property.

Mr. Berg asked why, with 47' of frontage, this was not also an area variance.

Attorney Pelech stated it was a nonconforming lot of record.

There was a discussion among members of the Board, Attorney Pelech and Ms. Tillman regarding the issues of a nonconforming lot of record, common ownership with the adjoining lot #89 and the progression of ownership, possible changes when I-95 was changed, the method of assessment of the two lots and the differences in tracing the history of the lot(s) through the deeds.

Mr. Parrott stated that this was a use variance and the question to him was whether this had been listed and marketed to sell as a single use property as it is legally zoned.

Attorney Pelech stated it had been on the market for three years and he read from an appraisal Mrs. Stearns, the owner, had received.

Mr. Berg stated that, if it was appraised as a single family lot, then obviously that was a potential use.

Attorney Pelech stated it might be a potential use, but whether it was the highest and best, or even appropriate, was the issue.

Mr. Scott Picard stated he was the owner of Power Pro Electric and wanted to address the issue of potential use as a single family. There were pallets and a dumpster outside at the abutting property, and deliveries beginning at 5:30 a.m. To put in a residential use would be a stretch. What they were proposing would fit with the neighboring property.

### **SPEAKING IN OPPOSITION TO THE PETITION**

Mr. Joseph Moretti stated that the applicant's attorney had mentioned a possible expansion and he wondered if this was a temporary variance to get them in the door. He had been working on plans to develop the neighboring property, and felt the area was still marketable for residential. A sound buffer could be erected. He asked if the house was going to stay on the adjoining lot.

Attorney Pelech confirmed it was.

Mr. Moretti mentioned his proposal again, which involved their putting in a road. They had never been approached by the applicants regarding sharing the use of the road or any other issues.

Mr. Henry Marcuri stated he was really not against the project, but his concern was access and traffic. Employees have to come and get their stock and someone has to resupply the warehouse. His concern was the use of Maplewood Avenue and he suggested using Central Avenue.

Attorney Graham Chynoweth stated he was representing Seamans Electric. They were concerned about the use of the property and parking in a zone that is a buffer zone between commercial and residential. If this were allowed to become commercial, with 22 parking spaces, it could be assumed at some point that 22 cars would be coming in and out, intensifying the use. He agreed with the lack of completeness of the application. It was hard to learn enough about the proposed use.

With regard to the Simplex analysis, he cited the Harrington v. the Town of Warner decision, a copy of which he provided to the Board with a relevant passage starred. He stated this meant that the decision on the highest and best use of the property has to be more than a lay person's opinion. They didn't feel the applicants had met the test of whether or not the property could be developed to a reasonable use in accordance with the ordinance.

Mr. Berg commented that the Board had not had time to read the decision and could only quickly view the particular paragraph cited.

Chairman LeBlanc read a portion of a letter from Mr. March, the president of Seamans which mentioned concerns with the slope and drainage. If there was paving where there now are trees, he felt runoff could be a problem for his property.

Attorney Pelech stated, in response to Mr. March's letter, that all of his concerns were site plan review issues. He added that Mrs. Stearns had the property available a few years ago and there were no offers on the vacant lot. If the Board needed further information, he had no problem with coming back the next month, but he felt there was enough for the Board to grant a variance.

Mr. Berg stated that the owner had said the property was on the market for six months with no activity and posed several questions about the selling price.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

Mr. Picard stated that he didn't want there to be an impression that the closest abutters were people who did not want them there. Seamans, who used to be on the abutting property, had been sold to Rexel CLS, an electrical supply house. Power Pro was one of their biggest customers and they have a very good relationship. Mr. March retained the actual property and rented it to CLS. He also stated that they were working with a surveyor to develop plans. He reiterated the problems that deliveries at an abutting property beginning at 6:00 a.m. and on Saturdays would present in finding a buyer as a residential lot.

Mr. Jousse requested clarification, and Mr. Picard confirmed, that Mr. March was the owner of the abutting property and Rexel CLS was the tenant.

Ms. Monica Lewis stated they were concerned about the impact on residents surrounding the property in the future. Her mother's property is in the neighborhood and they were concerned about the future changes to this property.

With no one further rising, the public hearing was closed.

### **DECISION OF BOARD**

Mr. Jousse made a motion to deny the application, which was seconded by Mr. Parrott.

Mr. Jousse stated that granting the petition would be contrary to the public interest and there was nothing presented demonstrating a hardship about this particular property. It had been stated that nobody would want to reside next to the interstate, but in looking at the tax map, it could be seen that there are 15 residences adjacent to it and a motel. He didn't feel there was anything extraordinary about this property and there were more appropriate areas in which to put a business.

Mr. Parrott stated that he did not feel it was a valid argument that no one would want to live there due to the highway noise. There were other homes all along the Bypass and both sides of the traffic circle. The houses were very close, but seem to stay occupied. He concluded that there were plenty of residences with less buffer where people were willing to listen to the traffic. He didn't see that the property was unique or that there was any hardship. Mr. Parrott continued that putting the property on the market for six months one time is not a serious effort to list the property.

Mr. Parrott stated that case law clearly outlines that applicants must have a strong case to carry a change of use because it is so permanent. This particular user may be respectful of the neighbors, but once changed, it was done forever and another use that could also be called a tradecraft, such as metal working, might be very disruptive to nearby property owners.

Mr. Berg stated that he was not opposed to this use in this location, but did have a problem with hardship. When talking about a change of use, they have to apply a higher standard. The notion that this was not a desirable residential parcel is absurd. While it was not a luxury piece of land, it was an

acre and a half within walking distance to downtown. When a property doesn't sell, it is usually not properly promoted or properly priced. He felt he could not get a clear answer to his questions on the price, but could only assume with so little activity in six months, that it may be priced higher. The appraisal listed it as residential.

Mr. Witham stated he would not support the motion. He felt concerns about water runoff would be handled by site review. This property was different from other properties along I-95. It had a utility easement on one side and I-95 on the other. They were hemmed in on all sides, creating a unique situation. He felt the buffer area would provide protection to the abutter who spoke in opposition. The fact that the property could be used as a residence was no reason to deny this use. He felt the other criteria were met and this business could fit in well.

Chairman LeBlanc stated that one issue not mentioned was the entranceway, which was currently little more than 40'. He didn't know if that was legitimate because of grandfathering or not, so would support the motion to deny.

Mr. Sanders stated that he felt this would represent a permanent change and he had concerns with regard to future use so he would support the motion.

The motion to deny the petition was passed by a vote of 6 to 1, with Mr. Witham voting against the motion.

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6) Petition of **Lawrence N. & Ruth S. Gray, owners**, for property located at **80 Currier's Cove** wherein a Variance from Article III, Section 10-301(A)(7) is requested to allow 190 sf enclosed living space (9.5' x 20') within 100' of the edge of the salt water marsh/wetlands. Said property is shown on Assessor Plan 204 as Lot 14 and lies within the Single Residence A district.

Chairman LeBlanc announced that the applicants had requested that the petition be tabled to the October meeting.

It was moved, seconded and passed by unanimous vote to table the petition to October.

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**III. ADJOURNMENT.**

The motion was made, seconded and passed to adjourn the meeting at 8:10 p.m.

Respectfully submitted,

Mary E. Koepenick  
Secretary