

BY: VIEWPOINT & HAND DELIVERY

January 23, 2024

City of Portsmouth
Attn: Stefanie Casella, Planner
Zoning Board of Adjustment
1 Junkins Avenue
Portsmouth, NH 03801

**RE: Objection to Request for Rehearing filed by Maxene Feintuch
Variance Application of Mark and Julie Franklin
168 Lincoln Avenue, Tax Map 113, Lot 6**

Dear Stefanie,

Enclosed herewith, please find the Objection of Mark and Julie Franklin, to the Request for Rehearing filed by Maxene Feintuch, pursuant to RSA 677:2. This Objection is being filed electronically with a copy being hand-delivered to the Planning Department.

Sincerely,



Derek R. Durbin, Esq.

**CITY OF PORTSMOUTH
ZONING BOARD OF ADJUSTMENT**

OBJECTION TO REQUEST FOR REHEARING

**168 Lincoln Avenue
Tax Map 113, Lot 6
Mark and Julie Franklin
(Owners)**

Mark and Julie Franklin are the owners of property at 168 Lincoln Avenue, Portsmouth (the "Property"). On December 19, 2023, the Board granted the following variances for the Property to allow for the demolition of a detached garage, rear deck and front porch and the construction of an addition with garage below, bulkhead and new front porch.

1. Variances from Section 10.521 to allow:
 - a) An 8.5' front yard where 15' is required (front porch);
 - b) A 7' right yard where 10' is required (bulkhead);
 - c) 33% building coverage where 25% is maximum allowed.
2. Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance.

On or around January 16, 2024, Maxene Feintuch, owner of abutting property located at 180 Lincoln Avenue, filed a Request for Rehearing, pursuant to RSA 677:2. The entire basis for the request is the Board's alleged failure to "determine clearly and definitively that the standards outlined in the Fisher v. City of Dover case were satisfied". Specifically, it is Mrs. Feintuch's contention that the Board was *obligated* prior to hearing the application to vote on whether a "material change of circumstances affecting the merits of the application has [] occurred" or the application is "materially differs in nature and degree from its predecessor...". *Fisher v. Dover*, 120 N.H. 187, 190 (1980). Mrs. Feintuch provides excerpts of statements purportedly made by different Board members during the public hearing to support her case for rehearing. However, none of the excerpts are followed with a citation; therefore, the statements cannot be properly put into context or verified or identified with a specific Board member. Moreover, none of the purported statements appear in the Meeting Minutes.

Ultimately, the burden of proof is on the person moving for rehearing to establish that the Board's decision was unlawful or unreasonable. Mrs. Feintuch has failed to meet this burden through her Request for Rehearing.

Mrs. Feintuch claims “that as a 29-year resident of this city, I believe that justice is achieved by rehearing this matter in compliance with the framework of the *Fisher v. Dover* case. This will ensure that all comments and concerns are properly taken into consideration.”

The Board heard comments from members of the public that both opposed and supported the application. It then took a significant amount of time to discuss and deliberate upon the variance requests. In the end, the Board’s vote was split 4-3.

Mrs. Feintuch cannot fairly argue that the Board acted unlawfully or unreasonably in its deliberations or failed to properly consider the public’s comments. The fact that Mrs. Feintuch has resided in Portsmouth for 29 years is commendable, but has little relevance to the Board’s decision-making process.

The Meeting Minutes and written record demonstrate that the Applicant, through undersigned counsel, addressed the *Fisher v. Dover* criteria in the Application Narrative and as a preliminary matter at the public hearing. Both the Applicant and Chairwoman, Eldridge, gave the Board an opportunity to comment on *Fisher v. Dover* before Applicant’s counsel proceeded with the merits of the application. No one on the Board raised any issues with *Fisher v. Dover* after being given an opportunity to. As such, Applicant’s counsel properly proceeded with the merits of the application.

Article VII, 7. of the Board of Adjustment Rules and Regulations for the City of Portsmouth states as follows:

When a previously denied application comes back before the Board, the Board *may* move to determine that the Board cannot lawfully consider the merits of the application because a material change of circumstances affecting the merits of the application has not occurred and the application is not for a use that materially differs in nature or degree from the previous application (*emphasis added*).

The burden of proof lies with the applicant to prove otherwise through their application submittal. No presentation time or public comment session is to be allotted at the scheduled meeting though the Board holds the right to ask the interested parties questions.

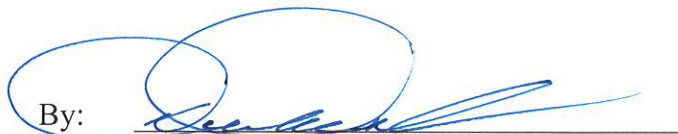
Whether or not the Board moves to determine that it cannot lawfully consider the merits of the application is a discretionary decision. In the present case, no one on the Board chose to exercise this discretion and make a motion to invoke *Fisher v. Dover*. Accordingly, the Applicant presented the application and the Board properly voted to approve it. The fact that the Board approved the current application is evidence itself that it was materially different from the application denied in March. The Applicant’s Narrative, which is attached hereto for reference, is also evidence of the differences between the March and December applications and nature of the relief being sought.

Respectfully Submitted,

Mark and Julie Franklin, Applicants
By and Through Their Attorneys,

Durbin Law Offices PLLC

January 23, 2024

By: 

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