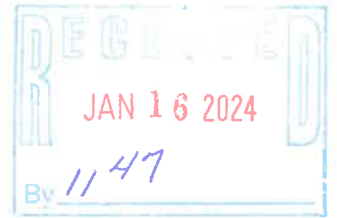


To: Stephanie Casella, Portsmouth Zoning Board of Adjustment
From: Maxene Feintuch, 180 Lincoln Avenue, Portsmouth, NH
Date: January 12, 2024
Regarding: Request for a rehearing on the variance application of Mark and Julie Franklin, 168 Lincoln Avenue, Portsmouth



In compliance with NH RSA 677:2, I am requesting a rehearing on the variance application that was approved December 19, 2023 for the owners of the property located at 168 Lincoln Avenue. I am a direct abutter to the subject property and will be impacted by any decision made by the Board.

For the reasons below, I feel that a rehearing is warranted.

1. Before the Board took up the matter of the variance requested by the Franklins on December 19, 2023, it was obligated to determine clearly and definitively that the standards outlined in the Fisher v. City of Dover case were satisfied. As the Board will remember, this application was first presented on March 29, 2023 and was denied. This December 19 hearing was the second hearing on the variance request.
2. On December 19, 2023, the Chair did not make any type of clear or concise call for a discussion or vote on whether this application “materially differs in nature and degree from its predecessor.” This opinion is supported by the video on record.
3. Absent a clear, concise discussion and ultimate vote on whether the test outlined in Fisher v. City of Dover had been satisfied, the Board failed to set the framework for whether or not the second hearing should proceed at all. In other words, a decision and vote on the applicability of the Fisher v. City of Dover test was the first thing that should have occurred at the December 19 hearing. Any discussion on the issues or merit of the Franklins’ second variance application was premature absent a decision on the “Fisher test.”
4. In fact, Board members were confused about whether this variance application should have been considered. Please see the following quotes from Board members prior to the vote:

“I think we have a Fisher v Dover problem, The same variances are being requested. The change between the initial request and this request is not that significant. And, so I don’t think we have the ability to consider this.”

“I got confused about when it (Fisher v Dover) had to come up.”

“It would have been better if we had discussed it (Fisher v Dover) as a Board ...”

“As has been pointed out by some of the speakers tonight, they (the Franklins) gave up a porch, and they took away about a foot and half on the width of their mudroom, which narrowed that up a little bit to try to reduce the total footprint there, and that was about all that was given up from the March application to this application here.”

“Some feel that it (the application) *does* implicate Fisher v Dover.”

“...even though they’re asking for the same variances, there has to be a change in the application, and as David pointed out, the difference between that (first) application and this one is losing the side porch. As he said, it’s not a big change because everything else is still there....”

“It’s not the variance request that invokes Fisher v Dover, it’s the totality of the application.”

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.

Respectfully,



Maxene Feintuch
180 Lincoln Avenue, Portsmouth, NH
mfeintuch1@comcast.net
603-969-1489



CITY OF PORTSMOUTH

Planning Department
1 Junkins Avenue
Portsmouth, New
Hampshire 03801
(603) 610-7216

ZONING BOARD OF ADJUSTMENT

December 26, 2023

Mark N Franklin and Julie S Franklin
168 Lincoln Avenue
Portsmouth, New Hampshire 03801

RE: Board of Adjustment request for property located at 168 Lincoln Avenue (LU-23-196)

Dear Property Owners:

The Zoning Board of Adjustment, at its regularly scheduled meeting of **Tuesday, December 19, 2023**, considered your application for demolishing the detached garage and constructing an addition to the primary structure that includes an attached garage which requires the following: 1) Variance from Section 10.521 to allow a) eight and a half (8.5) foot front yard where 15 is required, b) seven (7) foot right yard where ten (10) feet is required, and c) 33% building coverage where 25% is the maximum allowed; and 2) Variance from Section 10.321 to allow a nonconforming structure or building to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on Assessor Map 113 Lot 6 and lies within the General Residence A (GRA) District. As a result of said consideration, the Board voted to **approve** the request as presented and advertised.

The Board's decision may be appealed up to thirty (30) days after the vote. Any action taken by the applicant pursuant to the Board's decision during this appeal period shall be at the applicant's risk. Please contact the Planning Department for more details about the appeals process.

Approvals may also be required from other City Commissions or Boards. Once all required approvals have been received, applicant is responsible for applying for and securing a building permit from the Inspection Department prior to starting any project work.

This approval shall expire unless a building permit is issued within a period of two (2) years from the date granted unless an extension is granted in accordance with Section 10.236 of the Zoning Ordinance.

The Findings of Fact associated with this decision are available: attached here or as an attachment in the Viewpoint project record associated with this application and on the Zoning Board of Adjustment Meeting website:

<https://www.cityofportsmouth.com/planportsmouth/zoning-board-adjustment/zoning-board-adjustment-archived-meetings-and-material>

The minutes and audio recording of this meeting are available by contacting the Planning Department.

Very truly yours,

A handwritten signature in cursive script that reads "Phyllis Eldridge". The signature is written in black ink and is positioned above the printed name.

Phyllis Eldridge, Chair of the Zoning Board of Adjustment

cc: Shanti Wolph, Chief Building Inspector

Rosann Maurice-Lentz, City Assessor

Derek Durbin, Attorney, Durbin Law Offices PLLC

Findings of Fact | Variance

City of Portsmouth Zoning Board of Adjustment

Date: 12-19-2023

Property Address: 168 Lincoln Avenue

Application #: LU-23-196

Decision: **Grant**

Findings of Fact:

Effective August 23, 2022, amended RSA 676:3, It now reads as follows: The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. **The decision shall include specific written findings of fact that support the decision. Failure of the board to make specific written findings of fact supporting a disapproval shall be grounds for automatic reversal and remand by the superior court upon appeal, in accordance with the time periods set forth in RSA 677:5 or RSA 677:15, unless the court determines that there are other factors warranting the disapproval.** If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.

The proposed application meets/does not meet the following purposes for granting a Variance:

Section 10.233 Variance Evaluation Criteria	Finding (Meets Criteria)	Relevant Facts
10.233.21 Granting the variance would not be contrary to the public interest.	YES	<ul style="list-style-type: none"> The requested variances are not contrary to the public interest because the public interest does not manifest and the zoning ordinance doesn't deal with the bulky issue, and the public interest allowed for small dimensional setback items.
10.233.22 Granting the variance would observe the spirit of the Ordinance.	YES	<ul style="list-style-type: none"> The requested variances are not contrary to the public interest because the public interest does not manifest and the zoning ordinance doesn't deal with the bulky issue, and the public interest allowed for small dimensional setback items.

<p>10.233.23 Granting the variance would do substantial justice.</p>	<p>YES</p>	<ul style="list-style-type: none"> • It is difficult to find a new house, so justice is serviced by allowing the applicant to continue to reside in his house and to make necessary changes to support his family.
<p>10.233.24 Granting the variance would not diminish the values of surrounding properties.</p>	<p>YES</p>	<ul style="list-style-type: none"> • There are competing assessments from a realtor and her spouse and from a neighbor, so since the Board has evidence from both sides, it came down in favor of a neutral.
<p>10.233.25 Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.</p> <p>(a)The property has special Conditions that distinguish it from other properties in the area. AND (b)Owing to these special conditions, a fair and substantial relationship does not exist between the general public purposes of the Ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one. OR Owing to these special conditions, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is therefore necessary to enable a reasonable use of it.</p>	<p>YES</p>	<ul style="list-style-type: none"> • It is hard in the current real estate market to find a larger home to accommodate a family. The zoning ordinance is only minimally different from what is being asked for, and special circumstances existed and the purpose is a reasonable one. • The actual yard setback is for the one-story porch and the hardship was the undersized lot. • It is also a corner lot, so that creates special conditions where there is no fair and substantial relationship to the property.