

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING  
EILEEN DONDERO FOLEY COUNCIL CHAMBERS  
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE  
PORTSMOUTH, NEW HAMPSHIRE**

**7:00 P.M.**

**DECEMBER 15, 2015**

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

**MEMBERS EXCUSED:**

**ALSO PRESENT:** Planning Department: Juliet Walker

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**I. APPROVAL OF MINUTES**

A) November 17, 2015

B) November 24, 2015

**DECISION OF THE BOARD**

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

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Chairman Witham announced that Cases # 11-8 and 11-15 had requests to be postponed, and the Board approved the requests by unanimous voice vote.

**II. PUBLIC HEARINGS - OLD BUSINESS**

A) Case # 11-3

Petitioner: Douglas F. Fabbricatore

Property: 536 Marcy Street

Assessor Plan 101, Lot 56

Zoning District: General Residence B

Description: Construct second story addition.

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 or structure to be extended, enlarged or structurally altered except in conformance with the Ordinance.
2. A Variance from Section 10.521 to allow a 0'± left side yard setback where 10' is required. *(This petition was postponed from the November 17, 2015 meeting.)*

**SPEAKING IN FAVOR OF THE PETITION:**

The owner Mr. Fabbriatore briefly described his petition and addressed the criteria.

In answer to Mr. Rheume's questions, Mr. Fabbriatore said he had come before the Board in July 2013 for approval that had expired, and that the difference from the original petition was that there was no change to the roofline. The work on the front of the house needed to be redone, both windows facing the side with the zero setback were existing windows, and the Historic District Commission (HDC) had approved the changes. In answer to Mr. Johnson's questions, Mr. Fabbriatore stated that the entire first floor structure would remain and that there would be a full basement on the main house.

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

No one rose to speak, and Chairman Witham closed the public hearing.

**DECISION OF THE BOARD**

*Mr. Rheume made a motion to **grant** the variances as presented and advertised. Vice-Chair Parrott seconded the motion.*

Mr. Rheume stated that the project was unique due to the building's slanted wall that created a zero foot setback. He thought the previous approval held because the addition's overall height on the back was below the roofline with no additional glazing and no ability to see into the neighbor's property. He said that granting the variance would not be contrary to the public interest because the interest was in maintaining the overall streetscape. The addition was in the back side of the house and difficult to see from the road. It would not change the overall characteristics of the neighborhood because the houses had very small lots, which the small expansion wouldn't change. Granting the variance would observe the spirit of the Ordinance because it was asking for a zero foot setback where 10 feet was required, and though the Board was normally reluctant to grant a zero foot setback, they had made an exception in 2013 due to mediating factors. The overall small size of the addition on a modest house was enough that it wouldn't affect the light and air of the neighbors. It would do substantial justice because the tipping balance for the modest addition went to the applicant. It would not diminish values of surrounding properties because it was a modest addition and far enough away from the neighbors, and there were no objections from the neighbors. The petition met the hardship criteria because it was an older home set right along the property line, so the applicant was just adding onto a preexisting condition.

Vice-Chair Parrott concurred with Mr. Rheume, adding that the petition was one of those exceptions where it seemed appropriate to approve a zero foot side setback due to the odd placement of the house on the lot. Also, the adjacent house was separated from the property by the driveway on the next house, so he felt it met the criteria.

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

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- B) Case # 11-8  
Petitioner: Tammy Gewehr  
Property: 13 McDonough Street  
Assessor Plan 138, Lot 49

Zoning District: Mixed Residential Business

Description: Provide less than the required off-street parking for a Bed and Breakfast.

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

1. A Variance from Section 10.1112.30 to allow two off-street parking spaces to be provided where three spaces are required for a Bed and Breakfast use.
2. A Variance from Section 10.1114.32 to allow off-street parking spaces that do not comply with the vehicular circulation requirements of the Ordinance.  
(*This petition was postponed from the November 24, 2015 meeting.*)

Mr. Rheume recused himself from the vote.

### **DECISION OF THE BOARD**

*Vice-Chair Parrott made a motion to **postpone** the petition until the January 19, 2016 meeting. Mr. Mulligan seconded the motion.*

*The motion to postpone the petition **passed** with all in favor, 6-0.*

#### C) Case # 11-14

Petitioners: Christopher L. & Anna D. Shultz

Property: 140 Orchard Street

Assessor Plan 149, Lot 38

Zoning District: General Residence A

Description: Rebuild barn in existing footprint and add separate dwelling unit.

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 or structure to be reconstructed except in conformance with the Ordinance.
2. A Variance from Section 10.513 to allow a second free-standing dwelling on a lot where only one free-standing dwelling is allowed.
3. A Variance from Section 10.521 to allow 4,218.75 ± s.f per dwelling unit where 7,500 s.f. is required.
4. A Variance from Section 10.573.20 to allow a rear yard setback of 10'± where 14.8' is required.
5. A Variance from Section 10.1112.30 to allow two off-street parking spaces to be provided where four are required. (*This petition was postponed from the November 24, 2015 meeting.*)

Mr. Rheume resumed his voting seat. Chairman Witham and Vice-Chair Parrott recused themselves from the vote, and Mr. LeMay assumed the Chairman's seat.

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

The owners Christopher and Anna Shultz were present. Mr. Shultz stated that the barn was failing and was a safety concern. They wanted the barn to be a livable space while maintaining the original look. They had a legal document stating that if the property changed hands, it would not be divided. He also read a letter of support from his neighbors and said the criteria were met.

Mr. Johnson noted that there were four parking spaces designated on the petition and not two. Ms. Shultz said that four cars could fit and that the immediate abutters approved. Mr. Rheume asked

whether the applicant had considered re-using the existing structure. Ms. Shultz replied that the foundation was bad and the wood was deteriorating, but that they would use parts of the barn to keep the look. In answer to further questions from Mr. Rheume, Mr. Shultz said that it would not be difficult to replicate the Victorian-type shingles, that glazing would not affect the building, and that they would not subdivide the property. Ms. Shultz further described the barn and the site.

Steven Sacks of 109 Orchard Street said he had a direct view of the barn and felt that his property's value would not be diminished nor the neighborhood's character changed. He urged the Board to grant the petition. In reply to Mr. Mulligan questions, Mr. Sacks said he had lived in his house for 30 years and there was plenty of street parking on the street.

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

No one rose to speak, and Chairman Witham closed the public hearing.

### **DECISION OF THE BOARD**

Mr. LeMay stated that the variances were substantial and that he was concerned about going from a conforming residential use with a minimum of 7500 square feet to 4218 square feet. He felt that a second free-standing unit was not allowed without compelling reasons. Mr. Rheume said his main concern was people taking a portion of their property and converting it into a residential use because he felt that the Board had a City-wide perspective to consider. Mr. Moretti noted that a lot of relief was being asked for, which other people in the neighborhood might request in the future. Mr. Mulligan further discussed the issue, saying his main concern was the variance for the required lot area because the 4200 s.f. dwelling unit was a lot of relief and he couldn't see the hardship.

*Mr. Rheume made a motion to **deny** the petition. Mr. Moretti seconded the motion.*

Mr. Rheume stated that the Board recognized unique characteristics of a property but had to judge a petition against all five criteria and protect the City as a whole. He said he had a difficult time with the unnecessary hardship test as well as observing the spirit of the Ordinance because he didn't see the property's uniqueness and the use was not reasonable enough to overcome the request for the dwelling unit's square footage. Mr. Moretti concurred with Mr. Rheume.

*The motion to **deny** the petition **passed** by a vote of 5 to 0.*

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#### D) Case # 11-15

Petitioners: Ryan & Jennifer Smith

Property: 100 Peverly Hill Road

Assessor Plan 243, Lot 51

Zoning District: Single Residence B

Description: Allow two residential dwelling units and a two story deck addition.

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 or structure to be extended, enlarged or structurally altered except in conformance with the Ordinance.
2. A Variance from Section 10.440 to allow a two-family dwelling where only a single family dwelling is allowed.
3. A Variance from Section 10.521 to allow a 4791.6± s.f. lot area per dwelling unit where 15,000 is required.

4. A Variance from Section 10.516.40 to allow a 21'± front yard setback where 24' is required for an unenclosed deck. *(This petition was tabled with a request for additional information at the November 24, 2015 meeting.)*

Chairman Witham and Vice-Chair Parrott resumed their voting seats.

### **DECISION OF THE BOARD**

*Vice-Chair Parrott made a motion to **postpone** the petition to the January 19, 2016 meeting. Mr. Rheume seconded the motion.*

*The motion to **postpone** the petition **passed** with all in favor, 7-0.*

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### **III. PUBLIC HEARINGS – NEW BUSINESS**

- 1) Case #12-1  
Petitioner: Judith L. Hiller & John B. Wilkens  
Property: 18 Manning Street  
Assessor Plan 103, Lot 67  
Zoning District: General Residence B  
Description: Appeal decision of the Historic District Commission  
Request: Appeal the decision of the Historic District Commission to deny a Certificate of Approval for the use of full screens on windows instead of half screens.

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

The owner Judith Hiller gave a history of the property and said she had not noted the HDC's stipulation in granting her petition before them for half screen. She described how she researched the Livermore Condominiums and other projects on Manning Street that had full screens. She felt that the process was arbitrary and said that screens were not mentioned in the bylaws.

Chairman Witham noted that the HDC stipulated half screens the first time around and then denied the petition when they discovered that full screens were used, so it was clear that the HDC made a stipulation that was not followed,. He said it placed the Board in a tricky spot of overruling stipulations. He also noted that the stipulation was also placed on the project that was heard just before Ms. Hiller's project. Mr. Johnson agreed that the Board was not charged with evaluating the process but only reviewed it through the HDC filter.

Mr. LeMay asked whether Ms. Hiller had replaced all the windows, and she agreed. In response to Mr. Rheume's questions, Ms. Hiller stated that the house was built in the mid-1930s, that some of the windows she replaced were original 2/2s, and that all the windows had screens. The house had 21 windows that were mostly uniform in size, and she said she needed screens because she had cats.

Mr. Pete Morin of 49 Pickering Street stated that he was in support of full screens in general to allow fresh air in and believed it should be an option.

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

No one else rose to speak, and Chairman Witham closed the public hearing.

**DECISION OF THE BOARD**

Mr. LeMay stated that he rode around Strawberry Banke and saw many antique homes with no screens, some older homes with combination screens, many homes with half screens and some with full screens. He noted that her home wasn't an antique one. He felt that an antique home was different from a 1930s home and thought the screen issue had to be within the property-specific context. Chairman Witham agreed, noting that there were plenty of houses with full screens, that it was not specifically written in the HDC guidelines, and that half screens was not a consistent decision. He did note, however, that there were two cases where half screens were required in the stipulations. Mr. Rheume and Mr. Moretti, after further discussion, stated that the applicant's home and age made a reasonable argument for full screens.

*Mr. Mulligan made a motion to **grant** the appeal and reverse the decision of the HDC. Mr. LeMay seconded the motion.*

Mr. Mulligan stated that the Board had given due consideration to the purposes and objectives of the Historic District as set forth in Section 10.631 of the Zoning Ordinance. He felt that the proposal to use full screens instead of half screens met the applicable review criteria in the Ordinance, specifically the review factors, one of which was the historic time period context or immediate setting of the proposal. He pointed out that the house was built in the 1930s and was not an antique one that was an immediate candidate for restoration and reformation in the District. The architectural features did not lend themselves to a similar requirement that the windows meet a certain series of design criteria. He stated that the review factor of recognizing historical events was not applicable and also noted that he had never considered screens from a technological point of view until Mr. Moretti explained how full screens presented an air flow benefit. He stated that all those factors supported the applicant's request to use full screens instead of half and met the Board's criteria. As for the encouragement of innovative uses of technological processes, he said Mr. Moretti's enlightening information about full screens was beneficial, and he didn't see why the property couldn't use those practices.

Mr. LeMay said he fully concurred with Mr. Mulligan.

Mr. Rheume, Mr. Johnson, and Chairman Witham said they would support the appeal and stated their reasons for doing so.

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

## 2) Case #12-2

Petitioners: Abbie J. & Lee M. Frank

Property: 169 Madison Street

Assessor Plan 145, Lot 53

Zoning District: General Residence C

Description: Replace rear deck & porch with 18'± x 24'± two- story addition.

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 extended, enlarged or structurally altered except in conformity with the Ordinance.
2. A Variance from Section 10.521 to allow a left side yard setback of 0'± where 10' is required.

3. A Variance from Section 10.521 to allow 42.45%± building coverage where 35% is the maximum allowed.

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

The owner Lee Frank stated that his family had outgrown their house and explained why the addition would be beneficial and how it would meet all the criteria.

Mr. Rheume said he wasn't convinced that the addition was a modest one, and he asked Mr. Frank whether he had considered making the addition smaller. Mr. Frank said he had tried to line up the addition with the front setback but added the extra foot so that the upstairs bedroom wasn't so narrow. Mr. Rheume asked how Mr. Frank's house footprint would relate to the property at 173 Madison Street after the work was done. Mr. Frank said his neighbor approved as well as his other neighbors. He further discussed the hall width.

Mr. Frank's architect, Michelle Shields, noted that the plan did not show the existing front porch or the rear deck. In answer to Mr. Rheume's question about the condition of 173 Madison up against Mr. Frank's home, Mr. Frank said it was paved up through the small section toward the back of the property and that there was a fence.

Chairman Witham said he had concerns with the scale of the project, especially the extent of the volume increase, and felt that the Board had to consider the intent of the Ordinance. Ms. Shields noted that four of the adjacent five properties had zero foot lots, but Chairman Witham said it had to be a stronger case for the Board to allow it. Vice-Chair Parrott said it was 5-1/2 feet of net growth.

Mr. Dave Getty of 173 Madison Street stated that he was in favor of the addition and had no issue with the zero setback. He said it would not benefit him if the setback was moved, and he had no concerns with the addition's size, the glazing, or light and air issues. Mr. Rick Connor of 141 Madison Street stated that he supported the project.

Chairman Witham said he was supportive of improvements and additions to the home but had a hard time with the substantial volume increase and the zero foot setback. He also noted that there might not be any more modest homes in Portsmouth in the future because they would all be supersized. Mr. Rheume said he was also concerned with the volume because the length of the addition was two-thirds the size of the original home. He felt that the Board had to be careful of creating larger homes that imposed on neighbors and said there were compromises for living near the downtown area. Vice-Chair Parrott said the house was very compact and the footprint of the addition was not that big. He thought the zero setback architecturally made sense because it would be in the back of the adjacent house and not up against their wall. He found the volume tough to deal with but admitted that the proposal would make the house friendly for three children.

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

No one else rose to speak, and Chairman Witham closed the public hearing.

#### **DECISION OF THE BOARD**

*Mr. Mulligan made a motion to **grant** the variances as presented and advertised. Vice-Chair Parrott seconded the motion.*

Mr. Mulligan stated that the zero setback architecturally made sense, given how the existing structure was sited, and that it would not encroach on the next-door dwelling but would extend beyond it. He further discussed the lot coverage request, noting that it was a very small lot with a small building envelope and that any type of reasonable addition would require some relief from lot coverage requirements. Mr. Mulligan stated that granting the variance would not be contrary to the public interest or to the spirit of the Ordinance because the essential characteristics of the neighborhood would still be residential and would pose no threat to the health, safety, and welfare of the public. It would result in substantial justice because the loss to the applicant if denied would be outweighed by any gain to the public if the Board held the applicant to his narrow buildable envelope. Granting the variance would not diminish the value of surrounding properties because the new addition would enhance their values as well as the applicant's home property value. It would not affect the multi-family or very large apartment buildings that surrounded the property. As for the unnecessary hardship, Mr. Mulligan said the property had special conditions that included a very small lot and small building envelope that made holding to the 10-ft side yard setbacks impossible. Since the existing structure was already on the lot line, it made sense for the addition to carry that forward. No opposition had been heard from the most affected neighbor, so there was no fair and substantial relationship between the proposed setbacks and the lot coverage requirements of the property. He felt that the petition should be granted.

Vice-Chair Parrott said he concurred with Mr. Mulligan and had nothing to add.

Mr. Rheume stated that he would not support the motion because he felt that the Board had to be careful when people bought small houses and just kept adding on to it. Chairman Witham said that the petition did not overcome the public interest hurdle or satisfy the hardship, and special conditions did not exist. He further explained his reasons for not supporting the petition.

*The motion to grant the variance **failed**, with three voting in favor of the petition and Mr. Moretti, Mr. Rheume, Mr. LeMay and Chairman Witham voting against.*

3) Case #12-3

Petitioner: Pamela Gould

Property: 209 Clinton Street

Assessor Plan 159, Lot 27

Zoning District: General Residence A

Description: Construct a 10'6"± x 30'± single story rear addition.

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 extended, enlarged or structurally altered except in conformity with the Ordinance.
2. A Variance from Section 10.521 to allow a left side yard setback of 9'± where 10' is required.
3. A Variance from Section 10.521 to allow 27.5% building coverage where 25% is the maximum allowed.

Mr. Moretti recused himself from the vote.

**SPEAKING IN FAVOR OF THE PETITION:**

The owner Pamela Gould reviewed her petition and addressed the criteria. She said the setback requirement affected only one neighbor, who had no objection to it.



Mr. Rheume asked whether the intended use for the back was an extended kitchen area. Ms. Gould agreed and explained the layout for entering the house from the back.

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

No one rose to speak, and Chairman Witham closed the public hearing.

**DECISION OF THE BOARD**

*Mr. Mulligan made a motion to **grant** the variances as presented and advertised. Vice-Chair Parrott seconded the motion.*

Mr. Mulligan stated that the petition was very similar to the previous one, but the amount of relief was drastically less. Granting the variance would not affect the health, safety, and welfare of the neighborhood or have any impact that would modify its essential characteristics. The addition was very small, so substantial justice would be given because any gain to the public by requiring strict compliance with the Ordinance was outweighed by the loss to the applicant. Granting the variance would not diminish the value of surrounding properties because a very modest amount of relief was requested. As for unnecessary hardship, the lot was unique because it had frontage on two different streets. The amount of encroachment on the side yard setback was very minimal and became less so as the expansion went out from the house, so there was no fair and substantial relationship between the setback requirement and the lot coverage requirement as they applied to the property. He noted that it was similar to the previous petition except that the applicant was asking for a lot less relief, and he thought the Board could approve it as presented and advertised.

Vice-Chair Parrott concurred with Mr. Mulligan, adding that it was a small request, and where the addition was positioned on the back of the property, it was not close to any of the neighbors and was appropriate to the house's size and design.

*The motion **passed** with all in favor, 6-0.*

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**IV. OTHER BUSINESS**

There was no other business.

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**V. ADJOURNMENT**

*It was moved, seconded and **passed** by unanimous voice vote to adjourn the meeting at 9:30 p.m.*

Respectfully submitted,

Joann Breault  
Recording Secretary