

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

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

December 13, 2011

MEMBERS PRESENT: Chairman David Witham, Vice-Chairman Arthur Parrott, Susan Chamberlin, Derek Durbin, Alain Jousse, Charles LeMay, Alternates: Patrick Moretti, Robin Rousseau

EXCUSED: None

Chairman Witham noted that, with the Board currently down to 7, both Alternate Members would be assuming a voting seat for the entire meeting. There were a few items where a Board Member might have to recuse themselves so there might be some petitions with only six members voting.

I. APPROVAL OF MINUTES

A) October 18, 2011

A motion was made by Mr. Parrott, seconded by Mr. LeMay and approved by unanimous voice vote to approve the Minutes as presented.

II. PLANNING DEPARTMENT REPORTS

Chairman Witham noted that they had received several reports regarding the upcoming Requests for Rehearing to which they could refer as they considered those items.

III. REQUEST FOR REHEARING

(These items were to be considered by the Board with sole reference to the written motion for rehearing and to the statutory criteria for granting a rehearing. There was no public testimony.)

A) Request for Rehearing regarding property located at 28-30 Dearborn Street. *(This item was tabled to a time indefinite at the November 15, 2011 meeting so that information requested by the Board could be provided.*

Chairman Witham noted that the Request for Rehearing regarding 28-30 Dearborn Street had been tabled at the November meeting. Mr. Parrott made a motion to remove the request from the table, which was seconded by Ms. Rousseau and approved by unanimous voice vote.

Chairman Witham stated that the Board had asked the Planning Department for a report regarding any violations, which had been received indicating that there were. He felt that, with the information provided, as well as the other documentation they had already received, they could move forward with considering the Request for Rehearing.

Ms. Rousseau asked if he felt there should be a discussion or a motion and Chairman Witham indicated he would take a motion.

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

Ms. Rousseau stated that they had received a Planning Department memorandum and there seemed to be some outstanding violations. There were also previous applications for variances and a special exception in which the applicant submitted a plan indicating where they were going to install parking spaces. According to the Code Enforcement Officer, this had not occurred. She initially wondered if this was attached to a variance as a stipulation but that did not appear to be the case. Ms. Rousseau noted that the Planning Department had brought to their attention an Ordinance on the books that, if a plan was submitted where the applicant represented they were going to install parking spaces and the variance were approved, as was the case here, that became part of the variance, sort of an unspoken stipulation.

Ms. Rousseau stated that another question she had was whether the requirement of the variance to put in parking spaces, was enforced. Apparently, the Code Enforcement Officer did not go there from 1984 to 1991 so that a long time had gone by without enforcement, which was an issue the City needed to address. She cautioned that the Board should watch what they granted and attach stipulations for follow-up by the officer. She maintained that the City needed to ensure there were no code violations before a case came to them. An abutter requesting a rehearing had stated there were code violations and there were. There had been an error in procedure so the Board should move forward with a new hearing.

Mr. Parrott stated that he felt the memorandum from the Planning Department had been clear and thorough. The parking spaces which were required by the Ordinance, and clearly delineated on a plan approved by the Board of Adjustment, did not exist. Something had been promised that was never done. Beyond that, the other fairly serious allegation was a sewer pipe exposed to the weather, which had been shown in a photograph by a conscientious abutter. He felt there were grounds to revisit the petition and the rehearing should be granted.

Ms. Chamberlin agreed that the Board could not go forward now that they knew there were outstanding violations and they were compelled to grant the rehearing.

The motion to grant a rehearing was passed by a unanimous vote of 7 to 0.

Ms. Chamberlin recused herself from the following request.

B) Request for Rehearing regarding property located at 150 Greenleaf Avenue.

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

Mr. LeMay stated that he had carefully reviewed the Minutes and the process that occurred. He felt that this all hinged, in the applicant's judgment, on an interpretation of wording in the Ordinance. He had gone back through the wording and through the arguments and didn't see where there was anything new being presented, or any errors in procedure. For those reasons, he felt the request for rehearing should be denied.

Mr. Durbin stated that he also supported the motion as he didn't see any new information or errors committed by the Board.

Chairman Witham commented that ten points were cited as the basis for the request and he didn't agree with any of them. He didn't find there to be any new information and felt the request was just a necessary step for the applicants to take in order to go to Court. He referenced Item #8 of the Request in which the applicants alleged that the Board was biased and refused to do anything more than rubber stamp the City's action, as evidenced by opening comments that the hearing would be painful. Chairman Witham stated that he had tried to inject a little humor regarding going to the dentist versus hearing the petition and it became an argument in a Request for Rehearing. He felt that was weak and disrespectful, stating that the Board was not biased and did not rubber stamp any action. He stated that it was a reality that he had given a great deal of time to the requests of this applicant and he felt his comments had been warranted. Chairman Witham added that he would support the motion to deny the request.

The motion to deny the Request for Rehearing was passed by a vote of 6 to 0.

Ms. Chamberlin resumed her seat.

C) Request for Rehearing regarding property located on Marjorie Street.

Chairman Witham stated that the Board had received information from the Legal and Planning Departments, and from the filing of an abutter.

Ms. Rousseau asked if the Board was in agreement that the October 19, 2011 letter from the abutter would serve as the Request for Rehearing. Chairman Witham stated that he was comfortable with moving ahead with that and Ms. Chamberlin agreed, adding that the abutter had raised enough points to consider it a Request for Rehearing. Chairman Witham asked if the Board felt that anything new had been presented or an error made by the Board.

Quoting sections from the letter, Ms. Rousseau stated that there were a lot of personal feelings in some of the expressed positions, such as there being no economic hardship on the owners or that the owners had no intention of living in the home. While she felt the position was heartfelt and could understand the abutter's situation, there had been no new facts or presented or errors by

the Board cited. The Board had to make their decision by looking at the facts such as land configuration issues and considering whether a request met the criteria, not the economic issues for the owner. She felt this was an emotional rather than a factual appeal. Chairman Witham asked if she were making a motion.

Ms. Rousseau made a motion to deny the request, which was seconded by Mr. LeMay.

Mr. LeMay stated that the request was a re-statement of the sort of thing that had been presented the night of the hearing. There was nothing materially different. He pointed out that there seemed to be some confusion between the Minutes and this about whether or not they would have to come back for a variance if they wanted to have the lot coverage that, he guessed, their plan showed. He then felt the appellant would have another opportunity to comment on the size of the home or whatever else was there.

Chairman Witham stated that he would also support the motion. There was no new information presented and, while the appellants made their points, he felt those positions were all factored into the Board's decision to grant.

The motion to deny the rehearing was passed by a unanimous vote of 7 to 0.

ITEM NOT ON AGENDA

Ms. Rousseau stated that, before the Board went into the cases that evening, she wanted to open up an issue for discussion, something they had previously addressed, regarding Planning Department analysis on cases. Chairman Witham stated that they could have a discussion and he would give her two minutes to present, if she wanted something to note in the Minutes.

Ms. Rousseau stated that, several months back, they went into what she termed a private session with the ZBA, a non-public session which she alleged they probably should not have done, regarding Planning Board analysis or position or opinion regarding a variance or special exception case. Chairman Witham noted it was the Planning Department and she corrected the reference. Ms. Rousseau stated that they had given direction to the Planning Department that they did not want their analysis. They wanted the applicant to present their case fairly, just their facts and supporting documentation, without "Big Brother," the City of Portsmouth, saying they didn't like this. She maintained that the Board represented the people of the community and the Planning Department did not. They could look at the facts and make their own decision. She outlined her contacts with several other communities and maintained that they "were outraged" at this action and they just wanted the applicant information. Noting that the practice had stopped for awhile and then started again, she asked the Board to give a message to the Planning Department to not continue doing that.

Chairman Witham stated that the Planning Department was there and he was sure the message was being heard. While he wasn't playing devil's advocate, he understood her position and agreed with it. He speculated that everyone in the department might not have been informed about where the Board was on this. He also felt that what was factored in was what they had gone through on

Dodge Avenue with the Board saying it would have more helpful if they knew “this, this and this” on the case and he felt the Planning Department was trying to reach out and provide that. His position was that the Planning Department should provide all the facts that they could. He appreciated their taking a position and having an opinion on the facts based on what they knew and the history, but he agreed that they did not need to go through the criteria in the overview.

Ms. Rousseau continued, “And, also the City Attorney, that attorney should be at, when we need his help, we’ll ask for it, but for him to opine on a variance request before us, that is unfair to the applicant before us and it definitely sways the opinion of the Board when they take a position like that and we need to be fair to our applicants.”

Chairman Witham stated they would move on but he didn’t feel it could be said that it definitely swayed the opinion of the Board. He felt she should speak for herself and if it didn’t sway someone, it didn’t sway someone.

Ms. Chamberlin stated that she felt comfortable taking a different position if she didn’t believe the Planning Department was correct. She didn’t mind them giving the Board their analysis and appreciated the depth of information as she didn’t know the history, but she did feel comfortable with coming to a different conclusion. She did not see that it was biased against the applicant and felt it was a source of information that could be useful.

Mr. LeMay thought this was a question of degree. He had no problem with the Planning Board (Department) giving a history and perhaps connecting a few of the dots. He did have a problem when they started to put in judgments or instructions. If there was extensive information that needed to be brought, he felt it would be appropriate for that to be presented in public session. Particularly if it were a legal memorandum, for example, it wouldn’t hurt to hear it presented.

Chairman Witham stated that these comments would be in the Minutes and the Planning Director was in attendance. He felt adjustments would be made. .

Chairman Witham stepped down for the following petition and Vice-Chairman Parrott assumed the Chair.

IV. PUBLIC HEARINGS

- 1) Case # 12-1
Petitioners: Kevin L. & Marilee A. Eckhart
Property: 260 Walker Bungalow Road #260
Assessor Plan 202, Lot 13-5
Zoning district: Single Residence B
Description: Construct a 9’ x 7’ covered front landing.
Requests: Variance from Section 10.321 to allow the expansion of a nonconforming structure.

Variance from Section 10.521 to allow a 17' front yard setback where 30' is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Jay Lawrie stated that the applicants were trying to undo some things that had not been done quite as well as they would be now. They were trying to fix the front stairs which were about 6" from the front door and difficult to work with. They would like to construct a new covered landing at the front door, bumped out 2' from the building for a comfortable entry. Currently, the owners did not use the entryway in the winter as it was too icy. The balance of the proposed 9' x 7' structure would be a porch with an architecturally pleasing railing.

Mr. Lawrie stated that there would be no injury to the public interest. This would be 17' from the edge of pavement and the front of the house would be maintained as a yard. He stated that granting the variance would not be contrary to the Spirit of the Ordinance as no danger would threaten the health, safety and welfare of the public. He noted that a number of homes in the area had covered entryways so he felt the essential character of the neighborhood would not be changed. In the justice balance test, Mr. Lawrie stated that there would be no benefit to the public in denying the variance, which would correct a hazardous condition. He stated that property values would not be negatively affected. They had shared the plans with all the abutters, some of whom would speak that evening, and had their support. Addressing the hardship test, he stated that all the lots had to deal with the front setbacks, but most had the ability to expand to the front or rear. They were situated with a 30' front setback and a 100' rear setback so that, once the zoning had changed, the house became nonconforming. While the applicants understood the provisions in the Ordinance with respect to light, air and density, they felt it was not intended to prevent homeowners from having protection from the weather.

In response to questions from the Ms. Rousseau, Mr. Lawrie stated that the applicant's hardship was not only weather protection but a safety issue with the stairs. Using the front stairs put the door right in the face of someone trying to enter so they tended to use the garage, which was fine o.k. for the family but not for visitors. He confirmed they were looking for a 17' front yard setback where 30' was required but noted that the setback was 20' at the time the house was built. Ms. Chamberlin asked if this was the smallest addition they could build and accomplish their purpose and he stated it was, noting that a neighbor constructed a similar bumpout and it worked well. He added that there was constant ice on the steps and the roof over the entry shifted the ice back from the eave lines.

Mr. Michael Megliola stated that he lived at 284 Walker Bungalow Road and represented himself as well as Ms. Margaret Witham, Ms. Denise Croteau, and Ms. Sandra Ergin, who lived at 238,241 and 251 Walker Bungalow Road respectively. They wanted to express their unqualified support for the proposal. Mr. Gary Epler stated that he and his wife lived to the immediate left as you faced the property. They had no objection and felt the proposed entryway would be in character in a neighborhood with similar structures. They noted that the area was a cul-de-sac with little through traffic so there would be no impact on the general public.

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

Ms. Chamberlin stated that the five criteria had been laid out well in the variance request and, as the various members of the public had testified, she felt that granting the variance would cause no injury to the public interest. The spirit of the Ordinance would be observed as there was a smaller setback requirement when the house was built. The applicants were just trying to make use of the front door with a protective covering and there was no reason to believe that property values would be diminished. Regarding the hardship, she stated that they were up against a setback in both directions and, in order to have full use of the front entry, the applicants needed to do something such as the proposed.

Mr. Moretti stated that he knew the impact of water leaking and rot and felt the request was very reasonable. He added that the modest improvement would enhance the look of the home and increase property values.

Mr. LeMay commented on the hardship that, given the change in the zoning and the fact that the house was on a cul-de-sac, obviously denial of the variance would result in a hardship if the owners couldn't improve their front porch and door.

The motion to grant the petition as presented and advertised was granted by a vote of 5 to 1, with Ms. Rousseau voting against the petition.

Chairman Witham resumed the Chair. Ms. Rousseau recused herself from the following petition.

- 2) Case # 12-2
Petitioner: 750 Lafayette LLC
Property: 750 & 720 Lafayette Road
Assessor Map 244, Lot 8
Zoning district: Gateway
Description: Replace and relocate an existing freestanding sign with a 100 s.f.±, 20'± high freestanding sign.
Requests: Variance from Section 10.1243 to allow a second freestanding sign on a lot.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin stated that he was there representing the owners along with Mr. Erik Saari from Altus Engineering and Mr. Chad Caduleri. Noting that you could now drive by the property and not see a blade of grass, he stated that there would be a dramatically different, major upgrade and improvement including landscaping and surface water treatment. He referenced his

submittal which had addressed the criteria and the special conditions which caused the need for this free-standing sign. He felt the Board was familiar with the sign for the sports club, which was on this property, charged to this property, but it was actually a compromise that the City negotiated years ago so that the traffic from that development would not use Greenleaf Avenue. He stated that left this site without adequate signage and they had recently made a proposal for two lots which they felt they could do as a matter of right as there were two lots there now. He maintained that they could have the sign that they were seeking as a matter of right. The Planning Department felt strongly that it would be better to have one single lot and the applicants agreed if they received a variance. Advising that there was detailed explanation in his submittal, Attorney Loughlin stated that was why they were there that evening. Referring to Ms. Rousseau's earlier comments, he stated that finally, after years, the Planning Department agreed with him on something and she didn't want to use the recommendation. This one time, he strongly urged the Board to follow the recommendation.

Chairman Witham stated that his understanding from the information was that the applicants were going to have two signs, whether with a variance or developing the property as two separate lots with the signs. He asked if that was correct, noting that this seemed a far easier route. Attorney Loughlin responded that the Planning Department felt it was cleaner to handle it this way, and it was. The Planning Department and the applicant were trying to avoid the second entrance. Both aesthetically and from a safety standpoint, it was not desirable. He felt this was the best approach. In response to a further question from Chairman Witham, Attorney Loughlin stated that they hadn't given up their right to develop two separate lots, but had agreed that, if they received the variance, they would come in with just the one lot. Chairman Witham stated so that they would have two signs one way or the other. While he felt it could be stated in a softer way, Attorney Loughlin stated that was correct. Chairman Witham agreed this made a lot of sense.

Mr. Parrott noted that there was no request for a variance with respect to the size of the relocated sign if approved. He asked if the 100 s.f., 20' high sign would comply with the requirements of the Sign Ordinance and Attorney Loughlin stated it would. Mr. Parrott noted that they had been getting into a pattern of applicants asking for a little bit and then another little bit and he wanted to be sure they were not going down the same road. He asked if there would be a follow-up variance request and Attorney Loughlin responded that, as far as knew, there would not be.

SPEAKING IN OPPOSITION TO THE PETITION

No one rose to speak.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Rick Taintor stated that he was the Planning Director for the City of Portsmouth and wanted to reaffirm Attorney Loughlin's statements. He stated that this application came at the request of the Planning Board. The applicant had been willing to move ahead with the original plan but the Planning Board at its November meeting agreed with the staff recommendation that the applicant pursue a variance. The unusual situation was that the access road, which was not a public street, crossed the applicant's property to service the Greenleaf Woods development and the sign for that development consequently had to be placed on the applicant's property. So there was an existing sign that provided no benefit to the applicant. He stated that it seemed appropriate for the

applicant to have one sign to advertise businesses on its property. To follow the original plan for two lots would have created a number of headaches for the City. While it possibly could have been done by right, there would have had to be some Planning Board waivers. This was a way to clean up a problem created by a decision made years ago to put that access road in without making it a public way, which would have avoided the current concerns. He again emphasized this was at the request of the Planning Board. If the variance were granted, the matter would move to the upcoming meeting of the Planning Board and hopefully go through there easily.

With no one further 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 Ms. Chamberlin.

Noting that this petition was a bit unusual, Mr. Parrott stated that he didn't feel the public interest would be affected but, if it were, it would be in a positive fashion as a sign that was virtually on the street would be moved further from the travelway and the existing Greenleaf Woods sign would remain where it was. In the spirit of the Ordinance, this would be a common sense decision to combine lots for good reasons. In the justice balance test, there would be no overriding public benefit if the variance were denied so the balance tipped to the property owner. He didn't feel there would be any effect on the value of surrounding properties with respect to the sign. With regard to the hardship test, Mr. Parrott stated that the properties had special conditions resulting in a hardship due to the effect of the odd road winding around the property to get back into the Greenleaf development. He noted that the property was also off a busy road at a traffic light.

Ms. Chamberlin stated that she felt it would be a gain to the public interest in having a sign to identify the property and she otherwise agreed with the conditions as presented by Mr. Parrott.

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

Ms. Rousseau resumed her seat.

- 3) Case # 12-3
Petitioners: Richard C. S. Harding, Jr. & Linda Herbst Harding
Property: 1808 Islington Street
Assessor Map 241, Lot 15
Zoning district: Single Residence B
Description: Amendment of Previous Variance
Requests: Amend stipulation attached to Variance granted July 16, 2002 by allowing more than one tenant to rent both the dwelling unit and commercial space covered by the Variance.

SPEAKING IN FAVOR OF THE PETITION

Linda Herbst Harding noted that her husband had passed away in March so the property was now just in her name. She noted that she had sent a letter to the Board but, for the benefit of the public, would briefly summarize its contents. She was seeking relief from a stipulation to a previous variance that the same person who used the shop in the barn must also live in the apartment in the same structure. She provided the history of the originally granted request for a one bedroom apartment in the barn and how a boat building workshop began in the space. The workshop tenant no longer needed the apartment so that she was seeking an amendment of the stipulation as she was hoping to continue to rent the apartment as things had been difficult.

Ms. Harding stated that granting the variance would be in keeping with the spirit of the Ordinance as nothing would be changed. There would still be a beautiful farmhouse with an attached 1850's barn, in which there was a woodshop which had been there since the 1950's and a 600 s.f. apartment. The only difference was that the woodshop tenant's car would be there during the day and the apartment tenant's car in the evenings. She stated that this would not be against the public interest.

Chairman Witham noted that she did not have to address all five criteria as the request was to amend a granted variance. Ms. Harding stated that her neighbor was there with a lawyer so she thought she would address them. Chairman Witham added that the Board would be basing their decision on the reasonableness of her request to amend the stipulation. She stated she would quickly do it as she wanted to show there really was no reason not to grant this. There would be no change to the surrounding neighborhood, no negative impact on light and air. She felt that justice would be done by removing the stipulation. With no outside changes, there would be no diminishment in the value of surrounding properties. This was a very large property and space conditions were such that the use was reasonable and the spirit in which the variance was originally granted would not be violated.

Mr. LeMay asked where the apartment was located in the barn and how it would be accessed. Ms. Harding pointed out a small access door to the right of the main entrance to the barn. In response to further questions from Mr. LeMay, she stated that the apartment would be on the first floor as the second and third floors were undeveloped. They had just taken the existing office on the right hand side and reconfigured it as an apartment.

Mr. Parrott asked how many people worked in the boat building operation and Ms. Harding stated that there was never more than one. When he asked for confirmation that it was a commercial boat shop, the tenant confirmed from the public seating area that it was.

SPEAKING IN OPPOSITION TO THE PETITION

Attorney John Lyons stated that he represented Mr. and Mrs. Patterson who were direct abutters at 736 Islington Street and opposed the petition. He stated that this was already a nonconforming property in that it had this commercial space. The original application was for the boat builder to move into the apartment and that was why the request was granted and the apartment constructed from the old office and bathroom. He maintained that creating a second dwelling unit in the structure increased its variance from the Zoning Ordinance. They felt that, if the request was granted, the applicant would come back before the Board requesting condominiums. They

maintained that even another car would be over-intensification. Citing a sign advising vehicle traffic to slow down, he stated that the property was located near a ballfield, resulting in a lot of traffic in baseball season. Attorney Lyon stated that, since the variance was granted, the property was also subdivided and he felt granting this request would not be in conformity with the Single Residence B District.

Ms. Rousseau stated that they were talking about a 600 s.f. apartment and one or two cars and a car for the other building and wondered why he was raising an issue with traffic congestion.

Attorney Lyon stated that he was talking about the Zoning Ordinance and how it was not appropriate to the SRB District. He felt that the property had gone from a nonconforming commercial space to an apartment, then a subdivision and now another request so there had been a steady drip, drip, drip. Ms. Rousseau stated that she didn't get the drip, drip, drip and he responded that there shouldn't be a tenant in there. When she noted it was one car, he stated it could be one or two plus traffic from customers coming to look at the boats and from a single family home being constructed on what had been part of this lot. Ms. Rousseau stated that was not on the table that evening. This space had been historically used in this way and she didn't see a traffic issue from one or two cars.

Ms. Chamberlin asked if there was language that would provide parameters to allay his concerns with the "drip" effect. As Ms. Rousseau had pointed out, some of what he had raised was not related and one or two more cars didn't seem like a flood of traffic. She asked if there was a way to narrowly define the situation that would make his clients more comfortable. Attorney Lyon responded that her predecessors clearly felt there was an issue when they created the stipulation limiting the use of the working space and the apartment to a single individual. Chairman Witham recalled that the original variance request presented that the boat builder would live upstairs and, with the presentation that he was going to live there, the Board felt they should make it a stipulation. Their concerns were not what Mr. Lyons had been saying.

Attorney Lyons stated that he took his information from the letter of decision and it would appear that the approval was conditioned upon the fact that there would be only one individual. Chairman Witham stated that he was just sharing his recollection and Attorney Lyons stated that he understood, but had now lost the thread of Ms. Chamberlin's question. When she reiterated her question, he responded that they would want assurance that the property would not be developed for condominium use or have requests for additional dwelling units in the space.

Addressing the applicant, Ms. Rousseau noted that it appeared she did not have bathroom space. If they granted the request, there would be a 600 s.f. apartment for one tenant and another tenant for the commercial space without separate bathroom facilities.. Ms. Harding stated that when they received the variance, the City required that they put a handicapped bathroom in the shop. While they plumbed it, it had never been used as it was not needed. If the Board wanted, she would put in the fixtures. She noted that the 600 s.f. apartment had a full small bathroom. Regarding the opposing abutters, she commented that they previously owned the property and had certain feelings about it. Ms. Rousseau stated they were just looking at the facts and she wanted to determine if there were two stand-alone entities, the apartment and the commercial space. Ms. Harding reiterated that they did have the separate bathroom, which had been checked by the code enforcement officer.

No one further rose in opposition.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Greg Hopkins identified himself as the boat builder in the space. He stated that he didn't feel there was a traffic problem as it was a quiet area, now that it had been reconfigured. The previous Board had been concerned about over-use of the location, which was why the shop had to be restricted to a one-person, small shop, with no retail out of the location. It was a low key operation. He stated that there was no talk about reconfiguration or new apartments and no change to the external structure. He verified that the bathroom had been plumbed in.

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

DECISION OF THE BOARD

Chairman Witham announced that the request was to amend a previously applied stipulation and the criteria did not have to be addressed, just the reasonableness of the amended stipulation.

Ms. Rousseau stated that she was looking at the variance granted in 2002 where it stated that the tenants would be allowed to rent the dwelling unit and the commercial space. In her opinion, the City of Portsmouth couldn't dictate to a property owner who they could rent to. Effectively, the Board allowed for that living space to be used as an apartment, which had now been in use since 2002. There was also an active commercial space. She was shocked that the previous decision would dictate to whom the property owner could rent.

Chairman Witham interjected that had been on the Board in 2002 and who they could rent to was not dictated to the applicants. They presented what they were going to do and the Board agreed to it. Ms. Rousseau stated she was just reading. Chairman Witham stated that it said one tenant be allowed to rent the dwelling unit and the commercial and it meant one tenant. When Ms. Rousseau started to reiterate her position, he stated that he could see the interpretation someone might make, but if anyone watched the tape or read the Minutes, the intent was pretty clear.

Ms. Rousseau stated that they needed to make this property owner whole. There was an apartment since 2002 and there had been no issues brought up by neighbors as far as noise or other issues. They would just be granting what the applicant already had and letting her rent to a different person. She felt there was no issue with one or two cars and noted that she lived down the street and this was a wonderful property, with no congestion.

Mr. LeMay commented that he didn't buy what had been said about how the Board could restrict what body was in the apartment. He thought back to a classic court case where there was an issue of an apartment which had to be used by someone associated with the business so he felt there was precedent. Separate from whether it applied in this case, he didn't feel it was an unreasonable restriction and could realistically exist. Ms. Rousseau asked what owner could continue that indefinitely. They had to allow the property owner to use the space as they needed.

Mr. Parrott stated that he was sympathetic to the situation of the owner but, by law, they were not allowed to take into account personal situations but look at the land and zoning. This property was in the SRB District and, while it was uniquely large for the district, there was only supposed to be one individual or family and there was already one nonconforming use. Noting that the property could be sold or the circumstances of the present owner changed, his concern was for the longer view and respecting zoning.

Ms. Chamberlin made a motion to approve the amendment of the previously granted variance, which was seconded by Ms. Rousseau.

Ms. Chamberlin stated that a variance had been granted and they were not looking to revoke it, but consider the modification before them. While she appreciated the concerns, they were not looking at condominiums or additional subdivisions. They were just saying that someone had been living there and building boats and now there would still be a boat builder but someone else living there. This was a slight modification and would not change the character of the neighborhood. While they had to be vigilant to uphold zoning, they were just saying that what was granted was granted and this was a slight modification.

Ms. Rousseau stated that they didn't have cookie cutter lots in Portsmouth. There were a lot of different shapes and sizes and this was a unique property with a wonderful boat building business. She loved driving by the property. She felt there had been no issues and they should allow the property owner some flexibility in continuing to do what they had been doing all along.

Mr. LeMay commented on what he suspected happened in the past. There was an apartment and business in this building but no justification that a boat builder had to have an apartment there in order to make the building usable. Without that link, it seemed that this apartment having to be linked in tenancy with the commercial use was a pretty tenuous connection and he felt the request could be approved.

Chairman Witham stated that this property, located at the outer reaches of the district was unique for the SRB. He knew what the traffic was like in the area and didn't feel that granting the request would push it over the limits. He stated that the old barns were going in the area, with a loss to our heritage. It was hard to find a new re-use and he felt it was important to keep the barn going. Everything was intact and an important part of Portsmouth history. He added that a boat builder also went to maritime culture. He didn't see that a small apartment would be a problem and any additional traffic could be handled. Noting that a property this size in a different district would easily mean a twelve unit, here they were just looking at a small apartment and someone who worked on boats.

The motion to grant the amendment to the previously granted variance, by allowing separate tenants to rent the dwelling unit and the commercial space in the barn, was passed by a vote of 6 to 1, with Mr. Parrott voting against the motion.

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- 4) Case # 12-4
Petitioner: Gregory P. Chini and Louise Parsons Chini

Property: 315 Aldrich Road #2

Assessor Map 166, Lot 4-2

Zoning district: Single Residence B

Description: Construct a 6' x 7' shed.

Requests: Variance from Section 10.324 to extend a pre-existing non-conforming building or structure

Variance from Section 10.573.10 to allow a 0'± left side yard setback where 5' is required.

Variance from Section 10.521 to allow a building coverage of 20.74%± where 20% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

Ms. Louise Chini stated that they lived at 315 Aldrich Road and were requesting to put in a small 6' x 7' shed, 8' tall at the peak. Due to the small size of the lot, the grade at the back of the property, and a mulch garden, the shed would have to go next to the property line. She stated that moving the shed closer to the house would also cover a window to the basement and the other locations they had considered all had issues. Ms. Chini noted that they didn't have space for storage of bicycles or strollers or gardening equipment so that was all in the house. They couldn't put in a garage as there was not enough space. She also pointed out that moving the shed away from the property line would put it on top of a brick patio and block access. She noted that the fence which they were assuming was the property line was there when they bought the property and stated that the next door neighbors had no problem with the placement of the shed.

Ms. Chini stated that they would be exceeding the lot coverage by only .74%. When they purchased the property she estimated that it was 20.36%. They lived in a two unit condominium. Before they purchased, the unit owner on the other side had installed an attached garage as they had more space and had received a variance to slightly increase the lot coverage. Granting the shed would raise it to 20.74%, considering the property as a whole. Just considering their side and footprint, they would be under the 20% required. She stated that she wasn't familiar with the variance to extend a pre-existing nonconforming building or structure, which was listed in the notice she had received, but she would address it if needed. Chairman Witham stated that he thought she was covered in not specifically addressing that as it really was an issue of the shed.

Ms. Rousseau referred to a notation in the applicant's submittal that the shed was not going to be attached but on cinder blocks. Ms. Chini stated that was correct and described what their contractor would be doing. He had stated that, in theory, the shed was small enough for him to build and bring in on a truck. If it needed repair, they could move it. Ms. Rousseau asked if she were open to taking the shed with them if it were approved and they subsequently moved. Ms. Chini stated that they hadn't considered it, assuming it would become a part of the property. When Ms. Rousseau added that a zero setback was asking for something extreme, she stated that they would be open to that possibility. Ms. Chini noted that the existing fence was 6' tall so, from the neighbors' point of view, there was already a big structure on the property line. The additional 2' to the peak would not obstruct the view. She reiterated that the neighbors, who supported the proposal, also had a structure right on the line.

Mr. Moretti stated that his concern was the roof overhang. While there was a 6' footprint, the roof extension could be 6' to 8' and overhang the fence. Ms. Chini stated that she hadn't noticed that on the plan. She stated that the existing fence had a 6' section that they were planning to remove so they could access the shed directly from the driveway. She wasn't sure there would be room for an overhang. Mr. Moretti stated that the neighboring property could be sold and the next neighbor might be concerned. Ms. Chini stated that their plan was to not have an overhang over the fence and they would ensure with their contractor that it did not happen.

No one further rose to speak in favor of the petition

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. Chamberlin made a motion to grant the petition, which was seconded by Mr. Parrott.

Ms. Chamberlin stated that granting the variance would not be contrary to the public interest. While the shed would be up against the property line, it was a very small footprint and there were other factors that dictated its positioning. She noted that they were not receiving any objections from neighbors and would let others speak to whether there should be a stipulation added relative to the overhang. She felt that substantial justice would be done because there simply would be no significant impact to anyone. It was just a very small change to the property.

Mr. Parrott agreed. The concern with the overhang was that you were not supposed to shed water onto adjacent property and, if the roof allowed that, it was not good. Although the present neighbors did not have any concern, a future owner might. He felt the situation could be handled by setting the shed back or using some kind of gutter system so he proposed a stipulation that the shed be designed and installed so that water would not be shed onto adjacent property. Ms. Chamberlin agreed to the stipulation.

Mr. Parrott stated that, with respect to the general requirements, it was clear from the plot plan that there were very few options in placing an outdoor structure such as a shed. He felt that what was being requested was certainly a minimal size to be of any use so the hardship was inherent in the placement of the house, the size of the lot area on the applicant's side and just the general arrangement of the yard. He felt that the five criteria were met.

Mr. LeMay stated that he was uncomfortable with the zero foot setback and the representation that the applicants were not really sure where the line was. He felt the time to get the location right was when they were putting something in, not five years from now. He felt there needed to be some guarantee that the shed was in the right place. Chairman Witham stated that he could suggest a stipulation that the property line be confirmed before construction. Mr. LeMay stated that he would like to make that stipulation. Mr. Parrott and Ms. Chamberlin stated the stipulation was acceptable to them.

Ms. Rousseau stated that they saw Aldrich Road all the time with requests for garages and sheds. A lot of the lots were really small and an additional structure made it dense. A zero setback was right up on somebody's property line and future neighbors might not be ok with that. She stated that she couldn't vote for a permanent structure although it would be different if the applicants took the structure with them so that it was more of a temporary nature. Where she might vote for a zero setback, it would be a situation where the owners were replacing an existing structure that was put there before ordinances. Her position was that this setback would make the neighborhood really tight and she couldn't support it. If the applicants didn't have the space, they didn't have the space.

Chairman Witham stated that, usually he did not support zero setbacks but this one worked for him. The applicants had incorporated the design of the shed, which was very small, with the fence and kept the walls low. It was really incorporated into the face so that he did not see any adverse impact. The small size was a factor in his decision because this was not a two garage, which was sometimes what they had with zero setback requests.

The motion to grant the variance with stipulations was passed by a vote of 6 to 1, with Ms. Rousseau voting against the motion. The stipulations were the following: (1) That there will be no water run-off from the shed onto adjacent properties; and (2) That, prior to issuance of building permit for construction, the exact location of the left property line be confirmed to ensure that the shed is placed entirely on the applicants property.

VI. OTHER BUSINESS

No other business was presented.

VII. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 9:45 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk