

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

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

CONFERENCE ROOM B

7:00 p.m.

January 17, 2012

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

EXCUSED: Charles LeMay

Chairman Witham announced that a request had been received to postpone the hearing on 604 Lincoln Avenue.

I. NEW BUSINESS

A) Election of Officers

Ms. Rousseau nominated David Witham as Chairman, which was seconded by Mr. Durbin and approved by unanimous voice vote.

Ms. Rousseau nominated Arthur Parrott as Vice-Chairman, which was seconded by Mr. Durbin and approved by unanimous voice vote.

II. APPROVAL OF MINUTES

A) November 15, 2011

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

III. PLANNING DEPARTMENT REPORTS

A) Memorandum from City Attorney regarding Staff Reports.

Noting that the members of the public didn't know what was in the subject memo, Ms. Rousseau stated that the January 6, 2012 memo to the Board of Adjustment was basically the City Attorney advising that it was appropriate for the Planning Department to make recommendations and essentially take positions on ZBA cases. Providing examples from the Cities of Rochester and Dover as supporting documentation, the City Attorney had maintained that staff reports were not unusual and communities varied in their approach. Referring to his previous memo of September 20, 2010, he stated that these reports and recommendations were not intended to bias the Board but were for support and informational purposes only. He concluded, "Decision making authority always remains with the Board and never with the staff."

Ms. Rousseau stated that, in 2010, the Board had given direction to the Planning Department not to give the Board recommendations or opinions on their cases. She described what she termed a non-public hearing where the only matter discussed was the City's position of wanting to continue their practice. While the Board didn't see opinions for awhile, some positions on variance cases had appeared for the last couple of meetings, which so troubling that she contacted the Planning Departments of the major population centers in the State. These included Mr. Carter Falk, Deputy Planning Manager for the City of Nashua, Mr. Matthew Sink, Deputy Director of Planning and Community Development for the City of Manchester, Mr. Tom Johnson, Director of Zoning, Building Codes and Health for the Town of Durham and an unnamed Planning Director from the City of Laconia. She described each Planning Department as being "shocked" that they would allow this practice. When she stated she intended to read from the e-mails she had received, Chairman Witham stated that there really was not time to read each of these out loud.

An interchange followed with Ms. Rousseau maintaining that this was an incredibly important matter and it might not be important to the Chairman but it was to the public and Chairman Witham responding that he had not said it was not important but she had reiterated her position the past three meetings. Ms. Rousseau insisted that she wanted to read the e-mails into the record reiterating that it was important for the public. When she again stated that the Chairman might not think so, he requested that she not put words in his mouth and suggested that, if she had a lot to say, they call a special meeting to deal with the subject. After further discussion, he allowed Ms. Rousseau five minutes for her comments.

Ms. Rousseau read selected portions from the e-mails that she had received from the Planning Departments in the Cities of Nashua, Manchester, Durham and Laconia who made no recommendations but generally offered factual information and support to their Boards. She then stated, "The risk here, and what I've seen in my experience is that you leave Planning Department employees potentially collecting money on the side and potentially committing fraud. If an applicant wants to buy an opinion from the Planning Department, that is a risk when you allow the Planning Department to have an opinion on a ZBA hearing case. Someone can give them a check as a consultant and buy their opinion and if they don't pony up the money, "maybe you give that particular hearing a

negative opinion and tell us not to pass it so I don't want to give you that opportunity to collect fees from anyone - from our community - on a ZBA opinion."

Ms. Rousseau continued that she wanted to incorporate best practices. She stated that she wanted to make a motion that the Zoning Board of Adjustment give very explicit directions to the City's Planning Department that they are prohibited from making recommendations or taking positions on any ZBA hearing case before them.

Chairman Witham asked for a second, with no response from the Board. Ms. Rousseau interjected, "Great!" He started, "hearing none,.." when Ms. Rousseau talking at the same time stated, "There's no second. Then my next, my next (sic) step will be to talk to the City Council and they have the authority to give you direction not to make recommendations on ZBA cases."

Chairman Witham again started to make a comment when Ms. Rousseau again interrupted to state, "And maybe the Attorney General's Office would be the next step as well." Chairman Witham stated that he felt his idea of calling a meeting of all the parties involved and getting on the same page was probably a little more prudent than getting the Attorney General involved and throwing around comments about bribes. Ms. Rousseau again interrupted to state that she preferred not to do that but it was an open option.

In response to the Chairman's request for other comments, Ms. Chamberlin stated that she had not seen any evidence of corruption. She understood that people could feel differently about the value of the opinion, but she generally found them helpful. She agreed with the Chair that it might be useful to have a meeting so they could discuss how to go forward.

Chairman Witham stated that he thought they had planted the seed with the Planning Department and the Attorney's office and this could be discussed in further detail in a meeting with the Board and staff. He felt they were close and, with everyone's input, could reach a resolution.

Noting that the issue had been raised and, obviously, not effectively resolved, Mr. Parrott thought it would be worth the Board's time to have a meeting devoted to this particular subject, which he felt was a procedural matter and not of great general interest.

Chairman Witham agreed, noting that the Planning Department representative was there so that he didn't feel a motion was necessary. He expected they would soon receive a memorandum regarding a meeting to iron out these few details.

Ms. Rousseau requested that the Planning Department suspend any positions or recommendations until that meeting took place, until this Board took a position on that matter.

IV. PUBLIC HEARINGS

Chairman Witham announced that he would read the following petitions, although he understood that the applicants were going to request to table them.

1) **Case # 1-1**

Petitioners: Brian M. Regan & Susan M. Regan

Property: 28-30 Dearborn Street

Assessors: Map 140, Lot 1

Zoning District: General Residence A

Description: Divide an existing nonconforming lot containing two, two-family dwellings into two lots each containing one, two-family dwelling.

Rehearing Requests:

- Variance from Section 10.331 to allow a lawful nonconforming use to be extended.
- Variances from Section 10.521:

- Lot 1 - To permit a lot with 6,750 of lot area where 7,500 s.f. is required.
- To permit a lot with 3,375 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 90.15’ of continuous street frontage where 100’ is required.



2) **Case # 1-2**

Petitioners: Brian M. Regan & Susan M. Regan

Property: 28-30 Dearborn Street

Assessors: Map 140, Lot 1

Zoning District: General Residence A

Description: Allow the existing front-yard setback of the building to remain and revise the off-street parking layout required in a previous variance approval for the property.

Requests:

- Equitable Waiver (under RSA 674:33-a) to allow a front yard setback of 0’± where a 20’ front yard setback is required for the structure located at 30 Dearborn Street.

- Amend the Variances granted 1984 and 1991 by revising the required parking plan (as shown on the plan on file at the Planning Department).

Chairman Witham stated that the attorneys would speak to this and their request for tabling and, if any of the neighbors would like to speak, they would have an opportunity, but it was his understanding that common ground had been found and the parties needed to work out the details on the plans and then come again before the Board.

SPEAKING ON BEHALF OF THE APPLICANTS

Attorney Bernard W. Pelech advised that he was speaking on behalf of Ms. Susan Regan and, with him, was Attorney Jack McGee representing Mr. Brian Regan and Regan Electric. Attorney Pelech stated that he wanted, first, to compliment Mr. Cracknell with regard to his involvement. He noted that there was a lengthy staff report which was neutral with no recommendations. He felt that it was a breath of fresh air to have someone from the Planning Department reach out, noting that the abutters were not on board and would support a revised application. He stated that his client was also on board with the proposal and a schematic plan to which they had all agreed. As a result, all the parties had agreed to request a postponement to the February meeting so that details could be tweaked. He added that Mr. Brandzel needed time to consult with his attorney and it would be better to consider the whole package next month. He reiterated that Mr. Cracknell had done a tremendous job.

In response to a question from Ms. Rousseau regarding existing code violations, Attorney Pelech stated that the code violations would be dealt with. When she insisted that they were not cured and they were again before them with outstanding violations, he stated they couldn't be cured until they came back before the Board. When she reiterated her position, Chairman Witham added that the avenue in which to clean them up was to come before the Board. A brief discussion followed among Chairman Witham, Ms. Rousseau and Attorney Jack McGee about the Ordinance in its consideration of outstanding violations, during which Ms. Rousseau read an e-mail from the Planning Consultant Nick Cracknell and reiterated that the Planning Department should not be involved in the process. Attorney Pelech then stated that he did not believe that was inappropriate and was aware that Mr. Cracknell was involved.

Attorney Jack McGee stated that he represented Mr. Brian Regan and Regan Electric and noted that they were currently in front of the Planning Board and the Technical Advisory Committee. In that sense, the City wanted to look at this whole problem. He stated that this situation had disclosed a number of problems in the Dearborn Street area that needed to be addressed and the Planning Department was looking at those greater issues. To that extent, he felt that the Planning Department exerting itself on this project wasn't necessarily in front of this Board but to bring out general problems. He stated that his clients were anxious to clear up the problems and he noted that Mr. Brandzel and other abutters had pointed out certain things that would improve the situation. Their goal was to present a plan that would coordinate with this Board, the Planning Board and perhaps

the Historic District Commission. That was why they were requesting to have the petitions continued so that they could make a presentation. He noted that both the Planning Board and Technical Advisory Committee wanted to get this resolved. After talking with Mr. Brandzel and his attorney to address his concerns and the other issues on Dearborn Street, they wanted to start with the Board of Adjustment and, hopefully, get the necessary variances in place.

When Ms. Chamberlin reminded him that, even if the Planning Board were in agreement, this Board was free to reject the plan, Attorney McGee stated that he understood but hoped that, when they came before them with a plan that would be beneficial to the City and the residents on Dearborn Street, the Board would be amenable.

Mr. Michael Brandzel stated that he was there to speak in favor of the plan that Mr. Cracknell had helped to facilitate through an open communication process. He stated that, in a week's time, more progress had been made than had happened in nine months and Mr. Brandzel did not feel that Mr. Cracknell had forced a particular plan, but rather presented ideas. He stated that he had felt for a long time that what he was bringing forth was falling on deaf ears, but was now hopeful that an agreement could be reached that would be amenable to all parties and save time and energy. While they could come back and nitpick every little thing, bringing the parties together was very valuable.

Chairman Witham stated that he commended the neighbors for sticking with the process.

Mr. George Dempsey stated that he would like to back up Mr. Brandzel's comments and offer a recommendation to the City. He stated that Mr. Cracknell was new but understood mediation and he noted that a lot of issues could be resolved with someone who new mediation and how to facilitate. He felt that what was accomplished in one week's time was amazing. Mr. Dempsey stated that he watched boards through the City and wondered why they did not talk to each other. He thanked the Board for their time and appreciated their service to the community.

Mr. Chris Bridges stated that he lived at 22 Dearborn Street and supported the proposed plan. As he could not be there in February, he wanted to state that he was against having a parking lot adjacent to his property and believed it would affect safety and the value of his property. The road was too small for parking.

Mr. Michael Stasiuk stated that he lived at 31 Dearborn Street, which was probably most impacted by the wall that had been mentioned previously. He also felt that Nick had done a great job and was glad that the owners had come around to seeing that this was their best choice. Addressing Ms. Rousseau, he stated regarding the conversations, that this could have gone a lot longer and, with no better alternative than what was now going to be proposed, could have gotten stuck. He had spoken about this topic originally because he was in support of the owners separating the houses. He had lived there for twenty-five years and they could talk a lot about what has happened on Dearborn Street but he stated this was an impressive coming together of people. He wanted to support the plan and noted that a lot had come out of talking beforehand.

Attorney Pelech stated that they had to remember that this Board had asked the Planning Department to get involved. Until someone asked the Planning Department to investigate, nothing had been done. They got involved because the Board asked them to.

Chairman Witham stated that they had a request to table Case #1-1 and #1-2 and he would entertain a motion.

Ms. Chamberlin made a motion to table the petition to the February meeting, which was seconded by Mr. Durbin.

Ms. Rousseau stated that she was abstaining from the vote. While she thought it was “nice that everyone in the neighborhood was getting along and was in agreement,” she felt this was an inappropriate action by the City Planning Department - this Board did not have the authority to ask them to “insert themselves” in a ZBA hearing. She stated that she was “appalled” and warned that they would be discussing this further. She maintained there was a legal process which had not been followed and did not want to be involved in this vote.

Chairman Witham commented that, based on the comments they had heard from all factions that were once not on the friendliest terms, this seemed like a coming together of the neighborhood through the work of the Planning Department proposing some possible ideas and looking at the big picture. It seemed to be successful and a step in the right direction. Instead of having these cases repeatedly coming before them and getting into these long drawn out debates, things would go a lot smoother if some common ground could be found before it came to the Board.

The motion to table the petitions to the February meeting was passed by a vote of 5 to 0, with Ms. Rousseau abstaining.

3) **Case # 1-3**

Petitioner: Sam & Lea Chase

Property: 604 Lincoln Avenue

Assessors: Map 148, Lot 15

Zoning District: General Residence A

Description: Construct a 4' x 19', 2 ½ story addition to the existing building.

Chairman Witham advised that the applicants had requested to postpone the petition to the February meeting.

Mr. Parrott made a motion to postpone hearing the petition, which was seconded by Mr. Durbin and approved by unanimous voice vote.

V. OTHER BUSINESS

No other business was presented.

VI. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 7:35 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk