

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

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

May 29, 2014

Reconvened from May 20, 2014

MEMBERS PRESENT: Chairman David Witham; Vice-Chairman Arthur Parrott;
Susan Chamberlin; David Rheaume; Alternate: Patrick Moretti

MEMBERS EXCUSED: Derek Durbin; Charles LeMay; Christopher Mulligan

Chairman Witham noted that there were only five members present and that four votes were needed to grant an application. He said all applicants had been informed that they could postpone, but no applicants had requested postponement prior to the meeting; however, he was aware someone might have changed their mind.

Mr. Moretti assumed a voting seat for the meeting.

II. APPROVAL OF MINUTES

A) November 19, 2013

*Vice-Chair Parrott made a motion to approve the Minutes as presented. Mr. Moretti seconded and the motion **passed** by a unanimous voice vote.*

B) February 19, 2014

*Mr. Rheaume made a motion to **approve** the Minutes with corrections. Vice-Chair Parrott seconded and the motion **passed** by a unanimous voice vote.*

III. PUBLIC HEARINGS - OLD BUSINESS

A) Case # 4-7
Petitioner: Kevin James Lilakos
Property: 36 Artwill Avenue
Assessor Plan 229, Lot 4
Zoning District: Single Residence B
Description: Allow a second dwelling unit above a garage.

- Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance under Section 10.440, Use #1.20 to allow a second dwelling unit on a lot where only one single family dwelling is permitted.
 2. A Variance from Section 10.513 to allow more than one freestanding dwelling unit on a lot.
 3. A Variance from Section 10.521 to allow a lot area of 0.3± acres per dwelling unit where one acre per dwelling unit is required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech said he thought the Board secretary told him there would be six voting members and requested a postponement considering there were only five. Ms. Walker said he was informed prior to the meeting that there would only be five voting members and he had two opportunities to respond earlier.

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. Rheaume made a motion to **postpone** the hearing to the June meeting and Mr. Moretti seconded. The motion to postpone **passed**, 4-1 with Vice-Chair Parrott opposing.*

A resident of 77 Hanover Street said the hearing had been continued twice, and said at this point in time people of interest had no idea when the hearing would be held. He said in other cases postponements were usually renotified. Ms. Walker said that was justified and the Planning Department would be willing to renotice, but the applicant would need to pay to re-advertise as they did for any other renoticing.

*Vice-Chair Parrott made a motion to **re-advertise** the petition with the cost for re-advertising to be paid by the applicant. Mr. Rheaume seconded and the motion **passed** by a vote of 5-0.*

Chairman Witham commented that it pained him to postpone, but he understood it was difficult with only five members present and he hoped to acquire another alternate Board member before long.

B) Case # 4-13

- Petitioners: Jamer Realty, Inc., owner, A. J. P. Billiards, Inc., applicant
 Property: 80 Hanover Street
 Assessor Plan 117, Lot 2-1
 Zoning Districts: Central Business B and Downtown Overlay
 Description: Year-round game of chance for charity.
 Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance under Section 10.440 to allow a use that is not permitted.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech appeared before the Board to request a postponement. He also pointed out that the requirement in the SRB District on the third variance was incorrectly stated, but said he would agree to take responsibility for renotification. Ms. Walker again said Attorney Pelech was notified twice prior to the meeting because he had three petitions for the meeting. She said both times he opted to go forward and now he was requesting another postponement. She said she would not have scheduled the second meeting for the month if she had known he was going to postpone.

Chairman Witham said it was the Board's protocol to notify applicants when they only had five voting members and this was the first time an applicant came to the meeting to request a postponement after notification.

**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

*Vice-Chair Parrott made a motion to **postpone** the petition to the June meeting. Mr. Rheaume seconded with the stipulation that the applicant make appropriate arrangements to re-advertise. The motion **passed** by a vote of 5-0.*

Chairman Witham said they would request an email or letter confirmation in the future and the applicant would lose the option to wait until the meeting to postpone.

IV. PUBLIC HEARINGS – NEW BUSINESS (continued from May 20, 2014.)

- 7) Case # 5-7
 Petitioners: KWA, LLC, owner & Barre & Soul, LLC, applicant
 Property: 165 Court Street (163A & B)
 Assessor Plan 116, Lot 27
 Zoning District: Character District 5
 Description: Parking for a yoga studio.
 Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
 2. A Variance from Sections 10.1111.10 and 10.1112.30 to allow a change to a yoga studio use without providing the required parking.

SPEAKING IN FAVOR OF THE PETITION

Ms. Andrea Barre of Barre & Soul, LLC appeared before the Board with her request for the operation of a fitness, yoga and ballet bar in the downtown area. She said she currently operated another studio in Massachusetts and the average class consisted of 8-20 people for each one-hour

class. Ms. Barre said there was municipal parking near Citizen’s Bank and other free parking areas could be utilized for her business. She said she also expected numerous patrons to come directly from their downtown jobs.

Chairman Witham asked Ms. Walker if new zoning ordinances would apply to this project. Ms. Walker said there had been a similar application for the same location a few months ago, but character based zoning had not been formally adapted yet. She said yoga would now be a permitted use. She said it had been advertised as being in Character District 5 and it was actually in Character District 4, but noted that all old Zoning parking rules still applied. Mr. Rheume asked for clarification on what character use would be used for the parking and Ms. Walker said they would use the health club use.

Mr. Rheume asked what the hours of operation would be and Ms. Barre said a typical day would begin at 9 a.m. and she was also hoping for a lunch hour class for working people to come in on foot. She said the prime time would be after work from 5:30 p. m to 8 p.m. She said there would be no retail so she only planned on opening 15 minutes before class.

Vice-Chair Parrott asked if she had observed the area for the busiest times and the availability of parking. Ms. Barre said she knew the municipal lot was always available and found parking at the Parrott Avenue lot every time she had been there in the afternoon, but she had not checked it at 6 p.m.

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. Mr. Rheume seconded.*

Ms. Chamberlin reviewed the criteria, noting that granting the variance would not be contrary to the public interest because a yoga studio was a small use business that would not generate a lot of traffic or parking. She said the variance would observe the spirit of the Ordinance to make business and parking spaces available so the City could continue to grow. She said it was a low intensity use so the actual parking demand would be far less than the 14 parking spaces required and could be accommodated by the use of neighboring lots or on-street parking. She said it would do substantial justice by encouraging businesses in the city.

Ms. Chamberlin said there was no indication that granting the variance would diminish the value of surrounding properties. She said the special condition would be that it was on the edge of the zone and that there would not be a fair and substantial relationship in applying the purposes of the Ordinance to this property and preventing the establishment of a yoga studio.

Mr. Rheume echoed Ms. Chamberlin’s comments, though he said he struggled the most with how granting the variance would observe the spirit of the Ordinance that called for 14 spaces and none were being provided. However, the applicant made a decent case that the requirement of the

Zoning Ordinance was probably overstated for this business since a yoga studio was probably a less intensive use than other health clubs. In addition, some users might walk from nearby businesses. He said another hardship was that this building had been around a long time and predated any concepts of providing on-site parking.

Chairman Witham added that the building was against the lot line on all four sides and would never have the ability to provide the required parking. He added that the proposed use mostly operated during off-hours from regular downtown business uses.

The motion passed by a vote of 5-0.

8) Case # 5-8

Petitioner: Steve A. Hart

Property: 181 Kearsarge Way

Assessor Plan 218, Lot 2

Zoning District: Single Residence B

Description: Demolish existing home and construct new single family home with garage.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.321 to allow a lawful nonconforming building to be reconstructed without conforming to the requirements of the Ordinance.
2. A Variance from Section 10.521 to allow a lot area and a lot area per dwelling unit of 10,577± s.f. where 15,000 s.f. is required.
3. A Variance from Section 10.521 to allow a right side yard setback of 9.72'± where 0'± exists and 10' is the minimum required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech appeared before the Board on behalf of the petitioner, Mr. Steve Hart. Attorney Pelech referred to the photos in the packet showing the existing condition of the lot in the subdivision of 200 lots that was created in the 1930's and 1940's. He said this lot was shaped like a home plate shape with five sides and frontage on Kearsarge Way and frontage on Birch Street, which was a paper street. He said part of Birch Street was constructed and maintained by the City up to Mr. Hart's driveway. He said the existing residence was built with a 0' right side setback that encroached onto the City of Portsmouth right of way at the back. He said the new home would meet all the setbacks except for 9.72' where 10' was required. He said the other two variances were required because the lot was non-conforming.

Attorney Pelech reviewed the five criteria and said granting the variances would not change the characteristics of the neighborhood in any substantial form. He said it would not threaten the public health, safety or welfare, would observe the spirit of the Ordinance and would not be contrary to the public interest. He said substantial justice would be done, as the hardship on the applicant if the petition were denied would not be outweighed by any benefit to the general public. He said the public would actually benefit as a result of moving the new structure further from the City's right of way and the creation of a more attractive home that would generate more taxes. He said the hardship arose from the special conditions, which were that the lot was an irregular shape, two-thirds the size of the requirement for the district and it was burdened with two rear yard

setbacks of 30' and a front yard setback of 30' as a result of abutting two streets that created a reduced buildable area.

Mr. Rheume noted that the relief of 3 ½" was minor and asked why the house couldn't be moved 3 ½". Attorney Pelech said it would not be cost effective to cut 3 ½" off the prefabricated home that came in predetermined dimensions. Mr. Rheume asked if anything could be done with the placement of the home and Attorney Pelech said the building envelope was already touching on three sides and they would need another variance if they changed the placement.

Mr. Rheume noted that an optional garage was listed in the variance description and asked if there would be a garage and Attorney Pelech said there was no garage now, but they were planning to add one.

Chairman Witham asked if the canvas storage would be removed and if the shed would remain. Attorney Pelech confirmed that the storage would be removed and the shed would remain. Ms. Walker said the building permit only listed the home and garage so the applicant would need to update their permit to include all structures on the lot to be sure they didn't go over the building coverage. Attorney Pelech said the shed was used in calculating the lot coverage.

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. Rheume made a motion to **grant** the petition as presented and advertised with the stipulation that the Planning Department would confirm that the building coverage would not exceed the 20% maximum building coverage allowed and that no further variance was needed. Vice-Chair Parrott seconded the motion.*

Mr. Rheume noted that the applicant's proposal to position the prefabricated building of a fixed size was probably the most logical location to observe the setbacks toward Kearsarge Way and the backlot area that was a municipal area. He said the side along the imaginary paper street was probably the side of most concern.

Mr. Rheume reviewed the criteria, noting that granting the variance would not be contrary to the public interest because the home was in keeping with the Zoning area in which it was located. The overall size and construction being proposed was a little bit larger than the existing structure that was on the lot, but it did not seem overly burdensome for the size of the lot and for the other homes in the neighborhood. He said the request for relief from the lot area below what was required was a fairly substantial percentage, but it was not so egregious given the overall size of many lots in the area. He added that the applicant was asking for 3 ½" relief on a 10' side setback, which was within reason and met the spirit of the Ordinance. He said substantial justice would be served by allowing the property owner to replace a smaller, older home with an odd layout with a more modern home with logical layouts and the addition of a garage, which was a basic requirement for most homes.

Mr. Rheume said the newly constructed home with a more logical layout and characteristics would probably sell for more, would not diminish surrounding property values and would actually have a positive effect on the surrounding property values in the area. He said the special conditions that created a hardship and distinguished the property from others in the area were the smaller square footage of the lot and its odd shape that required relief in terms of one side setback. He said owing to those special conditions there was no fair and substantial relationship between the general public purposes of the Ordinance and their application to the property and the proposed use was a reasonable one.

Vice-Chair Parrott concurred with Mr. Rheume's comments and added that the new house would not only be a nice upgrade for the neighborhood, but also be less nonconforming with regard to the setback.

Chairman Witham said they could advise the applicant and tell them to make the house 4" smaller to fit on the lot, but that would be costly considering how modular systems worked and he didn't see any gain to the public in squeezing out those inches.

*The motion to **grant** the petition with two stipulations was **passed** by a vote of 5-0.*

V. OTHER BUSINESS

A) Rules & Regulations

The possible inclusion of procedures to be followed when there are only five voting members was briefly discussed. Chairman Witham said they were sympathetic with having to get four positive votes with only five Board members present, but the real concern was that the Planning Department receive advance notice to schedule a calendar and send out notification accordingly, particularly for the general public who wanted to speak to the petition.

Chair Witham said there was need for another alternate member on the Board and he would like to encourage interested citizens to consider applying to the Mayor for consideration.

VI. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 7:48 p.m.

Respectfully submitted,

Jane K. Kendall
Acting Secretary