

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

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

November 16, 2010

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

EXCUSED: Carol Eaton, Thomas Grasso, Alternate: Robin Rousseau

ALSO PRESENT: Principal Planner, Lee Jay Feldman

Prior to the opening of the hearing, the Honorable Mayor Thomas Ferrini made a presentation to Charles LeBlanc, who was retiring from the Board as Chairman. Mayor Ferrini thanked him for his years of hard work and commitment. He noted that Charlie's first meeting had been on June 20, 1989 and that he had served twenty one and a half years on the Board. As best as could be determined from previous records, in that period of time, he took part in 302 meetings, and that was in a number of months when there were split meetings, and entertained at least 2,650 petitions. For that, and for his service to the City of Portsmouth, Mayor Ferrini stated that he was issuing to him a Mayor's Award, adding that he had watched many of the meetings at home and felt that Charlie embodied the spirit of civility in public life in the manner in which he conducted meetings and dealt with people whose interaction with the City was limited. He felt this was one of the reasons the City had a well regarded Zoning Board of Adjustment. From his colleagues, Chairman LeBlanc was also presented with a pewter mug engraved with the City seal. Chairman LeBlanc stated that it had been a pleasure serving on the Board. It was nice to be able to interact with the people in the City and try to present the City in the best light possible. He recognized that coming before the Board could be a little intimidating and he had always tried to make people feel as comfortable as possible with the process, which he felt the other members of the Board would continue to do.

I. APPROVAL OF MINUTES

A) October 19, 2010

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

Chairman announced that Petitions #3 and #5, for 35 Mirona Road and 53 Pray Street were withdrawn at the request of the applicants.

II. PLANNING DEPARTMENT REPORTS

- A) Memorandum regarding Alternate Members of Land Use Boards, related statute and resource material
- B) Excerpt from the “Planning Commissioners Journal, Number 13/Winter 1994”
- C) By-Laws and Rules/Regulations/Procedures for the Zoning Boards of Adjustment for the Municipalities of Claremont, Deering and Manchester

Mr. Lee Jay Feldman stated that all the reports went together. He noted that the Board had received updated By-Laws the previous month, on which they had worked for some time. Subsequently, a new memorandum was issued regarding a new state statute requiring a section in the By-Laws for each municipality’s Zoning Board of Adjustment specifying how Alternate Members should participate. The newly issued By-Laws would again have to be amended to accommodate the State recommendation. Mr. Feldman stated that he could draft something or it could be discussed at one of the Board’s workshops and staff could be directed as to how to proceed. No specific action had to be taken that evening. After a brief discussion of the Board, it was determined that the Board would e-mail their thoughts to all Board members and perhaps narrow it down to one suggestion which Mr. Feldman could then draft for their review.

III. PUBLIC HEARINGS

- 1) Case # 11-1
Petitioners: Peter W. Dinan & Janet D. Dinan, Owner
Property: 278 Court Street Assessor Plan 108, Lot 13
Zoning district: Mixed Residential Office
Requests: To restore a property previously used as an office to a single family home
Variance: Section 10.311 to allow a single family use to be established on a parcel with less than the required lot area and frontage.

SPEAKING IN FAVOR OF THE PETITION

Mr. Steve Bedard of Bedard Preservation referred to a letter submitted by Strawberry Banke outlining the history of the property and their support for the proposal in front of the Board to return the property to a single family use. He noted that they had already received approval from the Historic District Commission for the changes to the structure and that they were reducing the existing nonconformance by reducing the size of the proposed new ell.

Mr. Jousse noted that the ell was being demolished and rebuilt. He asked Mr. Feldman if, once a structure was demolished and rebuilt, would that require a variance for that structure and Mr. Feldman stated that the new ell would meet the dimensional requirements in that zone.

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

Mr. Witham stated that this was fairly straightforward, a property built as a residence and converted to another use would now be restored to a single family residence. He stated that it would be in the public interest to have this structure, once part of Strawberry Banke, in the hands of owners who would bring it back to its original grandeur. It would also benefit the public to have a structure with a single use, as opposed to the three commercial and one residential in the recent past. It would be in keeping with the spirit of the ordinance to return to a residential use which was permitted in this district. He stated that, in the justice balance test, there was no reason to believe that a benefit to anyone else would outweigh the hardship on the applicant if the variance were denied. There was no reason to believe that the value of surrounding properties would go down and might actually increase by bringing the structure up to standards. Mr. Witham stated that the hardship due to special conditions of the property was that the structure was built as a house and converted. It made sense to go back to a house. The property could not be distinguished from the others in the area as all were built at the same time so that the essential characteristics of the neighborhood would not be changed.

Mr. Jousse stated that he agreed. He also noted that this was an allowed use. He had toured the property which, typical of homes built in Portsmouth in the 1700’s era, was very near the sidewalk. He felt it would be a nice project when finished.

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

- 2) Case # 11-2
 - Petitioner: Stephen D. Kellenbeck, Owner & Daryl Kent, Applicant
 - Property: 282 Hanover Street Assessor Plan 126, Lot 57
 - Zoning district: Mixed Residential Office
 - Requests: To reconstruct a single family home on a nonconforming lot of record
 - Variance from Section 10.311 to allow a single family use to be established on a parcel with less than the required lot area and frontage.
 - Variance from Section 10.521 to allow building coverage of 42% where 42% currently exists and 40% is allowed.
 - Variance from Section 10.521 to allow a right side yard of 2’ where 10’ is required.
 - Variance from Section 10.521 to allow a left side yard of 5’ where 10’ is required

Variance from Section 10.1112.30 Use #1 to allow no parking spaces on site where 2 spaces are required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Daryl Kent stated that he had recently purchased the property. He assumed they had received a copy of the existing and proposed site plans from the engineering firm, along with some building plans and photographs. Noting that he would attempt to address the criteria, he stated that there would be no decrease in the value of surrounding properties. The current building contrasted with the architecture and general appearance of the neighboring properties. Situated on the property line, it routinely shed pieces of debris onto the neighbor's property and the street. He felt that granting the variance would allow a structure which would be more consistent in appearance with the neighborhood and be situated further onto the lot to allow for better maintenance and access in the future. He stated that granting the variance would not be contrary to the public interest as the character of the neighborhood would not be altered but enhanced. The property would be less nonconforming and consistent with the neighborhood. The carbon footprint would be reduced and there would be no injury to the public health, safety or welfare. Mr. Kent stated that denial would result in unnecessary hardship to himself. They were requesting to remove a building and replace with a new building more in character with the neighborhood and less nonconforming than what existed. He noted that, if they confirmed to the zoning requirements, shared by his neighbors, the structure would be only 2' wide. He suggested that the restrictions on the property did not reflect the intent of the ordinance and clearly represented an unnecessary hardship. He stated that open space on the lot would be maintained and there would be no negative impact on any public or private interests. Justice would be done by granting the variance as it would benefit the public. Considering the spirit and intent of the Ordinance, the use would not be changed and no basic zoning objectives would be violated. He stated that there would be no expansion from the existing structure or greater impact on the site.

In response to questions from Chairman LeBlanc and Mr. Jousse, Mr. Kent stated that the foundation was rubble with brick topping and in poor condition, with the rubble part leaking and becoming unstable. They were going to demolish it and put in a new foundation.

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 in its entirety as presented and advertised, which was seconded by Mr. LeMay.

Mr. Parrott stated that the choices were pretty simple. Let the property sit there and patch it up or take it down and replace it. The condition of the foundation, as shown in the submitted photographs, would argue for the latter. If it were a vacant lot, it might be a different story but he felt that a denial would render the lot virtually worthless or close to it. The proposal would make

the house 15' x 31' less nonconforming by positioning it a little more central to the lot, which was only 22' wide. They were limited in what they could and the the house was modest, the same size as the existing structure.

Mr. Parrott stated that it would be in the public interest and not out of character for the neighborhood to maintain a single family residence in a district of mixed structures. Regarding the spirit of the Ordinance, single family homes were allowed in the Mixed Residential Office district so it would conform in that respect. He felt that in the justice balance test, there were no public or private rights or interest that would be benefited by denying the variance. There was no other useful purpose for the property except a pocket park. The balance tipped toward the owner to replace a house with a house. Mr. Parrott stated that the value of surrounding properties could only be helped by tearing down a ramshackle building and constructing something new that would be up to code. The hardship certainly was the tiny size of the lot relative to today's zoning standards which rendered it not even close to conformance. He felt that, as the aerial photograph showed, the property was unique with other lots much larger.

Mr. LeMay stated that he saw this as a repair and modest improvement on a pre-existing nonconforming use. He felt it would be in the public interest to get the property squared away. He would like to add a stipulation as mentioned in the departmental memorandum to have a boundary survey provided to the Inspection Department before a permit was issued to verify the proposed footprint in the field to assure meeting the proposed setbacks.

Mr. Parrott stated that he agreed to the stipulation.

Mr. Witham commented that the house was beyond repair and to make someone patch it up rather than do it the right way didn't make sense.

Mr. Feldman stated that the boundary survey had already been provided so the important part of the stipulation was to make sure that the foundation was staked out in the field prior to construction.

The motion to grant the petition as presented and advertised, with the stipulation that the proposed footprint, as shown in the submitted boundary survey, be verified in the field prior to construction to assure meeting the proposed setbacks, was passed by a unanimous vote of 6 to 0.

- 3) Case # 11-3
Petitioner: Michael's Realty Trust, Owner, Lighthouse Manufacturing, LLC, Applicant
Property: 35 Mirona Road Assessor Plan 252, Lot 3
Zoning district: Gateway
Requests: To establish a manufacturing/light manufacturing use in a zone which only allows light manufacturing as a special exception use.
Special Exception under Section 10.440, Use 14.11 to permit a light industrial use in the Gateway zone.
Variance from Section 10.440, Use 14.51 to allow a manufacturing use in the Gateway zone where the use is not permitted.

As announced earlier in the evening, this petition was withdrawn at the request of the applicant.

4) Case #11-4

Petitioners: NIP Lot 2, LLC NIP Lot 5/6, LLC & Maplewood & Vaughan Holding Co., LLC

Property: 111 Maplewood Avenue Assessor Plan 124, Lot 8

Zoning district: Central Business A

Requests: To allow 2 drive-through lanes as an accessory use with a retail bank in the Downtown Overlay District

Variance from Section 10.440, Use 19.40 to permit a drive-through facility as an accessory use to a permitted use.

Variance from Section 10.836.22 to permit a drive-through facility with 2 lanes associated with a building of 3,000 sf where a minimum of 5,000 sf of associated building area is required for each drive-through lane.

SPEAKING IN FAVOR OF THE PETITION

Attorney Robert Ciandella stated that he was appearing on behalf of the applicant and was requesting a postponement to the December meeting for just cause. Questioned by Chairman LeBlanc as to the reason, he stated that under the Board rules, 4 affirmative votes were required for the relief they sought and there were only 6 members. That was requiring a super, rather than a simple, majority. Chairman LeBlanc noted that the public hearing had been opened and he felt that they didn't grant delays once that had happened. Attorney Ciandella stated that they had wanted to wait to see if a seventh member arrived and did not want to precipitously postpone.

Chairman LeBlanc noted that the Board usually allowed applicants to withdraw if they only had 5 members, but there were 6 sitting. He asked if there was a motion to grant the request.

Mr. Parrott stated that he would reluctantly grant the motion. He had read in some recently provided material that, if there were less than a full Board, the applicant could ask for a postponement. Chairman LeBlanc noted that was not the current Board rules and Mr. Parrott agreed, but confirmed his motion to postpone, which was seconded by Mr. LeMay.

There was a brief discussion among the Board, with Mr. Jousse stating that he had no objection to postponing. Mr. LeMay stated that, rather than cloud the proceeding with what seemed like a technicality of having opened the meeting, he would rather postpone for a month. Mr. Witham concurred, referencing a previous decision where a petition with a 3/3 vote was remanded back by the Court for hearing by a full Board.

The motion to postpone hearing the petition to the December meeting was passed by a majority voice vote with Chairman LeBlanc voting, "nay."

5) Case # 11-5

Petitioners: Helga Washburn, owner Steven and Clea Hayes, applicants
Property: 35 Dover Street Assessor Plan 144, Lot 39
Zoning district: General Residence C

Requests: To allow one nonconforming use to be changed to another nonconforming use.
Special Exception under Section 10.335 to allow a warehouse and distribution center for costume jewelry to operate where a warehouse and distribution center for a plumbing operation currently exists.

SPEAKING IN FAVOR OF THE PETITION

Attorney Douglas Macdonald stated that this was an application for a Special Exception. This was a warehouse property on Dover Street with which the Board was familiar. Historically a cistern for the railroad, it had been a warehouse for 25 to 30 years. The applicants had the property under contract but a Special Exception was required for the use in the General Residence C district. Where now oil tanks were stored, the applicant proposes to use this as a warehouse/distribution center for their costume jewelry operation.

Addressing the requirements for a Special Exception, Attorney Macdonald stated that this use would present no greater hazard to the public or adjacent properties. They would be going from a use which was a little more intense because of the size of the equipment stored and used there to a jewelry distribution center with maybe a snow blower for clearing the walk. Rather than a pick-up truck, they would be receiving overnight mail type of packages. There would be no greater risk from fire or explosion and no hazardous materials stored there which would be harmful to the neighborhood. A warehouse use had been on this property for some time and this was an older building which could use some repair and clean up. With improvements to the property such as replacing broken windows and consideration down the road to make it more attractive, there will be no detriment to property values. The essential characteristics of the area will not be changed on account of the location or scale of buildings, accessways, odor, smoke, gas, dust or other pollutants. There should actually be an improvement as no large equipment will be used.

While it was hard to say what the level of traffic was now, Attorney Macdonald stated that there would be no creation of a traffic safety hazard or increase in traffic around the building. If approved, there would be applicant and a few employees. There were some parking spaces on private property in front of the building. The building was currently on city sewer and there will be no change in the demand for municipal services. He stated that the building consumed most of the lot and there would be no change in the drainage from the roof resulting in an increase in storm water runoff. He concluded that the use would be less intense and more appropriate to the neighborhood, therefore, a better use of the property.

Mr. LeMay asked if there were currently any full-time employees and Attorney Macdonald stated he didn't know but didn't believe they were at the site all the time. Mr. LeMay wondered if the employees used the parking out front, and there were smaller and more frequent deliveries, where the room would be for delivery trucks without double parking on the street. Attorney Macdonald stated that there were 6 spaces in front associated with the building but on private property. The area in general was on-street parking and there was more than sufficient space for a delivery truck once or twice a day.

Variance from Section 10.334 to allow a nonconforming use of land to expand into any part of the remaining land.

Variance from Section 10.531 to allow a 9' rear yard where 20' is required

Variance from Section 10.531 to allow a 0' front yard where 30' is required for the vertical expansion of the garage

Variance from Section 10.531 to allow an 18' front yard where 30' is required for the expansion of the residential structure.

Variance from Section 10.531 to allow a building coverage of 32% where a maximum building coverage of 30% is allowed and 31% currently exists.

As announced earlier in the hearing, this petition was withdrawn at the request of the applicant.

IV. OTHER BUSINESS

No business was presented under this item.

V. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 7:50 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk