

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

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**SEPTEMBER 16, 2008**

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

**EXCUSED:** Alternate: Robin Rousseau

**ALSO PRESENT:** Lucy Tillman, Chief Planner

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**I. OLD BUSINESS**

- A) Approval of Minutes – August 19, 2008  
- Excerpt of Minutes - August 26, 2008 regarding  
49 Sheafe Street.

It was moved, seconded and passed by unanimous voice vote to accept the August 19, 2008 Minutes and the Excerpt of Minutes – August 26, 2008, as corrected.

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B) Motion for Rehearing for property located at **71 Baycliff Road**.

Mr. Durbin made a motion to deny the Motion for Rehearing, which was seconded by Mr. Jousse.

Mr. Durbin stated that there had been no new evidence presented and he didn't see any statutory error made in arriving at the decision.

Mr. Jousse stated that, while there had one additional letter presented, the key word in the Zoning Ordinance was "available" and he believed that the letter from Mr. Merrill would have been readily available to the applicant at the time of the hearing, so therefore no new evidence had been presented to support a rehearing.

Mr. Witham stated that, although he had not been present at the meeting, he had read the Minutes thoroughly and would support the motion. He felt there was quite a bit of confusion about the right of way and who owned what and the pavers being in the right of way. It wasn't clear from the site map. Under Fisher v. Dover, the Board did not have to hear something if it was not significantly different, but he would be open to having this come before the Board again with a clear delineation of who owns what and, if the applicant does not own the right of way where the pavers are, some plan to address that.

Ms. Tillman stated that, from the City’s perspective, it was in the municipal interest that they look at this again. She stated that the right of way was not before the Board. It was the pavers. The City had rights going down to the water. If the applicant came back for a rehearing, they could bring back the information that the Board needed with lines drawn as to exactly the edge of the right of way, if that was what the Board wanted. It might be worth taking a second look at it to get that information and, at that time, the City Attorney could be present to answer any questions that the Board might have.

Chairman LeBlanc stated that he believed the attorney for the applicant went over the right of way and showed that the property was given to each of the owners abutting the property and that it was their property.

Ms. Tillman reiterated that there was still a municipal interest in the outcome.

Mr. LeMay stated that one of the concerns he had was who was exactly getting the variance and could you approve one variance for what was going on someone else’s property. He would like to have that cleared up before taking this up at another time.

Mr. Parrott stated that it was his position that they went far afield in the discussion from what should have been a narrow question. The ownership or conditions for use of the right of way were not before them. They had turned down the request and this would be one of those rare cases where they should entertain a reconsideration.

Chairman LeBlanc began the roll call vote and, when it came to Mr. Witham, he stated he was willing to hear it again if it would all be straightened out and they would not be hearing the same thing. Ms. Tillman stated that they would have the information.

Mr. LeMay asked if Mr. Witham was saying that he would like to see them come back with another proposal, another application. Ms. Tillman stated she felt they could make clarifications on this application.

Mr. Witham stated that he felt Mr. Durbin’s point was correct that there were really no grounds for a rehearing. Saying that they were willing to hear it if the applicants brought more information could be a slippery slope. He was going to support the denial because he didn’t see the grounds for a rehearing, but he was open to them coming back again with further clarification.

Chairman LeBlanc continued the roll call.

The motion for rehearing was denied by a vote of 4 to 3, with Ms. Eaton and Messrs. LeMay and Parrott voting against the motion.

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C) Motion for Rehearing for property located at **49 Sheafe Street.**

Mr. Witham made a motion to deny the rehearing, which was seconded by Mr. LeMay.

Mr. Witham stated that he didn't feel there was any error in our procedural issues when this came before them and there was no evidence of any new information. He did want to touch upon some of the issues that were brought by the attorney in the Motion for Rehearing.

Mr. Witham stated that one of Attorney Bosen's first arguments was that this should be reheard because it was the abutters who were the applicants and he said they didn't have any grounds because they never appealed to the HDC. Mr. Witham stated that it came before them and the Board dealt with it. The abutters weren't trying to build anything so they wouldn't have an application for a building permit and couldn't set the wheels in motion for this process. He felt this had gone through the proper channels.

The property owner's attorney had gone on to say that the Board ignored the considered opinions of two professional architects. Mr. Witham stated that he didn't think those opinions were ignored. The Board just viewed it differently. Attorney Bosen had referred to the Board's "subjective opinion that the proposed project would appear inappropriately placed in abutters back yards." Mr. Witham stated that Attorney Bosen considered the architects' opinions as professional opinions and those of the Board as subjective. Mr. Witham felt the opinions of the architects could also be considered subjective so didn't feel that carried much weight.

Mr. Witham stated that, in the attorney's point #6, he said the Board erred by not making specific findings of fact, referring to Sections 10-1004(B)(1),(2) and (4). For 1), Mr. Witham felt that the Board did address the special character of the area because they talked about the tiering effect. With regard to section 2), they talked about size, general size and new construction, and looked at height and similar factors and, he felt, clearly covered that. Attorney Bosen also alleged that the Board didn't address findings of fact, section 4), which is to encourage the use of new technologies and materials. None of the criteria in that section were even presented to them.

In point #8, Attorney Bosen stated that the Board had erred in regarding the building as being too high, claiming that it was not compared to other buildings. Mr. Witham felt that Mr. Parrott had made a good point to them that there were no streetscape sketches which showed the height in relation to other buildings. That would have gone a long way, so the property owner had an opportunity there.

Attorney Bosen, in point #9, claimed that the Board's reversal was unfair because the information was provided by a third party, that being the Planning Department. Mr. Witham felt that, when they came before the Board, they had their chance to make a full presentation. He was aware that their architect was not available, which might not have helped their case, but they came up with only one poster board with some drawings. They didn't take full advantage of their chance to present everything they needed, which was not the fault, or an error on the part, of the Board.

In point #11, Attorney Bosen noted that the Board's reversal of the HDC's decision was on the basis that there was not enough compromise made by the applicant over the past two years and claimed that was a subjective determination. Mr. Witham felt this was based on a comment he had made and didn't carry any weight, either. At the time, his point was that they had really hyped up the fact that there had been 8 work sessions and they had gone

before the HDC and had made all these compromises. He had commented that, in his view, looking at where they had started and where they had ended up, just didn't feel there was that much difference.

The property owner and his attorney also claimed that the Board permitted negative and slanderous comments about the applicant and that they were prejudiced by that. Mr. Witham thought the Board was able to rise above comments and he had even stated in making the motion that there were many comments by the abutters that weren't pertinent to the application and didn't carry any weight. He didn't really feel this was a fair argument.

Lastly, Attorney Bosen claimed that the Board failed to consider the decrepit condition that existed in the building, but that was not a criteria for the HDC to consider.

Mr. Witham concluded that the only reason he was being so thorough with this was in the event the issue went to court and the City Attorney needed supporting material for their decision. He felt that the property owner and his attorney received fair attention from the Board and denial was deserved.

Mr. Lemay stated that he agreed with the statements made by the maker of the motion. He wanted to add that these folks were given an extensive hearing and they listened carefully to everything that was said. They had certainly plenty of opportunity to make any points they needed to make.

Mr. Parrott noted that, in point #9 in the Motion for Rehearing, the last sentence read, "It is understood that few, if any, members of the Board took a site visit." He wanted it on the record that, in his own case, he took an exhaustive site visit looking down the street at the front of the garage, looking from both adjacent side streets, looking at every possible angle that could be accessed. He felt that the statement was speculation bordering on fabrication and didn't think it reflected well on the writer of the memo and it certainly didn't reflect well on the Board. It was not the case that the Board flew blind and he would also like that on the record.

Chairman LeBlanc stated that he would like to note that Mr. LeMay, when he spoke to the motion, referenced the criteria that were in the Zoning Ordinance regarding decisions by the Historic District Commission; how they were to be made and how they were to be presented. He felt that covered all the ground and agreed that the Motion for Rehearing should be denied.

The motion to deny the Motion for Rehearing was passed by a unanimous vote of 7 to 0.



D) Petition of **Paul Nakrosis and Millie Nakrosis, owners, and Michael Brandzel, applicant**, for property located at **39 Dearborn Street** wherein the following were requested to place a 7'10" x 13'9" one story shed: 1) a Variance from Article IV, Section 10-402(B) to allow said shed to have a 4'± left side set back where 10' is the minimum required, and 2) a Variance from Article III, Section 10-301(7)(b) to allow said shed to have a 65'± setback to salt water marsh or mean high water line where 100' is the minimum required. Said property

is shown on Assessor Plan 140 as Lot 3 and lies within the General Residence A district. *This petition was postponed from the August 26, 2008 meeting.*

Chairman LeBlanc announced that the applicants had requested to postpone this hearing to the October 21, 2008 meeting.

Mr. Parrott made a motion to postpone the hearing to the October 21, 2008 meeting, which was seconded by Mr. Jousse and approved by unanimous voice vote.

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**II. PUBLIC HEARINGS**

1) Petition of **Emile R. Jr. and Allison K. Bussiere, owners**, for property located at **678 Middle Street** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow: a) a one story irregular shaped 274 sf addition with a 5'± right side setback where 10' is the minimum required, and b) a 288 sf porch with a 5'± right side setback where 10' is the minimum required. Said property is shown on Assessor Plan 148 as Lot 30 and lies within the General Residence A and Historic A districts.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Emile Bussiere, Jr. referred to a map which his architect was displaying. This was the same map that had been provided to the Board but had the existing structure shown in orange. It also showed what they were proposing to build and the 3' existing setback from the neighboring property. They propose to build a screened porch at the back attached to the garage, where there now was a deck. He wasn't sure if it was clear in the materials, but they want to square off the lines of the house and the rear portion of the addition, which would not be visible from the street, and create a screened in porch.

Mr. Bussiere stated that the proposal would not be contrary to the public interest. They were going to move back some of the structure, which would become more conforming as it would be further away from the property line. The special conditions creating a hardship were that the property lines were not squared off and the deck had been put in at an angle. He stated that the fence that was there was actually on their property. He stated that there was no other method than the screened in porch which would permit them to access the garage from the house. He noted that the existing garage did not match the style of the house, so tying this all in would make it look more like a single structure. Mr. Bussiere stated that it would be in the spirit of the ordinance to make a nonconforming structure less nonconforming and move it further from the property line. He felt that justice would be done by allowing them to do what they would like to their property without bothering their neighbors. He noted that there was no opposition to their petition and felt that surrounding property values would increase, as their property would be more aesthetic.

Mr. Jousse asked how far the corner of the house was from the property line and Ms. Dutton advised that the existing house was 4½' from the line. Mr. Bussiere stated that the fence on the property was there originally and was put up by his neighbor a couple of feet over the property line.

Mr. Parrott asked, with respect to the neighbor to the right, how far was the nearest point on that house to the actual property line. Mr. Bussiere stated it was 15', maybe a little more. There was a lot of old growth and they can't even see the neighbor's house from their back yard.

**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 asked if it was too late to ask a question relative to design and Chairman LeBlanc indicated he should go ahead. Mr. Parrott asked if the applicant was removing the existing detached garage and back deck, which were within 3' of the property line and Mr. Bussiere indicated, "Yes." Mr. Parrott noted that they had provided one proposal which was still within 5' of the property line and asked what attempts had been made to design to comply.

Mr. Bussiere stated that they had a two car garage and, to have any reasonably sized porch would squeeze their small addition, between the screened porch and the house, almost into a hallway.

Mr. Parrott stated that it seemed that the proposed screen porch could slide toward the center and gain another 5'.

Ms. Dutton stated that, if they moved that wall over 5', they would, in effect, lose the little breakfast nook they could see on the interior floor plan and it would essentially become a hallway. That would also move the staircase into the garage even more, thus losing parking. In addressing the screened porch and moving the wall, they were trying to not take up too much of the yard. They would like to maintain that open space and be able to see their children in the yard from the kitchen without a wall obstructing the view.

Ms. Eaton asked why lessening the porch width of 18' wouldn't improve the yard. Rather than sliding it over, what about making it shorter?

Ms. Dutton stated that to comply would make it 13' which would make it a little more unusable. Her concern was that, once they moved that wall over, it became an obstruction from the kitchen.

Mr. Bussiere added that, if they were to bring in the 5' setback off the corner of the screened in porch, it wouldn't just result in a 13' loss. If they wanted to keep the porch square, which they would like to do as it makes the property look more natural than odd-angled bends, it would actually turn into a much, much smaller porch for their proposed use.

Chairman LeBlanc noted that there was still a need for a motion.

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

Mr. Jousse stated that he had done some figuring on his plan and moved the wall back 5’ from the property line. It demonstrated to him that the access to this entry would be very narrow and they would have to remodel the kitchen just to get into the proposed nook area. That area would be almost gone and it really didn’t seem feasible to move the porch over to keep everything within the setbacks. The property line was not running parallel to the house, but was askew. The further back from the façade of the house, the closer to the right side property line and that presented a hardship in the way the house was situated on the lot.

Mr. Jousse stated that granting the variance would not be contrary to the public interest. The special conditions creating a hardship he had just covered. He didn’t believe there was any other method to create what they were trying to accomplish that was really feasible or reasonable. Granting this variance would be in the spirit of the ordinance and justice would be done. No evidence had been presented as far as improving or decreasing the property values in the surrounding area.

Mr. Witham prefaced his second by stating that he had been on the fence. He felt it met most of the criteria and the applicants had made an attempt to stay within the pattern established by the house. This wasn’t like a request for 5’ that goes right along the property line. There was this kind of sawtooth footprint that runs along 4½’ to 5’, 6’, 7’, 8’ from the property line. The inner corner of both the rear addition and the screen porch were probably both within 12” of the requirement. He had struggled with the other reasonably feasible method criterion, which was based on the benefit sought. It appeared that what the applicants were seeking was a visual benefit, to be able to see their children playing in the yard. With the option of sliding everything over, the visual connection was gone. Another method would be to angle the walls, which would be an expensive construction nightmare and he didn’t see any benefit in asking them to take that on. Having clarified the benefit sought, he thought what they were pursuing was reasonable. He noted that the three unit apartment building to the right side was a good distance away with heavy screening. He didn’t see any detriment to surrounding properties or the public interest, or anything against the spirit of the ordinance. They were just continuing this kind of established, staggered pattern along the property line and trying to achieve a way to enjoy their property and get some visual connection to the back yard.

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**

It was moved, seconded and passed to adjourn the meeting at 7:45 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary