

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

March 17, 2015

MEMBERS PRESENT: Chairman David Witham; Vice-Chairman Arthur Parrott; Charles LeMay; Christopher Mulligan; Jeremiah Johnson; David Rheume, Patrick Moretti

MEMBERS EXCUSED: Derek Durbin

ALSO PRESENT: Juliet Walker, Planning Department

Mr. Durbin was not present for the meeting, and Mr. Johnson assumed a voting seat.

I. APPROVAL OF MINUTES

A) February 17, 2015

*The minutes were **approved** with minor corrections by unanimous vote.*

II. OLD BUSINESS

A) Request for Rehearing regarding property located at 173-175 Market Street.

*Mr. Mulligan moved to **deny** the rehearing request. Mr. LeMay seconded.*

Mr. Mulligan stated that it was clear to him that, whether or not Fisher vs. Dover applied, the project as it was presented to the HDC and on appeal to the Board was substantially different from the one previously under consideration. They were dealing with a much different and significantly-changed project, so he felt that there was no error related to the Fisher vs. Dover issue. The Board had gone through the merits of the application thoroughly, and he did not see anything in the motion for rehearing other than a strident disagreement with the opinions of the land use boards and the conclusions they reached.

Mr. LeMay concurred with Mr. Mulligan and said he had nothing to add.

*The motion to deny the rehearing **passed** with all in favor, 7-0.*

III. PUBLIC HEARINGS – NEW BUSINESS

- 1) Case # 3-1
Petitioners: Andrew E. & Alyssa A. Ervin
Property: 192 Park Street
Assessor Plan 149, Lot 53
Zoning District: General Residence A
Description: Construct a rear addition and room over relocated garage.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
 - 1. Variances from Section 10.521 to allow a left side yard setback of 2'± and a right side yard setback of 7'± where 10' is required for both.

DECISION OF THE BOARD

The Board acknowledged that this petition was withdrawn by the applicants.

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- 2) Case # 3-2
Petitioners: Brandon & Tara Seppa
Property: 151 Elwyn Avenue
Assessor Plan 112, Lot 49
Zoning District: General Residence A
Description: Construct a 17'± x 8'± two story rear addition and 8'± x 21'± deck with 4'± x 8'± extension.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
 - 1. A Variance from Section 10.521 to allow 34%± building coverage where 25% is the maximum allowed.

SPEAKING TO THE PETITION

Mr. Mark Fournier representing Brandon and Tara Seppa stated that the main purpose for the project was to create access to the garage from the inside of the house. It would also incorporate a mudroom and a 1st-floor bathroom. The second floor would have a bedroom extension. He went through the criteria, stating that the project met all five criteria and that there were no issues with neighbors or setbacks.

In answer to Mr. Mulligan's questions, Mr. Fournier stated that the addition would be 2-1/2 stories and that it had been downsized from the original submittal, as well as the deck. The amount of square footage of living space achieved by the addition would be 265 square feet. He also believed that McNabb Court that abutted the rear of the property was an active street.

Mr. Moretti asked what the height of the deck was from the ground. Mr. Fournier replied that it was 2-1/2 feet and noted that it was a landing and would be part of the landscaping, even though the plan showed it as wrapping around. Chairman Witham asked how the change would affect the lot coverage calculation. Mr. Fournier replied that it would make it 31%, and

he submitted the changed plan to the Commission. Mr. Witham asked if the last-minute changes had been driven by abutter concerns or economic ones, and Mr. Fournier said they were budgetary concerns.

**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 variance as presented and advertised. Vice-Chair Parrott seconded the motion, noting that the Board was voting on the revised plans handed out that evening showing a 62 s.f. rear deck, reduced from the 199 s.f. deck advertised.*

Mr. Rheume stated that the request was reasonable. Granting the variance would be in the public interest because there was a balance against any public interest for not seeing it happen. What was being requested was minor and probably less significant, with the last-minute changes presented. The big plus was that the property faced a back street, and the Board had not heard from any abutters from across McNabb Court. The spirit of the Ordinance would be observed because what had been 29% or so lot coverage was being expanded by about 5% and was down to about 2-3%. Substantial justice would be done because granting the variance would allow the homeowner to make better use of the entryway and give them a 1st-floor bathroom and also create a balcony for a proposed future office. Value of surrounding properties would not be diminished due to the improvements to the home. The addition was not so large that it would impede property values. The hardship associated with the property was its unique position and gave the homeowner the opportunity to expand the back of the property without impeding on the needs of neighboring properties, so no fair and substantial relationship would exist between the general public and the purpose of the Ordinance. It was a relatively small addition, even smaller than originally proposed due to the last-minute changes.

Vice-Chair Parrott reiterated that the Board was voting on the revised deck and concurred with Mr. Rheume’s comments.

*The motion to grant the petition, with the rear deck reduced to 62 s.f., was **passed** by a unanimous vote of 7-0.*

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- 3) Case # 3-3
 - Petitioner: State Street Discount House
 - Property: 3613 Lafayette Road
 - Assessor Plan 298, Lot 6
 - Zoning District: Gateway
 - Description: Allow a changeable sign to be changed more than once a day.
 - Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1290 to allow a changeable sign to be changed more than once a day.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech representing the applicant was present to speak to the petition. Chairman Witham asked him to address Fisher vs. Dover and why it did not apply to the petition.

Attorney Pelech stated that in January they had been seeking three variances and had proposed a sign that would change every two hours. The Commission had granted the variance for the sign square footage and the sign height and had denied the animated sign, but had said it was a changeable sign and could only be changed once a day. Attorney Pelech stated that they were back to request a sign that would change three times, and he felt that it was reasonable as well as a substantial change from the previous proposal, given the fact that it wasn't considered an animated sign because it had a fixed image that would be static until the sign changed 3-4 hours later. He did not believe that Fisher vs. Dover applied.

SPEAKING IN OPPOSITION TO THE PETITION, OR SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Mulligan stated that the Ordinance's definition of a changeable sign contained a sub-definition of an animated sign, saying that the sign on which the message changed more than once a day shall be regulated as an animated sign. Therefore, he still believed that it was an animated sign based on the Ordinance's definition, and he asked why the Board would disregard that definition. Attorney Pelech replied that the sign would not be animated because his definition of animation was some movement other than a fixed image. Mr. Mulligan stated that the Ordinance had a more refined definition and that they were bound by that definition. Attorney Pelech stressed that in January, the Board said it would be allowed as a changeable sign, and the definition of a changeable sign stated that it could only be changed once a day, which was the specific section they were applying for a variance from. They were not applying for a variance for an animated sign. Mr. Mulligan said the Board had concluded that it was an animated sign because it changed more than once per day, and he felt that Attorney Pelech was asking for the same relief.

Chairman Witham said he agreed with Mr. Mulligan that the Ordinance was clear on what an animated sign was, and he felt that it didn't seem right for the applicant to ask for a variance from a changed sign. The Board was bound to the way the Ordinance was written. He stated that he would support invoking Fisher vs. Dover.

DECISION OF THE BOARD

*Mr. LeMay made a motion to **invoke Fisher vs. Dover and decline to hear the petition.** Mr. Mulligan seconded the motion.*

Mr. LeMay said he agreed with the discussion, except that he didn't think that the Ordinance was unclear on whether the sign was animated because it made a clear distinction between an animated and a changeable sign. For convenience, the Ordinance drew a line between a

changeable sign that changed more than once a day. The Board had discussed it, and changing it every few hours wasn't the issue under merit. They decided that it would open the door to degrees of animation as time went on. Since the Ordinance was clear, they understood it at the time, and they addressed that particular variance and made their decision, so he didn't a material change from the original proposal. Mr. Mulligan said he would reiterate the questions and comments he had made to the applicant and thought it was identical relief as requested before, except for a very minor technical change. He thought Fisher vs. Dover did apply.

Mr. Rheaume said the Board ended up settling on a changeable sign because it would prevent the applicant from being able to change it during the course of the day. They were granting a lot of relief to the applicant, essentially a big-screen television that they allowed the applicant to put up, which allowed a lot of imagery not available on other signs seen in the Gateway area. Their concern was that, because of that big-screen television, there was a lot of opportunity to do stuff that was changeable. They had chosen the changeable sign because it would remain fixed throughout the day, and that was an important consideration. They left no opening to say that they'd feel better if the sign was changed three times a day. The reduction in the number of times was not substantial enough.

Vice-Chair Parrott stated that it was a change in degree only and was minor. He thought that the Ordinance as written was pretty liberal and allowed the change. Every day was not insignificant, and he found no justification why three times would be better than one time, so he didn't think it was a substantial change in the sense of Fisher vs. Dover.

*The motion to **invoke** Fisher vs. Dover and not hear the petition **passed** with all in favor, 7-0.*

 4) Case # 3-4

Petitioners: Anna R. Natowich & Matthew R. McPhee

Property: 308 Thornton Street

Assessor Plan 161, Lot 15

Zoning District: General Residence A

Description: Construct a 2-story rear addition and deck. Relocate expanded 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 structure to be extended, reconstructed or structurally altered without conforming to the requirements of the Ordinance.
2. Variances from Section 10.521 to allow the following:
 - (a) A left side yard setback of 0'± where 10' is required;
 - (b) A right side yard setback of 3'± where 10' is required.
 - (c) 47%± building coverage where 36%± exists and 25% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

The applicants Ms. Anna Natowich and Mr. Matthew McPhee were present to speak to the application. Ms. Natowich stated that the addition was a modest square-foot addition to their

small home. He stated that the garage work was necessary because the existing garage was very old and sat in a location that made it difficult for them and the abutting neighbors to get in and out easily. There also was not a lot of parking space. He stated that they wanted to increase the size of the garage and move it back. He also noted that the deck had been ruined because a tree fell on it, so they had rebuilt in bigger than it previously was and were asking for permission to keep the deck as rebuilt.

Ms. Natowich went through the criteria, noting that granting the variance would not be contrary to the public interest because it would improve the neighborhood's condition as well as their relationship with neighbors who shared the same driveway. She stated that the house would not become exceedingly larger. Mr. McPhee added that the parking situation was congested, so moving the garage would let everyone have parking space.

Chairman Witham asked the applicants to address the deed easement. Ms. Natowich stated that the deed regarded a section of their shared driveway, which they had already been granted permission to drive on by their neighbors. Chairman Witham asked whether they had done the lot coverage calculations on their own and included the driveway, and Ms. Natowich stated they had. There was further discussion with Ms. Walker about how the Planning Department calculated lot coverage and that it was based on the building permit, which was 47%. Chairman Witham stated that he had come up with a different percentage but was comfortable granting the variance because he clearly understood the project was based on the plan and photos.

Mr. Rheume asked the applicants if they had submitted a building permit for the deck. Mr. McPhee replied that they had not gone through that process. They also discussed an area of 18 inches on the property line that didn't count as structural square footage. Mr. Rheume asked if the applicants had had further surveying done. Ms. Natowich replied that they had not, but they had spoken to the neighbors and also checked the post markers at the back of the lot. She stated that the property marker sat in line with the fence, and the deck sat on the line. Chairman Witham noted that the applicant used tax maps for the area and used the second-floor square footage. Mr. Mulligan asked the applicant if they had seen a copy of the neighbor's proposed easement, and Ms. Natowich replied that they had signed it.

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. Walker suggested a stipulation that the numbers be confirmed because it looked to be closer to 36% coverage than the advertised 47%.

*Mr. Rheume made a motion to **grant** the variance as presented and advertised, with two stipulations:*

- 1. That the proposed new dimensions will be confirmed by the applicants and provided to the Planning Department so the specific new building coverage*

- will be in the record of the property for future reference.*
- 2. *That the applicants will provide a plan verified by a licensed surveyor indicating the exact location of the deck and where it would lie along the existing fence and property line.*

Vice-Chair Parrott seconded the motion.

Mr. Rheume stated that what was asked for was reasonable. He stated that there was already an addition added on years before to provide relief that the applicants simply wanted to finish out. He said that the proposed roof lines were acceptable and that replacing the small garage and realigning it would add setback relief. He said his biggest concern was the deck that was built without realizing all the requirements, but a zero-foot setback was something that the Board did not authorize and the deck could be brought back if there was an issue. Due to a potential long-term issue between the owner and the neighbor, Mr. Rheume said that he wanted to make sure a qualified surveyor would do a survey based on work already done.

Mr. Rheume stated that granting the variance would not be contrary to public interest because it was reasonable in terms of relief and was at the back of the property, so it would not change the essential character of the neighborhood. Many properties had odds and ends added throughout the years. Mr. Rheume stated that the spirit of the Ordinance would be observed, and the stipulation would address the zero-foot setback. He said the deck was not a light and air issue but was a structure that could be on the neighbor’s property. The building coverage was high but was actually less of a relief than originally asked for, and the other stipulation would determine what it was. He stated that substantial justice would be done because the applicant would be able to make use of their property with no harm to the public or abutters. Granting the variance would not diminish the value of surrounding properties because all the improvements would add to the total value of the property and the project would be in keeping with the nature of the neighborhood. There was positive feedback from the abutters. Mr. Rheume said the special hardship condition was that the lot was narrow and deep, and the request was driven by the driveway easements and the nature of the lot.

Vice-Chair Parrott stated that he concurred with Mr. Rheume and had no further comments.

The motion passed with all in favor, 7-0.

5) Case # 3-5

Petitioners: Michael Brandzel & Helen Long
Property: 39 Dearborn Street (Dearborn Lane)
Assessor Plan 140, Lot 3
Zoning District: General Residence A

Description: Construct a 100 s.f. shed in front yard. Construct an 8’ x 13’ single story addition and add shed dormers.

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 structure to be extended, reconstructed or structurally altered without conforming to the requirements of the Ordinance.

2. Variances from Section 10.521 to allow the following:
 - (a) A front yard setback of 5’ where 15’ is required.
 - (b) A right side yard setback of 4’ where 10’ is required.
 - (c) A rear yard setback of 3’ where 20’ is required.
3. A Variance from Section 10.571 to allow an accessory structure to be located in a required front yard.

Chairman Witham advised that the applicant had requested that the petition be postponed to the April meeting.

*Mr. Mulligan made a motion to **postpone** the petition. Vice-Chair Parrott seconded the motion. The motion passed with all in favor, 7-0.*

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- 6) Case # 3-6
 - Petitioners: Portwalk HI, LLC/Hanover Apartments LLC
 - Property: 15 Portwalk Place (195 Hanover Street)
 - Assessor Plan 125, Lot 1
 - Zoning Districts: CD5, Historic and Downtown Overlay
 - Description: The provision of parking for a first floor restaurant use.
 - Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
 1. A Variance from Section 10.1115.21 to allow 235 off-street parking spaces to be provided where 253 are required.

SPEAKING IN FAVOR OF THE PETITION

The Program Manager Mr. Tim Levine was present to speak to the application. He stated that the petition was for relief from the Zoning Ordinance that was repealed a few years before. He stated that the location of the coffee shop would activate the street during different times of the day; the customer base would come from surrounding apartments and hotels and he did not anticipate a lot of traffic or parking issues.

Mr. Rheume asked whether a retail unit would be divided into two, and Mr. Levine agreed. Mr. Rheume noted that it was the second request coming before the Board and that originally it was a plan to have a restaurant use. He asked Mr. Levine if he anticipated anything further for changes. Mr. Levine stated that he did not; he noted that there was an additional grease trap because the Technical Advisory Committee had requested that they put in one more, so there was a total of four grease traps, making it difficult to have further restaurant uses on the street.

Vice-Chair Parrott asked whether there would be an entertainment venue in the evenings. Mr. Levine replied that they did not have a liquor license and that it was primarily intended for morning and lunch usage.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Rick Becksted of 1395 Islington Street stated that there were 22 off-street parking spaces granted the previous month and he felt that it would become more congested. He stated that one of his concerns was that it was possible to exceed what was planned with enough time and money, and he asked the Board not to grant the variance because it would become 40 parking spaces.

With no one else rising, the Public Hearing was closed.

DECISION OF THE BOARD

Chairman Witham stated that he was aware of Mr. Becksted's concerns about recurring chipping away at parking requirements, but he viewed it differently because it was a coffee shop and felt that it wouldn't be a destination place. He stated that the customers would be mostly from the apartments and hotel and didn't see an adverse impact to parking, so he was comfortable with granting the variance. Mr. LeMay stated that he felt manipulated by the applicant's 1-2 punch and believed that no one would find parking simply to run in and get a cup of coffee but would instead double-park, which could present a nuisance. Mr. Rheume stated that he had some reservations as well because he didn't like the chipping-away effect and thought there would be requests for 15-minute parking spots. However, he said he knew that a lot of business people that would go to the coffee shop would have already parked downtown anyway, so he didn't feel that it would add that much more parking.

Mr. Mulligan said he was in favor of it and that the 18-space requirement was really a theoretical one, based on the old Ordinance's square footage of a restaurant. He felt that it was not an immutable law that every time the enterprise was in operation, there would be 18 parking spaces needed. He stated that he agreed with Chairman Witham that the primary users of the coffee shop would be apartment residents and hotel guests, and that he also agreed with Mr. LeMay that it was annoying that the applicant was coming back with it. He stated that he was okay with the application, however.

Vice-Chair Parrott stated that 38 seats in the coffee shop was not an insignificant number. He felt that it was a bit calculated because it was one month after the other approval, and there was opportunity for more conversions. He stated that he was uncomfortable with the way the request had been presented and couldn't really believe it had not been anticipated before. The area was already congested and he was not comfortable voting for it. Mr. Moretti agreed with Mr. LeMay regarding the chipping away in the downtown district and said he knew that people would have a hard time finding parking and might take up other important parking space. Chairman Witham said he thought that Mr. Mulligan's point about the Ordinance having evolved to incorporate the more current needs of the City was interesting. The most recent Ordinance had a requirement of zero parking for that use, so the spirit and intent for the type of use was zero. He also said he had to disregard the chipping away effect.

Mr. Mulligan noted that the parking requirement was based on the square footage of the space and not on the actual number of people who would be there, so supply and demand would determine how many people would go to the coffee shop, and if parking was a problem, they would go elsewhere. Mr. Johnson said he agreed with Mr. LeMay that the Board might have the wool pulled over their eyes, but he also agreed that it was a new project and they were trying to fill their parking spots.

*Mr. Mulligan made a motion to **approve** the petition as presented and advertised. Mr. Rheaume seconded the motion.*

Mr. Mulligan stated that the applicant's proposal created some variation in the uses available in the newly-created neighborhood, which was a good thing because it would promote the area's walkability and was an appropriate use for the available space. He said he did not think granting the variance would be contrary to the public interest or to the spirit of the Ordinance because the essential character of the zone would not be affected by the modest coffee shop. The public's health, safety and welfare would not be negatively affected. Granting the variance would result in substantial justice because the loss would go to the applicant if the Board strictly applied the old Ordinance's calculation of parking, as opposed to the more enlightened current Zoning requirement of no parking requirements for restaurant use. The loss to the applicant would not be counterbalanced by any gain to the public. The public had determined that it did not require the excessive amount of parking that used to be required. Mr. Mulligan stated that granting the variance would not diminish the value of surrounding properties. Literal enforcement of the Ordinance would result in unnecessary hardship because special conditions of the property was that it was a large property that already met 80-90% of parking requirements based on old standards. The primary users would be apartment residents and hotel guests, so applying the parking requirement had a fair and substantial relationship to the property. Mr. Mulligan said he felt that it was a reasonable use because it was seen all over town. Also, the use proposed would draw people out of their cars and out to the sidewalk, so it met the City's goal for walkability.

Mr. Rheaume concurred with Mr. Mulligan and stated that there were a lot of options for the coffee drinker market, and that the customers would be people walking around town who had already parked in town for something else. If the shop did require 17 parking spots, it would fail, but he thought it would be successful. He stated that the applicant had a vital business plan, and he thought it could work, and if it didn't, it would correct itself.

Chairman Witham said he would support it. He said he didn't want it to look like he was caving into developers because if it were an Olive Garden restaurant, there would be red flags. He said he'd be surprised if more than 10% of clientele drove to the coffee shop, and that carried a lot of weight with him. It would not have a negative impact on parking.

*The motion **passed** by a vote of 5 to 2, with Mr. LeMay and Vice-Chair Parrott voting against the motion.*

IV. OTHER BUSINESS

There was no other business.

V. ADJOURNMENT

*It was moved, seconded and **passed** by unanimous voice vote to adjourn the meeting at 8:25 p.m.*

Respectfully submitted,

Joann Breault
Recording Secretary