

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

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

October 19, 2010

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

EXCUSED: Alternate: Derek Durbin

ALSO PRESENT: Principal Planner, Lee Jay Feldman

I. APPROVAL OF MINUTES

A) June 22, 2010

Chairman LeBlanc advised that on page 11, there was no motion to deny part two. That will be checked out in accordance with the tape of the proceedings.

Mr. LeMay noted a clerical error on page 7.

It was moved, seconded, and passed by unanimous voice vote to approve the Minutes as amended.

B) September 21, 2010

Ms. Rousseau referenced a paragraph on page 5 which she felt could be tightened up. She read a particular section of the paragraph and indicated how she wanted it to read. She asked if someone could take a look at that.

It was moved, seconded, and passed by unanimous voice vote to approve the Minutes as potentially amended.

When Ms. Rousseau questioned how they were accepted and how were they going to look at the final version, Chairman LeBlanc stated she could contact the department. She asked how long that would take and Mr. Feldman indicated by the following afternoon. She asked that the corrected Minutes be e-mailed to her and Mr. Feldman agreed noting, regarding correction, that much of this was verbatim from the tape and, if it were verbatim, they would leave it as presented. If it needed to be changed, then they would certainly change it.

II. PLANNING DEPARTMENT REPORTS

A) Board of Adjustment Rules & Regulations, Adopted as Amended May 18, 2010

The amended Rules & Regulations were distributed to the Board.

III. PUBLIC HEARINGS

1) Case #10-1

Petitioners: Nicole R. Gregg Rev. Trust, Nicole R. Gregg, Trustee

Property: 13 Salter Street Assessor Map 102, Lot 28

Zoning district: Waterfront Business

Description: To change a nonconforming residential use with 5 residential units to a nonconforming residential use with 2 units and expand a nonconforming structure by adding a two story addition and an attached garage with less than the minimum required front and side yards.

Request: Special Exception under Section 10.335 to allow a lawful nonconforming use to be changed to a similar nonconforming use with impacts on the adjacent properties less adverse than the current use.

Variance from Section 10.321 to allow the expansion of a nonconforming structure.

Variance from Section 10.334 to allow a nonconforming use of land to be extended into part of the remainder of a lot of land.

Variance from Section 10.521 to allow a front yard of 26' where 30' is required.

Variance from Section 10.521 to allow a right side yard of 16.5' where 30' is required.

SPEAKING IN FAVOR OF THE PETITION

In response to a question from Mr. Jousse, Mr. Feldman advised that the request for a special exception had been included in the agenda and advertised but not addressed in the departmental memorandum.

Attorney Bernard Pelech advised that, in February of 2008, the Board had granted all of these variances and the special exception that were being requested that evening. They had previously requested an extension and, as a second extension was not allowed, they were back to seek approval again. He stated that this 200 plus year old home was located at the corner of March and Salter Streets. The current applicants had purchased the property after the variances were granted but, due to circumstances, could not move forward until now. The home was currently a 5-unit residential structure in need of a facelift. They would be making extensive renovations and constructing two additions. Since 2008, tenants had moved out so that 2 units were occupied and they were seeking a special exception to reduce the number of residential units from 5 to 2.

Attorney Pelech stated that, as outlined in his submittal that evening, although the property was always a residence located in a predominantly residential area, it was zoned Waterfront Business District which had larger setbacks. Due to that fact, almost every residence was nonconforming as

to setbacks and lot size. He read comments that the Board had made in granting the 2008 petition including that “the conditions on the site creating a hardship included a tidal waterway on one side, proximity to an intersection on another and a utility pole, all involving regulation from outside agencies.” Referencing the current Articles and Sections from which relief was requested, Attorney Pelech stated that their requirements had not changed. They were seeking variances to allow a 2-story addition with a 26’ front yard setback and a garage addition with a 16.5’ right side yard setback where 30’ was required for both. He noted that this was a large corner lot with the house well back from the front and back.

Attorney Pelech stated that two years ago, the Board had found that the petition also met all the requirements for a special exception. The change in use would be to go from 5 residential units to 2, which would be more conforming as residences were not allowed in the district. He maintained that the reduction would create no hazard to the general public or adjacent properties on account of fire, explosion or release of toxic materials. There would be no detriment to property values or change in the essential characteristic of the area. Reducing the units from 5 to 2 would not create any excessive noise, odors, pollutants, or unsightly storage of materials. No traffic safety hazard or increase in the level of traffic would result and there would be no excessive demand on municipal services. Attorney Pelech stated that this reduced change in use would not result in storm water runoff onto adjacent properties. He noted that the project had received Historic District Commission approval in 2008 and again this month. They also had all the necessary permits from the Department of Environmental Services for construction within the Shorefront District.

Addressing the variance criteria, Attorney Pelech stated that granting the variance would not be contrary to the public interest. The purpose of setback requirements was to avoid overcrowding and provide light and air. This property was one of the largest and least dense lots in the neighborhood and, even with the additions, there would be no overcrowding. He reiterated that virtually every structure in the area had setback issues due to being residential uses located in the Waterfront Business District. He stated that the proposed expansion would not change the essential characteristics of the neighborhood as set forth in the Chester Rod & Gun case. The other basic zoning objective in that case was that there be no threat to the public health, safety or welfare, which would not result from this proposal.

As the Board had found in 2008, Attorney Pelech stated, there was a hardship which interfered with a reasonable use of the property given the special conditions, which was that this was a large corner lot with a historically significant structure predating zoning. Placed in the Waterfront Business District, it did not comply with the 30’ front setback. In addition, the rear property boundary and the proximity to Pickering Creek created special wetlands setback requirements. Anything proposed would also need relief from the Shoreland Protection Act which required a 50’ setback. He stated that there was no fair and substantial relationship between the general purpose of the Zoning Ordinance and the restriction on the property. When originally submitted in 2007, the Board had felt that the garage and the addition could be switched but it was subsequently documented by a letter in the 2008 file that this could not happen as the garage addition would be within 40’ of the Marcy Street intersection violating a Public Works requirement. Additionally, the garage on the left would create a new driveway impacting the Shoreland Protection Act and the Tidal Buffer Zone. With regard to adequate light and air and access for emergency vehicles, there will still be a street on one side and Pickering Creek on another, with a large expansion of marsh on a third side. Attorney Pelech stated that the proposed use was a reasonable one which had been in place for over 200 years and would be less intense with less units.

Attorney Pelech stated that granting the variances would not threaten health, safety or welfare or alter the essential characteristics of the neighborhood so that it would be consistent with the spirit of the ordinance. This area of town was a very dense compact neighborhood with pre-zoning homes built close to lot lines. This lot differed in that it was a big lot. He stated that in the justice test, the hardship on the applicant outweighed any benefit to the public if the variances were denied. Rather than diminishing the value of surrounding properties, they would actually be enhanced by updating and refurbishing the property. He asked the Board to grant the same relief as they had done previously and noted that Mr. Ron Harbeson from Lisa DeStefano Architects was there for any questions.

Chairman LeBlanc asked what the setback was from the front of the garage to the front of the house as, from the perspective of the exhibit on the easel, it appeared pretty much level with the front and that was not what their plans showed. Attorney Pelech responded that from the plan he had it appeared approximately 8' to 10' from the front of the house. Mr. Ron Harbeson stated that the perspective on display was to give the Historic District Commission an idea of the massing of the building but the plan was accurate at 8' to 10'.

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 variances and special exception as presented and advertised, which was seconded by Mr. Parrott.

Mr. LeMay stated that fortunately the heavy lifting had been done a couple of years ago and the basic facts had not changed. He stated that they were going to a use that was two residential units instead of five and he believed the conditions for granting the special exception were met as presented.

Mr. LeMay stated that granting the variances would not affect the essential characteristics of the neighborhood and would not therefore be contrary to the public interest. Substantial justice was done as the project had been reviewed by the Historic District Commission and various commissions that protected the wetlands. The value of surrounding properties would not be diminished by cleaning up the property and making it more fitting to the area. Mr. LeMay referred back to the Board's original comments when the variances and special exception were first granted as support for the position that literal enforcement of the Ordinance would result in unnecessary hardship due to special conditions of the property. These included tidal water on one side, proximity to an intersection on another and a utility pole, all involving regulation from outside agencies. He stated that the light and air as protected by the Ordinance would be preserved.

Mr. Parrott stated that he agreed. This was a case where the change would bring the property closer to compliance with the present Ordinance and be a net gain. In terms of hardship and special conditions, it was an unusually large lot and, even with the setback incursions, there was

still much more space between the building and the property lines than any other property in the area. On balance, he felt it would be an improvement to the property and neighborhood.

The motion to grant the petition as presented and advertised was passed by a vote of 6 to 1, with Mr. Jousse voting against the motion.

2) Case # 10-2

Petitioners: Todd G. Merrill & Caroline Merrill

Property: 238 Lincoln Avenue Assessor Plan 130, Lot 5

Zoning district: General Residence A

Description: To remove the existing entryway and deck from the rear portion of the structure and locate a new entryway and deck on the right side of the structure.

Request: Variance from Section 10.321 to allow a nonconforming structure to be altered.

Variance from Section 10.521 to allow a rear yard of 12' where 20' is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Todd Merrill stated that he lived at 238 Lincoln Avenue and would like to remove an existing rear entryway and add a new 10' x 8' entryway at the side which would require a variance. He referred to the submitted photographs which showed the current rear entryway in the upper right hand corner where they could see that it was virtually on top of the neighbors' driveway. He stated that part of the reason they needed a variance was that this was a narrow, nonconforming, corner lot. The setback would be 12' where 20' was required. Mr. Merrill stated that he didn't think there would be any negative for the neighbors. The area would be enhanced and allow a little more privacy for their entryway and that of the neighbors. The submitted plot plan didn't show the current rear entryway fully but it was a 7' x 6' structure which would be removed.

Mr. Jousse asked if the new entryway was going to reduce the bow windows from 3 to 2 lights and Mr. Merrill confirmed it would. In response to a question from Chairman LeBlanc, he stated that he had not gone far enough yet with the architect to decide on the height of the deck off grade but it would be a one story structure. He confirmed in response to Mr. Jousse's question that it would be an enclosed structure.

**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

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

Mr. Eaton stated that the proposal would make a nonconforming property more conforming. The current entryway was on top of the neighbors’ driveway and they proposed to move it to the other side of the house. The fact that the property was a corner lot affected the variances required and, while a variance would still be required, it would be more conforming. She stated that she didn’t see any public interest in this entryway, except for the neighbor and that would be improved. It would be in the spirit of the Ordinance to bring the property closer to conformity and the setback for which relief was required would go from 3’ to 12’. Substantial justice would be done by allowing better access and use of the property. Nothing had been presented indicating that the value of surrounding properties would diminish and she didn’t feel they would decrease. Ms. Eaton stated that the special conditions creating a hardship were a corner lot with a driveway set way back.

Mr. Grasso asked Mr. Feldman about the submitted material indicating a new entryway and deck but the applicant had stated it would be an enclosed entryway. Mr. Feldman stated he was led to believe it would be a deck but confirmed that, whether a deck or enclosed, the variance requirement would be the same. Ms. Eaton stated that she was addressing an 8’ x 10’ structure and, whether it was a deck or enclosed, it was the same variance.

Mr. Grasso stated that he agreed with Ms. Eaton’s comments and wanted to emphasize that the depth of the lot was fairly shallow, which was partly the reason they had to come before the Board for a variance.

Mr. Witham stated that they often received variance requests for setbacks where additions were pushed to the front and the Board challenged them to consider a more central location. He noted that the proposed location couldn’t be any more centrally located on the available land so he saw no feasible alternative.

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

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- 3) Case # 10-3
 - Petitioner: Todd Eiseman
 - Property: 29 Morning Street Assessor Plan 163, Lot 18
 - Zoning district: General Residence A
 - Description: To demolish the existing garage at the rear of the property and construct a new one story addition to the home on the same footprint.
 - Request: Variance from Section 10.521 to allow a left side yard of 1’ where 10’ is required.
 - Variance from Section 10.521 to allow a rear side yard of 1’ where 20’ is required.
 - Variance from Section 10.521 to allow a building coverage of 57% where 57% currently exists and 25% is allowed
 - Variance from Section 10.321 to allow a nonconforming structure to be reconstructed.

SPEAKING IN FAVOR OF THE PETITION

Mr. John Barber stated that he was the contractor for the project. The applicant’s garage had fallen into disrepair and he would rather have a family room than a garage. He stated they would not be changing the character of the neighborhood and would be making the property better. He added that, due to the size of the lot, this was the only place they could place the addition.

Mr. Grasso asked if he could specify on the plan where the two required off-street parking spaces were. Mr. Barber stated they would be in the passageway to the proposed addition. That was already a driveway and they had 19’ from the passageway to the addition. Mr. Grasso stated so, as they looked at the house, to the right was a driveway and Mr. Barber stated, “correct.”

Mr. Grasso asked if that was the passageway which didn’t belong to the applicant. Mr. Todd Eiseman responded that it was a shared driveway with the property behind them right now.

Ms. Eaton asked if the property line had been surveyed and he stated, “No.” In response to further questions, Mr. Eiseman stated that they were staying in the same footprint. The 50 year-old garage would come down and the room would be there as he would rather have the living space. The parking spaces would be the same. There was no foundation to speak of, just 8” concrete.

**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

Ms. Eaton asked about any parking issues and Chairman LeBlanc stated they were in front of what is now the garage with access through a shared driveway.

Mr. Parrott made a motion to grant the petition as advertised, presented and discussed, which was seconded by Ms. Eaton.

Mr. Parrott stated that this was a constrained lot because of its small size and, in order to gain space, they were proposing to replace one use with another on the same footprint. He found it hard to see how any public interest would be adversely affected and any change was likely to be positive due to the deterioration of the garage. The spirit of the Ordinance would be observed by allowing people to make maximum use of their property as long as they didn’t intrude on others’ rights, which he did not feel was the case. In the justice balance test, he felt that the balance tipped to the property owner. Mr. Parrott stated that the value of surrounding properties would not be diminished by replacing a deteriorated structure with a new one built code. It would be a plus for the neighborhood as well as the homeowner. The hardship in the property was the very small size of the lot which left few alternatives to gain living space.

Ms. Eaton stated that she had nothing to add.

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

- 4) Case # 10-4
Petitioners: Christian L. Berling Revocable Trust, Christian L. Berling Trustee

Property: 117 Ash Street Assessor Plan 150, Lot 36

Zoning district: General Residence A

Description: To allow the expansion of the existing home with a 2 story addition

Request: Variance from Section 10.321 to allow the expansion of a nonconforming structure

Variance from Section 10.521 to allow a left side yard of 3'± where 10' is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Roe Cole stated that he was the builder for the project. They were looking to remove 203 s.f. of existing deck at the rear of the house as well as a brick patio and shed for approximately 260 s.f. more. They were asking to add a two story addition to the left hand, rear side of the home. He noted that this was already a nonconforming lot on all sides. It tapered slightly so that the existing home was 3'1" at the very tightest point at the rear. In making their plans, they took into consideration being able to put up a ladder and ease of maintenance. Thought had been given to alternatives during the design phase but, because of the location of the bathrooms on the interior, they were limited as to where they could go. He stated that they had approached the abutting neighbors and had submitted a letter of support signed by all.

Mr. Cole stated that granting the variance would not be contrary to the public interest as this addition to the rear of the home was not going to be against any public, health, safety or welfare or diminish the character of the neighborhood. He felt it would bring value to the homes. The applicants had looked at other options but could find nothing on a dead end street as they were now and they would like to stay.

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

Mr. Jousse stated that he was trying to understand why the relief was 3'1" while the original was 3'6" and Mr. Cole stated that the house was slightly canted. He had tried to be as accurate as he could. Mr. LeMay asked if the lot was changing as there appeared to be different dimensions on the two drawings. Mr. Cole stated that the lot did not change. He had accidentally turned the framing on for the second set so that some of the numbers changed minutely. The existing plot plan was the existing plot plan.

With no further discussion, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Grasso stated that there would be no public interest in this addition to a house on a dead end street. Granting the variance would not be against the spirit of the Ordinance as there would be no threat to the public health and safety and plenty of light and air would be available. In the justice balance test, he stated that there would be no benefit to the general public in denying this request. He did not feel that the value of surrounding properties would be diminished. The hardship in the property was that the existing house was approximately 3'6" from the property line and, as had

been mentioned, the property line was not quite square so the request was in front of them to go down to 3’1”.

Mr. Parrott stated that 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.

5) Case # 10-5

Petitioners: Celeste C. Ledoux & Christopher Ledoux

Property: 100 Dennett Street Assessor Plan 140, Lot 15

Zoning district: General Residence A

Description: To construct a front porch with a front yard of 9’6” where 15’ is required.

Request: Variance from Section 10.321 to allow the expansion of a nonconforming structure.

Variance from Section 10.521 to allow a front yard of 9’6” where 15’ is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Chris Ledoux stated that he lived at 100 Dennett which he owned with his wife, Celeste. They had also brought the architect to help with any questions. He stated that they had lived there for 12 years and would like to add a roof to a new front deck which would be less than 18” high. They would like to balance the addition they were putting up. The specific relief they were seeking was a front setback of 9’6” where 15’ was required. Referring to the submitted renderings, he noted that the addition was shown with a deck and with a covered porch. They felt that the porch presented a more appealing street presence and was no closer to the road than the existing structure, which had a 4’ setback. They were requesting somewhat less than that. Mr. Ledoux stated that the characteristics of the neighborhood would not be changed if the petition were granted. Most of the houses between his and downtown had front doors and porches directly on the sidewalk. In addition, the house currently faces the right-of-way and they were looking to establish a street presence so that the front door would be on the street.

Mr. Witham stated that he was looking at the floor plan for the original part of the house. He asked if the side property line was once the front of the house, where they had that doorway which entered the stairs. Mr. Ledoux stated he was correct. That was their current front door. It was basically a right-of-way now and they don’t use that entrance. They use the entrance on the existing deck to the left.

**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. Jousse.

Mr. Parrott stated that in this neighborhood most of the houses were perched on the front property lines so that this would not look out of place. As importantly, the proposed covered front deck would be no closer to the front property line than the existing house, which had that odd jut on the right hand side.

Addressing the criteria, Mr. Parrott stated that the public interest was hard to define in this case but he could see no negative impact. Only this house was affected and it was not as though it were facing someone else's property. The spirit of the Ordinance would be to encourage the upgrading of a home, particularly when consistent with the neighborhood. The new construction would be code compliant and add to the aesthetic appeal of the property. He stated that, in the justice balance test, lacking any evidence to the contrary with respect to the public interest, the balance tipped to the homeowner. The effect on the value of surrounding properties would be, if anything, positive. He stated that the hardship was that the house was perched right at the front of the lot, with the front right hand side 4' from the property line. The proposed structure would be set back from that. All in all it would fit in with no harm to neighbors or the general public.

Mr. Jousse stated that this was basically approving a roof over the deck, which was less than 18" from the ground. He felt this would be more aesthetically pleasing to look at than blank walls and provide shelter in inclement weather. He felt it would be a pleasant addition to the neighborhood.

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

IV. OTHER BUSINESS

Chairman LeBlanc returned the Board's attention to Item II on that evening's agenda.

Mr. Feldman noted that they had provided them with a copy of the Board of Adjustment Rules and Regulations which had been adopted several meetings ago.

Mr. Feldman also reminded the Board about the joint work session with the Planning Board to be held that Thursday at 6:00 p.m.

V. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 8:10 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk