

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

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

DECEMBER 18, 2007

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice Chairman David Witham, Thomas Grasso, Alain Jousse, Charles LeMay, Arthur Parrott, Alternate: Derek Durbin

EXCUSED: Carol Eaton

ALSO PRESENT: Lucy Tillman, Chief Planner

I. OLD BUSINESS

- A) Approval of Minutes - November 20, 2007
- November 27, 2007

It was moved, seconded and passed by unanimous voice vote to accept the Minutes with minor clerical corrections.

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B) Petition of **HCA Health Services of NH, Inc., owner, Independent Wireless One Realty Corporation, and its affiliate, Sprint Spectrum, LP, applicants**, for property located at **333 Borthwick Avenue** wherein a Variance from Article II, Section 10-209 was requested to allow the installation of six additional panel antennas and related base station equipment on the Hospital roof. Said property is shown on Assessor Plan 240 as Lot 2-1 and lies within the Office Research district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Grasso made a motion to take this petition off the table, which was seconded by Mr. Parrott and approved by unanimous voice vote.

Attorney James Hoyt stated that the petitioners were seeking a variance to install 6 panel antennas at 333 Borthwick Avenue. They have made minor modifications to their plans and will be removing 3 of the 6 existing antennas and installing 6 as part of an upgrade to new technology. The new total would be 9. He indicated on the site plan where the wireless facility was located on the roof. What they were proposing, including the equipment cabinets, was on the diagram they had submitted. They would be adding and removing 1 per sector at each existing corner location, with the antennas mounted at the same points.

Mr. Benjamin Abrezzi stated he was an engineer with Sprint Nextel. From time to time, as the network matures, there are areas with deficiencies in coverage, which is what happened here. The yellow areas on the map indicate where there is some type of difficulty in coverage. They would use what was already in place and add to it to cure the deficiency. He noted the proximity of the site to Route One and stated that, as the number of customers increases, they need to increase coverage.

Referring to the photo simulations, Attorney Hoyt stated that the proposed antenna and cabinet facilities will be facade mounted and painted to match the existing brick and fade in as much as possible. There would no objectionable heat or noise generated and no additional traffic. The one to two times a month maintenance schedule would remain the same. There would be no degradation to aesthetics and surrounding property values would not be affected. He stated that improving the degraded service would be in the public interest. While they had investigated other options, this site was the ideal location.

In response to questions from Mr. Jousse, Attorney Hoyt stated that the reason for their proposal was to keep up with the demand placed on their services. There was a certain amount of expansion built into their plans and additional sites were not anticipated for the foreseeable future. He stated that, without promising, their belief was that this facility would provide necessary coverage for ten years to come. There was no conflict with the antennas at Pease and their FCC license requires them to shut down if a conflict was identified.

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

With no one rising, the public hearing was closed

### **DECISION OF THE BOARD**

Chairman LeBlanc clarified that the petition was to install 6 new antennas, with 3 of the existing 6 antennas being removed, for a net increase of 3 antennas.

Mr. Grasso made a motion to approve the petition as presented and advertised, which was seconded by Mr. Parrott

Mr. Grasso stated he would like to include the following stipulations as outlined in the departmental memorandum:

- That the antennas shall not exceed the height of the penthouse facade.
- That the antennas shall be painted the same color as the penthouse.
- That the related equipment shall be painted to match the existing hospital façade.
- That the fence screening the equipment shall be extended to shield the additional equipment.

Mr. Parrott agreed to add the stipulations to the motion.

Mr. Grasso stated that this would only be a net gain of 3 antennas on the roof for a total of 9 and he didn't feel this would be contrary to the public interest as it had been demonstrated that there was an obvious demand for this technology. The special conditions creating a hardship were that there were limited areas where these antennas could be installed. With the stipulations, the rights of others

would not be injured and surrounding property values would be protected. The variance would be consistent with the spirit of the ordinance and he believed justice would be done in granting it as there was really no other place that would serve the needs of the Interstate 95 and Route One corridor.

Mr. Parrott stated he agreed and had nothing to add.

The motion to grant the petition with the stated stipulations was passed by a unanimous vote of 7 to 0.

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Mr. Witham advised he was stepping down for Items C) and D) and Petition #1.

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C) Motion for Rehearing regarding property at **150 Greenleaf Avenue**.

Mr. Jousse made a motion to deny the request for rehearing, which was seconded by Mr. Parrott.

Mr. Jousse stated that their guidelines for granting a rehearing were pretty straight and narrow: one, that the Board didn't apply the law correctly and, two, that new evidence had been presented that was not available at the time of the original hearing. Neither of these criteria were met and the request should be denied.

Mr. Parrott stated that a fairly comprehensive hearing had been conducted at which the points mentioned in the request were addressed.

The motion to deny the request for rehearing was passed by a unanimous vote of 6 to 0.

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D) Motion for Rehearing regarding property at **13 Salter Street**.

Mr. Durbin advised that he would be stepping down for this request.

Mr. Parrott made a motion to grant the rehearing, which was seconded by Mr. LeMay.

Mr. Parrott stated that, in this particular case, there were very specific reasons which had resulted in a tie vote. One of these was a design modification with a certain structure on the left instead of the right side. The memoranda submitted from the architect and the attorney address reasons for the design presented to the Board that seemed sound to him. Because these points had not been fleshed out during the hearing, he felt there was a factual basis for granting a rehearing.

Mr. LeMay stated that new and substantial information had been presented that they should consider.

Mr. Jousse stated that, while the information had not been presented, he believed it was available to the applicant prior to the hearing. It may have been an oversight on their part, but it was available. This was not new information.

Chairman LeBlanc agreed, stating that he didn't feel this was new information and that the Board had fully considered the petition and acted appropriately.

The motion to grant the rehearing was passed by a vote of 3 to 2, with Messrs. Jousse and LeBlanc voting against the motion.



II. PUBLIC HEARINGS

1) Petition of **Benjamin N. Otis and Kristin A. Trapane Otis, owners**, for property located at **46 McNabb Court** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow: a) a 10' x 20' two story rear addition with a 6'8"± right side setback, and 4' x 7'8" steps with a roof having a 9'4"± left side setback where 10' is the minimum side setback in each instance, b) a 6' x 18' covered porch with steps with a 4'± front setback for the porch and 3'± front setback for the steps where 15' is the minimum required, and a 7'8"± right side setback where 10' is the minimum required; and, c) 28.3% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 112 as Lot 59 and lies within the General Residence A district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Benjamin Otis outlined their reasons for needing the extra room. He stated that it might seem like they were asking for a lot, but if the Board looked at it, it was really a modest request. He outlined the differences between this request and a previous one in 2005, which had been denied as being too intense. The main difference was that the current request has less building coverage, which he felt was in the spirit of the ordinance. He pointed out features on the tax map, including what looked like a road, but was not paved. He identified various features in the photographs, including a small piece that was actually City property. He noted that, although the front porch would come close to the property line, there was a little grassy area so it was still set back somewhat.

Referring to the site plan, Mr. Otis indicated portions that are subject to a variance. He handed out a supplemental site plan which showed the orientation of the steps with regard to the setbacks. He handed out a letter of support from abutters, along with a plan showing where each signing abutter was located in relation to the property, including the ones most affected by the rear addition. He pointed out existing and proposed features on the plan and outlined how the addition would be used. The roof was flat to keep the scale down and minimize the impact of the rear addition. They would keep the same house line so it would not be closer to the right than the existing structure. Regarding the front covered porch, he outlined how that would be used and presented a photograph of a similar porch across the street so the Board could visualize its impact.

Addressing the criteria, Mr. Otis stated that the public interest would not be affected. The road was a dead end street and only serves 4 homes. The use of City land to the right of house is like a shared yard. The addition would be appropriate in style and would not alter the essential character of the neighborhood. He stated that the location of the existing house makes any expansion difficult. The lot was less than half of the required size. He stated that the benefit sought could not be achieved by any other reasonable method. Any reduction would hinder the function of the rooms. They had

considered other methods, but there were none. He stated that the light and air protected by the ordinance would not be affected. He could not see any injustice to anyone that would outweigh the justice to them in granting the request. As indicated by the letters of support, surrounding property values would not be diminished.

Mr. Derek Wolf stated he lived at 419 Dow Street and was the backyard neighbor. He stated that the house was not constructed to meet family needs and changes in ownership to meet those needs would affect continuity in the neighborhood. In response to a question from Chairman LeBlanc, he stated that the addition would not interfere with their light or air. There is a sharp incline and their house actually sits above the subject property.

Mr. Michael Dickson of 43 McNabb Court, stated that the porch would add to the neighborhood feeling.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. LeMay made a motion to grant the petition as presented and advertised, which was seconded by Mr. Grasso.

Mr. LeMay stated that granting the petition would not be against the public interest. The right side of the building would be no closer to the side line than it was and that side abutted public land. There was no immediate abutter to be affected. They had also had testimony that the neighbor most impacted did not feel there would be any infringement on his light or air. He stated that the primary special condition was the offset position of the existing building on the lot. The building coverage infringement was small. This was a modest improvement needed to improve the functional obsolescence of the property. It would be in the spirit of the ordinance and justice would be served by granting a petition which would not affect the feel of the neighborhood. Surrounding property values would not be impacted.

Mr. Grasso stated that the proposal was well thought out and well planned. This was a minimal request and the addition at the back had the same setback as the main house. The lot size was also a factor.

Chairman LeBlanc stated that the amount of lot coverage being exceeded was 3.3% and that was a fairly small amount. On a dead end street, no one else would be impacted.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 6 to 0.

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2) Petition of **Peter Schwab, owner**, for property located at **270-272 South Street** wherein Variances from Article III, Section 10-301(A)(2) and Article IV, Section 10-401(A)(1)(b) were requested to expand an existing second free-standing dwelling unit into vacant first floor space in a

district where only one dwelling unit on a lot is allowed. Said property is shown on Assessor Plan 111 as Lot 6 and lies within the Single Residence B district.

### **SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard W. Pelech stated that this property had a commercial use until sometime in the late 60's or early 70's when it ceased to be a flower shop and has been vacant since. The shop was in about 300 s.f. on the first floor of one of the structures which had, since the 40's, a dwelling unit on the top. The bottom floor is now proposed to be a bedroom and bath room for the existing dwelling unit above. He stated that the ordinance does not allow two free standing dwellings on the same lot, even though two structures have existed on the same lot for many years. The building where the change in use was proposed is a very small, narrow building, approximately 17' x 13'. They were not seeking a commercial use or another dwelling unit, but wanted to simply expand the existing unit. Without relief, the owner could not use the first floor space.

Attorney Pelech stated that the hardship was a 41,000 s.f. lot in a district requiring 15,000 s.f. The zoning restriction would interfere with a reasonable use of the property as that use has been in place for over 50 years. There was no fair and substantial relationship between the ordinance and the restriction. This size lot would allow 20,000 s.f. per dwelling unit so there would be no overintensification or crowding two dwelling units onto a single lot. He stated that the property abuts a 20' wide right-of-way so the public or private rights of others would not be involved and it would not be contrary to the public interest. Adding a bathroom and bedroom to the one of the existing two units would not result in any additional demand on municipal services. The minimal expansion of 300 s.f. and no commercial use would not be contrary to the spirit of the ordinance. He stated that justice would be served by allowing the most appropriate and least intensive use. Surrounding property values would not be diminished by improving the property and making it more code compliant. A large commercial window would be removed and something more appropriate to the neighborhood and residential use would be installed.

In response to questions from Chairman LeBlanc, Attorney Pelech confirmed that there was currently a one bedroom unit upstairs so the unit would become a two bedroom. The garage with interior stairs leading to the second level will remain.

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

With no one rising, the public hearing was closed.

### **DECISION OF THE BOARD**

Mr. Parrott made a motion to grant the petition as presented and advertised, which was seconded by Mr. Witham, who requested a stipulation that there will be no increase in the footprint. Mr. Parrott agreed to the stipulation.

Mr. Parrott stated that there would be no change in use and the property has been used as a two unit property for a long time. The building would be renovated and present a better appearance. The relief requested was minimal and the changes internal, with no difference in appearance to passersby.

Mr. Parrott stated that the special conditions were that the use was existing although in a single family residence district, and that this was a large lot. The general purposes of the ordinance relate to light and air, which would not be affected by two residential structures, neither of which was huge, on a 41,000 s.f. lot. With no change in appearance or use, he could see no objection to the public or private rights of others. He noted that no one had spoken in opposition to the proposal. He stated that it was in the spirit of the ordinance to allow a reasonable use of the property to its maximum potential as long as others were not negatively affected. With no harm to the neighbors, the justice balance would be toward the property owner.

Mr. Witham stated that they were not dealing with an expansion of a use. They were only adding one bedroom in what had been shop space. This was a reasonable use of the property and it was not the intent of the ordinance to prevent this type of use. The use will not be intensified in terms of the numbers of people staying there and the neighborhood will not be impacted.

The motion to grant the petition as presented and advertised, with the stipulation that there will be no expansion of the footprint, was passed by a unanimous vote of 7 to 0.

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3) Petition of **Evon Cooper, owner**, for property located at **287 Maplewood Avenue** wherein Variances from Article III, Section 10-303(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow an 11.9’ x 13.8’ one story rear addition with a 2.49’ right side setback where 10’ is the minimum required. Said property is shown on Assessor Plan 141 as Lot 36 and lies within the Mixed Residential Office district.

SPEAKING IN FAVOR OF THE PETITION

Attorney John Springer stated that when the owner purchased it in 1997, there was a fully enclosed back room, where currently there was only a foundation. The house needed a total rehabilitation and the owner hired a contractor who did not do the job correctly. He took down the back room and never told her there was a time limit to replace it. They have redone the property with a new contractor but, due to the timeframe, they now have to come before the Board in order to replace the room. He stated that this was the final bit of renovation and they would like permission to rebuild on the foundation. They were not looking to increase the space or build a second floor, just replace the room which had been there. He stated there would be no concerns for light and air or emergency vehicle access. The closest abutter has a paved drive, so it was open on that side and it was also open behind the property, in the gravel area.

Further addressing the criteria, Attorney Springer stated there would be no diminution in property values by replacing a room which would be totally in tune with the first class renovation. The special condition of the property was the existing foundation. Any other option would require digging up the foundation and moving it over which would mean an unnecessary and unfair expense to the landowner. He felt justice would be served because the only reason the owner was here was that the actions of a contractor put her in this position. He felt replacing the room would be in the spirit of the ordinance which would have allowed her to rebuild it, even within the setback, if the room had burned down.

In response to questions from Chairman LeBlanc and Mr. Grasso, Attorney Springer confirmed that there had been a structure, but it was torn down by the contractor and they had not been able to proceed with rebuilding until now. He stated the existing foundation was sound.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Durbin made a motion to grand the petition as presented and advertised, which was seconded by Mr. Witham.

Mr. Durbin stated that there was no evidence to suggest that rebuilding on a foundation that already existed within the setback would be contrary to the public interest. The hardship in the property was that the foundation already exists. There was a previous structure which had been removed and not replaced on ill advice from a contractor. Because the previous structure was already infringing on the setback, a variance was needed. He stated that the other option of moving the foundation to within the required setbacks would result in significant economic hardship. Granting the variance would result in no offense to the light, air and open space protected by the ordinance and justice would be served by not requiring the homeowner to move the foundation. He stated that there was no evidence to suggest that neighboring property values would be diminished.

Mr. Witham stated he agreed and had nothing to add.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 7 to 0.

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**III. ADJOURNMENT.**

The motion was made, seconded and passed by unanimous voice vote to adjourn the meeting at 8:22 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary