

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

**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**CONFERENCE ROOM B**

**7:00 p.m.**

**May 17, 2011**

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

**EXCUSED:** None

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**I. APPROVAL OF MINUTES**

A) March 15, 2011

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

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**II. PLANNING DEPARTMENT REPORTS**

Chairman Witham advised that two documents relating to the first two items on the agenda had been distributed to the Board.

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**III. OLD BUSINESS**

Ms. Eaton recused herself from this petition. Ms. Rousseau assumed a voting seat.

A) Case # 4-5

Petitioners: Brian M. & Susan M. Regan

Property: 28-30 Dearborn Street

Assessor Map 140, Lot 1

Zoning district: General Residence A

Description: To divide an existing nonconforming lot containing two two-family dwellings into two lots, each containing one two-family dwelling, where both lots will have less than the required minimum lot area per dwelling unit and minimum street frontage; one lot will have less than the required minimum lot area; and one lot will have less than the required side yard.

Requests: Variances from Section 10.521:

- Lot 1 To permit a lot with 3,940 s.f. of lot area per dwelling unit where 7,500 s.f. is required.  
To permit 55.15' of continuous street frontage where 100' is required.  
To permit a side yard setback of 3.7' where 10' is required.
- Lot 1-1 To permit a lot with 6,432 s.f. of lot area where 7,500 s.f. is required.  
To permit a lot with 3,216 s.f. of lot area per dwelling unit where 7,500 s.f. per unit is required.  
To permit 95' of continuous street frontage where 100' is required.

*(This petition was postponed from the April 19, 2011 meeting.)*

Chairman Witham suggested to the Board that they might want to switch the order of the first two items and take Case 5-1 first, which was an Administrative Appeal related to the first order of old business that evening. He stated that, if they granted the appeal, then there would be no reason to hear the variance request.

Mr. LeMay made a motion to reverse the order of business and hear Public Hearing Case #5-1 first, followed by Old Business Case #4-5. The motion was seconded by Mr. Parrott and passed by a unanimous vote of 7 to 0.

After conclusion of the discussion on Public Hearing Case #5-1 below, the petition, Case #4-5 was withdrawn.

#### **IV. PUBLIC HEARINGS**

- 1) Case # 5-1  
 Petitioner: Brian M. Regan  
 Property: 28-30 Dearborn Street Assessor Plan 140, Lot 1  
 Zoning district: General Residence A  
 Description: To appeal decision of Code Official to allow a Variance application by one co-owner of the property without authorization from the second co-owner.  
 Request: Appeal from an Administrative Decision under Section 10.234.20

#### **SPEAKING IN FAVOR OF THE APPEAL**

Attorney John T. McGee stated that he was representing Brian Regan, one of the owners of the property regarding the application made by Susan Regan to subdivide the lot at 30 Dearborn Street. He outlined a lengthy history of the property and a divorce settlement affecting it. Among other issues, he maintained the Board should not have considered a request when both owners were not in agreement as to the property. He stated that Mr. Regan did not want the request to be considered at this time. He also mentioned a 15' strip of land which he stated was to be conveyed to Regal Electric in consideration of an advance. He provided further details on disagreements between the owners as to what a court order required and related issues and asked that the Board

not consider the proposed subdivision due to the disagreements. When Ms. Rousseau mentioned a letter submitted by Attorney Pelech on behalf of Ms. Regan, Attorney McGee stated he had not seen it. There followed a lengthy discussion among Ms. Rousseau and Attorney McGee about the degree of ownership and the impact of the Regan Electric portion which Attorney McGee claimed was a part of the property. Chairman Witham interjected to state that what they were there to discuss was the Zoning Ordinance. Mr. LeMay asked if there were any regulations governing agreement of both parties, citing the instance of a condominium association where all unit owners might not be in agreement. Attorney McGee stated that was different as the majority ruled in an association but he maintained that, if the Board made a decision on the variance before them, he felt it could prejudice Mr. Regan's position.

### **SPEAKING IN OPPOSITION TO THE APPEAL**

Attorney Bernard W. Pelech stated that he was representing Ms. Regan. He noted that the City Attorney had made a determination that the application could be heard. He outlined a sequence of events, rulings and submittals in support of Ms. Regan's position and desire to subdivide the property. He stated that Ms. Regan had no problem with deeding the 15' strip of land to Regan Electric, noting that they probably had it by adverse possession by now. He stated that had nothing to do with the requested subdivision and issues dealing with the divorce were up to the court to decide. He maintained that Attorney McGee had told him and the court that he had no objection to the subdivision. Ms. Rousseau and Attorney Pelech then engaged in a discussion about the issues involved, with Ms. Rousseau maintaining that the Board should be looking at the final court disposition as to what could be done with the property. Attorney McGee interjected to clarify that the order that Ms. Regan could subdivide was two years ago and he read further language stating that she had to list the property for sale when she turned 55 which he stated she had not done. He confirmed that they didn't object to a subdivision but insisted that it had to include the 15' strip previously referenced. The attorneys began to address their comments to each other and Chairman Witham told them they had to address the Board.

Attorney McGee stated that, if Ms. Regan would have a plan prepared that showed the 15' strip in the subdivision, they would be fine as that was their opposition to the plan. Chairman Witham asked if he was withdrawing their Administrative Appeal and Attorney McGee stated only if the other party withdrew theirs so that they could come back with a fresh plan. Chairman Witham asked Attorney Pelech if they were withdrawing Case #4-5, the request for a variance and Attorney Pelech stated that they would as long as Attorney McGee concurred with a subdivision plan and his client would sign it.

When Mr. Parrott stated that he thought the Board should rule on the matter, Chairman Witham asked if anyone from the public wanted to speak to, for, or against the petition.

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

Mr. Michael Stasik stated that he owned 31 and 41 Dearborn Street, across the street from the houses in question. He stated that he had hoped the Board would subdivide the property to put 26 years of conflict to rest. He noted that the house at 28 Dearborn Street had fallen into disrepair and it would be nice if someone found the property desirable. Chairman Witham stated that the

petition currently before them was whether they should hear the request or not and asked if he was in favor. Mr. Stasik stated that he was.

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

### **DECISION OF THE BOARD**

Chairman Witham stated that they had a petition that the parties had agreed should be withdrawn. He requested that Attorney McGee hand-write a note to that effect that the Appeal had been withdrawn. Attorney McGee stated he would as long as the other attorney withdrew their petition. Chairman Witham asked Attorney Pelech to hand-write a withdrawal of the pending subdivision request, which Attorney Pelech stated he would be happy to do. Both documents were produced and the Appeal Case 5-1 and Old Business Case #4-5 were withdrawn.

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- 2) Case # 5-2  
Petitioners: Ryan J & Molly Shaw Wilson  
Property: 1360 South Street Assessor Plan 168, Lot 4  
Zoning district: General Residence A  
Description: To operate a pediatric occupational therapy business.  
Requests: Special Exception under Section 10.440 Use# 19.22 to allow a Home Occupation 2.

Ms. Eaton resumed her seat and Ms. Rousseau resumed her position as Alternate.

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

Ms. Molly Shaw Wilson stated that she was an Occupational Therapist who currently travelled to children's homes. She was seeking a Special Exception to conduct occupational therapy in her home. This would be for therapy practice only. She stated that no toxic materials would be released, there would be no change in the essential character of the neighborhood, and no increase in traffic would occur. Ms. Wilson stated that she would schedule sufficient time between sessions to allow for parking. In addition, there would be no change in demand for municipal services or increase in storm water runoff.

When Chairman Witham asked Ms. Wilson to describe the nature of the therapy work, she stated that she worked with children recently diagnosed with autism on basic skills and that she also helped with bathing and dressing but that traveling to individual homes had its limits. Chairman Witham asked if the therapy occurred inside or outside the home, Ms. Wilson replied that the therapy can occur anywhere, preferably the child's natural setting – their home, outside, or at the playground down the street.

Mr. Lemay questioned if it was one child at a time. Ms. Wilson replied, "yes."

Mr. Jousse stated that if the petition were granted, he wanted one stipulation. Would there be signage in front of the residence. Ms. Wilson responded that there would not be.

**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. Grasso made a motion to grant the petition as presented and advertised, adding Mr. Jousse’s stipulation that there be no signage be in front of the residence. The motion was seconded by Mr. Jousse.

Mr. Grasso stated that the application in front of the Board was to have a home based business to help children that need some work on early childhood development. The business would serve one child at a time and allow sufficient time between appointments. There would be no hazard to the public or adjacent property as only one child and possibly a parent would be in the home at a time. There would be no detriment to property values or a change in the essential characteristics of the neighborhood. There would be no creation of a traffic safety hazard, no excessive demand on municipal services and no significant increase in storm water runoff. Mr. Grasso stated that he felt this was something they could approve.

Mr. Jousse stated he had nothing to add.

The motion to grant the petition as presented and advertised, with the stipulation that no sign would be installed on the premises in connection with this business activity, was passed by a unanimous vote of 7 to 0.

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- 3) Case # 5-3  
Petitioner: Laurie Ann McCray 2005 Rev. Trust, Laurie Ann McCray, Trustee  
Property: 15 Haven Road Assessor Plan 111, Lot 17  
Zoning district: Single Residence B  
Description: To create a mudroom by expanding and enclosing existing porch.  
Requests: Variance from Section 10.321 to allow the expansion of a nonconforming structure.  
Variance from Section 10.521 to permit a building coverage of 25%± where 20% is the maximum allowed.  
Variance from Section 10.521 to permit a rear yard setback of 4’± where 30’ is required.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Laurie McCray, owner of the property at 15 Haven Road, distributed a copy of the tax map to show her property in relationship to the neighborhood. She requested a variance to improve the function and accessibility of their main entrance by closing in the existing porch at end of driveway in order to create a mudroom with a handicapped accessible entryway. She stated that the porch, which was outlined in orange on the tax map, was to the rear of the property and would

most affect the neighbors to the south. Ms. McCray submitted a signed letter of support from her neighbors. Ms. McCray stated that they plan on living in the neighborhood for years to come and wanted to make this minor improvement to increase enjoyment of our home as well as to accommodate potential future needs for accessibility. She stated that they have no other doors that allow for handicap accessibility and referred to a packet of photos that made it easier to see why the improvement was needed. She stated that the pictures were looking from South Street at the back of the property. Ms. McCray stated that the steps to the left of the plan would be removed, the porch would be moved down a foot or so, and a small landing would be added to the right which would allow them to move the existing door. She distributed a picture which showed the current door opening into a tiny stairwell to which the access is difficult. She indicated the porch would only be expanded by 11 s.f. and that the existing lot was nonconforming with lot coverage of 25.03%. Ms. McCray indicated the construction would only increase the lot by .15% to allow the entrance. She stated the construction would significantly improve the functionality of the porch and that currently they don't conform to any setbacks right now, so all they would be doing is sliding within the existing 4' setback.

Mr. Jousse stated that he understood that they would basically be keeping the same width of the porch but sliding it down the side of the house and replacing the present door with a window. Ms. McCray stated that they would also be adding a door to the kitchen. In response to further questions from Mr. Jousse, Ms. McCray stated that they planned on adding a handicapped accessible ramp to the door in the future. They had no immediate need but had a family member who might need it in the future. Mr. Jousse added that, if there were no roof, there would be no need for a variance to make it handicapped accessible.

### **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 Witham stated that the petition was to convert a porch into a mudroom, requiring a couple of variances and the lot size going from 25.03 to 25.18% with a 4' rear yard setback where a 4' setback currently exists.

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

Mr. LeMay stated that this was a simple request for a very tiny variance that was well justified. The variance was not contrary to the public interest; it did not increase the nonconformity in any essential way, and the neighborhood was not affected so the spirit of the Ordinance was observed. Substantial justice was done as there was a benefit to the applicant with virtually no harm to the general public. The values of the surrounding property will not be diminished and the abutter that would be the most impacted agreed that the change would be good. Regarding literal enforcement of the Ordinance resulting in unnecessary hardship, the key here was that it was unnecessary.

Applying the zoning to the strict letter of the law would serve no purpose on this property, as it was essentially the same lot coverage.

Mr. Parrott stated that he agreed with Mr. LeMay's statements.

Chairman Witham stated that the colored site plan really revealed the limitations of the lot, with the way the house sat at the corner and definitely created a unique situation.

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

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4) Case # 5-4

Petitioners: Stephen R. & Elisabeth C. Rakaseder

Property: 93 Thaxter Road Assessor Plan 166, Lot 43

Zoning district: Single Residence B

Description: To build a two-story addition to the right rear corner of the existing structure.

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

Variance from Section 10.521 to permit a building coverage of 27%± where 20% is the maximum allowed.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Elisabeth Rakaseder informed the Board that her husband had passed away, so it was just her petitioning the court.

She had lived at the residence for 14 years and had raised her two children from infancy in the house and it had become too small for them. She had wonderful relationships with her neighbors and submitted a signed petition from them to the Board. She stated her current home was non-conforming, being a 5,000 s.f. lot in a 15,000 s.f. zone. The existing dwelling coverage was 24%, which was already 4% over the allotted amount. She was requesting an additional 3% so that she could build a room for herself and a small family room. Ms. Rakaseder stated that there was currently a deck off the back of the house and the footprint of the addition would take up that space and would create a larger setback from one neighbor. She distributed pictures of the backyard to the Board and further stated that quite a few homes in the neighborhood have had similar additions and she was hoping that the Board would also approve her request.

In response to questions from Chairman Witham, Mr. Grasso and Ms. Eaton, Ms. Rakaseder stated that the home had an attic, but the ceiling was 6' 2" and was not usable. She also confirmed that the new addition would be strictly two stories. She stated that the lot coverage was currently 24% and that she wanted to include a covered porch instead of just a patio so she and her family would have a place to sit that was protected. She confirmed that lot coverage would be increasing by roughly 3%.

**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 grant the petition as presented and advertised, which was seconded by Mr. Parrott.

Mr. Durbin stated that the applicant was seeking an addition to their home to put in a family room and bedroom by increasing the lot coverage by 3%. Granting the variance would not be contrary to the public interest. The spirit of the Ordinance would be observed as there will be enough light and air between the neighbors so no intrusion or nuisance would be caused by the proposed addition. Substantial justice would be done as, balancing the hardship to the applicant on a small lot with a growing family versus any hardship to the public, the balance favored the applicant. Granting the variance would not diminish the value of the surrounding properties and no one testified to that effect. Mr. Durbin stated that the property had special conditions that distinguished it from other properties in the area. It was a very small lot and restrictive of development. The addition of the porch was what accounted for the increase in coverage, not necessarily the family/bedroom addition. He stated that no fair and substantial relationship existed between the general public and the Ordinance and the proposed use of the property was a reasonable one. The special conditions were that it was an extremely small lot with little room for development without running into a need for a variance.

Mr. Parrott stated that the proposed additions were centered on the back of the house and in the middle of the lot, further off the property line, which offset the increase in coverage and would not have a negative effect on neighbors. The addition would make the house more useful to the owners.

Chairman Witham stated that he had carefully looked at lot coverages and that most requests also needed setback relief. This did not so it told him that they were building within a buildable area. Chairman Witham stated that he had also looked at the appropriateness and whether the addition would change the essential character of the neighborhood and he felt that this did meet the criteria.

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

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- 5) Case # 5-5  
Petitioners: Earl A. Picard, Jr. & Linda J. Picard  
Property: 375 Ocean Road Assessor Plan 292, Lot 220  
Zoning district: Single Residence B  
Description: To add a 12' x 22' rear deck.  
Requests: Variance from Section 10.521 to permit a rear yard setback of 21'± where 30' is required.

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





Requests: Variance from Section 10.521 to permit a left side yard setback of 4'± where 10' is required.

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

Mr. John Shields stated that he was one of the owners and, in response to a comment from Chairman Witham, he clarified that his wife, Mrs. Shields, agreed with the petition. Mr. Shields stated that this had started out last November as a simple repair and that the deck had been repaired several times in the past with a combination of pressure treated and non-pressure treated lumber, causing rotting. He started last fall to make the repairs and the contractor informed him there was nothing to nail into to repair the railings which were a wobbling staircase off the back. He let it go for the winter and started the process earlier in April and checked if he would need a building permit. He was told by the Historic District Commission that if he was replacing with the same materials and same shape and size that there would be no problems. He started the application process the first week of April and through a series of discussions and interactions with building inspectors and the planning office, he felt the permit had been approved and told the contractor on April 14. That afternoon he received a call indicating that the Historic District Commission did need to approve the project because, in order to replace the deck, he needed to change the head balusters. He stated that he had previously indicated that to the planning department and was told it was okay. Around April 18, he had a conference call with the Planning Department and was told he would have to go to the Historic District Commission and Board of Adjustment because the left side of the house, from Pleasant Street towards the water, was 4' off the property line. He stated that the deck was at the back of the house and started at the left edge and ran for 18.5' but because it was 4' away, it would require a variance although the house was built 150 years ago.

In response to questions from Chairman Witham, Mr. Shields stated that he wanted to replace the deck in-kind, with the exception of adding a baluster and a simple enhancement to the top rail. He stated that everything was the same, with the exception of bringing it up to code.

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

Mr. Jousse stated that the variance would not be contrary to the public interest. The spirit of the Ordinance would be observed as the deck was being replaced in-kind and, from the applicant's presentation, it appeared that he had believed that everything was fine and then the application ran into glitches. Mr. Jousse stated that granting this variance would do substantial justice and nothing has been presented regarding the value of the surrounding properties. He stated that the hardship was that the deck, which was an egress from the house, had rotted away and had to be replaced.

Ms. Eaton added that the new deck would be brought into code and improve the property values, which was a positive.

Mr. LeMay stated that the neighbor that would be affected was a cemetery and the Board hadn't heard anything from them.

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

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- 7) Case # 5-7  
Petitioners: T Beyar Realty LLC, Owner, William Lodwyck, Applicant  
Property: 141 Banfield Road Assessor Plan 254, Lot 2  
Zoning district: Industrial  
Description: To operate a custom race car fabrication/retrofit facility.  
Requests: Special Exception under Section 10.440, Use #11.20 to allow a motor vehicle service use.

Mr. Grasso stepped down for this petition and Ms. Rousseau assumed a voting seat.

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

A relative of the applicant stated that she would be speaking on his behalf as Mr. Lodwyck felt she would be better understood. She noted that Mr. Lodwyck was present and would answer questions when needed. The applicant's representative stated that he was looking to operate a motor vehicle fabrication facility to build customized cars.

Chairman Witham stated that in order to grant the special exception, the Board had to go through certain criteria and he asked that the representative address these. For instance, would there be any hazard with regard to potential fire, explosion or release of toxic materials due to this operation. Mr. Lodwyck's representative stated there would not. Chairman Witham stated that the Board needed to consider whether there would be a detriment to property values with regard to smoke, dust, pollution, noise, glare, heat, or odors, or whether there would be outdoor storage of equipment. Mr. Lodwyck's representative stated that everything would be done inside the facility so that there should be no impact on the neighbors.

Chairman Witham asked whether the operation would create a traffic safety hazard, indicating that he didn't know how often vehicles would be brought in and whether they would be brought in on flatbeds. Mr. Lodwyck identified himself as the applicant and responded that deliveries would occasionally be made on flatbeds. When Chairman Witham asked if he would be having three cars towed in on a daily basis, Mr. Lodwyck stated that would not happen. Chairman Witham asked about the demand on municipal services and storm water runoff, Mr. Lodwyck's representative stated there would not be any excessive demand on municipal services and, with everything inside, no increase in storm water runoff.

In response to questions from Mr. LeMay and Mr. Jousse, Mr. Lodwyck indicated that there were a total of three (3) employees, including himself. Ms. Rousseau asked about fuel oil on the

property and whether the motors were laid on the ground. Mr. Lodwyck stated that the engines were delivered and they installed the parts. His representative added that they didn't change oil. When Chairman stated that it sounded like they worked with one car at a time, building it and then sending it out, Mr. Lodwyck's representative stated, "yes."

**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. LeMay.

Mr. Parrott stated that the area was industrial and he felt this was an appropriate use of the building. He saw no hazard to the public from fire, explosion or release of toxic materials. He stated that there would be no detriment in property values as the area was commercial and was backed up by a huge pile of gravel. Any normal sounds or actions would take place within the building and were appropriate. There would be no traffic safety hazard created as this was not a high traffic operation. There would be no excessive demand on municipal services as they were not producing or using huge amounts of anything. Further, there would be no changes to the outside of the building, so there would be no increase in storm water runoff.

Mr. LeMay stated that he had nothing to add.

Chairman Witham stated that Mr. Parrott hit the nail on the head in stating that the petition was for an industrial zone and this also seemed to him an appropriate use.

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

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**V. OTHER BUSINESS**

No other business was presented.

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**VI. ADJOURNMENT**

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 8:35 p.m.

Respectfully submitted,

Mary E. Koepenick  
Administrative Clerk