

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

7:00 P.M.

**APRIL 25, 2017 Reconvened
From April 18, 2017**

MEMBERS PRESENT: Chairman David Rheaume, Vice-Chairman Charles LeMay, Arthur Parrott, Jeremiah Johnson, Peter McDonell, Alternates James Lee and John Formella

MEMBERS EXCUSED: Patrick Moretti, Christopher Mulligan

ALSO PRESENT: Juliet Walker

The alternates Mr. Lee and Mr. Formella assumed regular voting seats in the absence of Mr. Mulligan and Mr. Moretti.

II. PUBLIC HEARINGS – NEW BUSINESS

10) Case 4-10

Petitioners: Lauren H. Wool and Jeffrey Bower

Property: 53 Summit Avenue

Assessor Plan: Map 230, Lot 14

Zoning District: Single Residence B

Description: Construct an 8'± x 8'± mud room with a 4'± x 4'± covered front entry.

Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:

1. A Variance from Section 10.521 to allow an 11'8"± primary front yard where 30' is required.
2. A Variance from Section 10.321 to allow a lawful nonconforming building to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance.

SPEAKING IN FAVOR OF THE PETITION

The applicant Jeffrey Bower was present to speak to the petition. He reviewed the criteria and said they would be met.

Vice-Chair LeMay asked how old the house was. Mr. Bower said it was built in 1937.

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

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

DECISION OF THE BOARD

*Vice-Chair LeMay moved to **grant** the variances as presented and advertised, and Mr. Lee seconded.*

Vice-Chair LeMay said it was a moderate variance and that, with the property's history, age, and lot siting, along with the nature of the improvement, it appeared to be a reasonable expansion of the footprint and consistent with the neighborhood. He stated that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance, given the fact that the proposal would not change the nature of the neighborhood at all. It would do substantial justice because it would allow the family to have a small improvement of their property and the functionality without encroaching on the public rights. He said that granting the variances would not diminish the value of surrounding properties and would probably enhance them. He noted that the hardship was the siting of the lot and the age of the house, and the house itself had an existing nonconforming use, and it would be just a small increase in the encroachment. He said for those reasons, he felt the variances could be granted.

Mr. Lee said he concurred with Vice-Chair LeMay and had nothing to add.

*The motion **passed** by a vote of 7-0.*

11) Case 4-11

Petitioners: Colman C. Garland & North Woods Revocable Trust, John D. Rust, Trustee & Rust Family Trust, Libby K Rust, Trustee, owners, & David Calkins, applicant
 Property: Off Moffat Street
 Assessor Plan: Map 243, Lots 25 through 28
 Zoning District: Single Residence B
 Description: Provide less than the required frontage while creating two residential lots from four existing lots.
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including a Variance from Section 10.521 to allow 0'± continuous frontage where 100' is required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Derek Durbin on behalf of the applicant was present to speak the petition. He noted that a similar application was brought before the Board in February and granted for frontage and lot area. He said the only thing that changed was the status of the streets that would provide access to the proposed consolidated lots. Attorney Durbin said the applicant met with the neighborhood residents as well as City officials, and the result was the February conceptual plan that proposed a connector roadway between Swett and Woodworth Avenues through Moffat

Street. He said the City had expressed concerns about trash pickup and emergency vehicle access. He said the applicant's team had a meeting with the Planning Department prior to the February meeting, who recommended that they move forward with the variance relief request. In February, abutting landowners had asked that the City release portions of the paper street to them. The first request was granted by the City Council, which exempted the corner of Moffat Street and Woodworth Avenue. Attorney Durbin said it did not affect the project because it would still allow for the connector, and it would also not impede development plans.

Attorney Durbin stated that, subsequent to that, the 85 Woodworth Avenue owner's request did impact the plan, in that if the release was granted by the City Council, a 20-ft wide section of Woodworth Avenue and Moffat Street would be released to those landowners. He said the Planning Board recommended that it be approved, and it had gone to the City Council. He said the applicant needed approval from the City Council for issuance of building permits if he was granted relief that night. He pointed out that there was some frontage on a public street, frontage on Swett Avenue, and also some access off Moffat Street, which was the portion that the City maintained. He said they put forward a conservative zero frontage request to the Board, noting that the Planning Department said it was the last two buildable lots. Attorney Durbin said that if the Board denied the variance relief, it would leave the lots without any type of access of ability to develop. He said they tried to accommodate the concerns of the neighbors and the City's request to provide the connector loop.

Vice-Chair LeMay asked why it was okay to have a driveway coming down the paper street when it wasn't okay to have a connector loop, and noted that both had driveways and accessways on areas that were paper streets. The applicant Mr. Calkins showed where the improvement was proposed and said it was reasonable to assume that they could put a driveway in those spots. He said their initial concept was that the streets were public and that he still had the right to access his land. He said an easement would be granted to access his property.

Attorney Durbin stated that the City Planning Department's opinion at this point was that the rights to these paper portions of these streets had reverted back to private ownership by the abutters to the center line of the roads depicted on the tax map, essentially 20' plus or minus to the center line. Even if you took away any type of public street frontage from the proposed consolidated lot off Swett, the landowner would still have 20 feet to where this portion of Swett Avenue ran on the tax map. He said they still had abutting property to the public street so there was direct access over the 20-ft strip of land that had reverted back to the current landowners to access the lot. He stated that there was an implied easement right for the most direct access to their lot which enabled the applicant to either propose access off of Swett Avenue or from Woodworth Avenue. The area would have to be improved on Woodworth that technically in Conceptual Plan 2 crosses over what appears to be abutting property or paper street here, but he said there was an implied easement right to be able to do that. He said the applicant put forth two conceptual plans to give different options to the Planning Board, once they were there, to access the lots, and he believed that he had they had the right to access both lots which he believed the City would not dispute. It was a case of which way was more reasonable and made more sense at this point. Attorney Durbin stated they presented two conceptual plans but it was conceptual and the issue before the Board was whether or not it was reasonable to grant zero frontage relief off a private drive. He noted that in 2012, the Board approved a similar although not identical request for property off Dodge Street, where the same principles applied. He had submitted a copy of the Minutes of that meeting.

Mr. McDonell asked whether the plan was to have the 18' wide driveway be on both the 20' of street on the applicants' side of the road as well as the 20' that the abutters were claiming. He asked if it was correct that the plan was to have an 18' wide driveway beyond the applicant's 20' strip of land. Attorney Durbin stated it was in one conceptual plan. In the other conceptual plan that showed the separate access points, that would depict the driveway over what would appear to be paper street or potentially an abutter's property. This reverted to the fact that there never had been a formal legal determination. After speaking with City Attorney Sullivan, he said it would take an enormous amount of research to determine whether these paper portions of streets were ever accepted by the City or not accepted, or received implied acceptance. He said the Planning Department said the rights on the paper portions of the street were reverted back to private ownership, but he felt that either of the conceptual plans was viable from a legal perspective and was just a matter of which one would make the most sense. Mr. McDonell asked Attorney Durbin for confirmation that if, assuming the neighboring landowners did get that 20' strip of land that abutted their property to the center line of Moffat, the intent was not to have the driveway encroach on the neighbor's property and Attorney Durbin stated that they would not be proposing to encroach on any abutter's property in that respect.

Chairman Rheume said it looked like the 175 Swett Avenue property did have current access to that little piece of Moffat Street. Attorney Durbin agreed and said there was an improved portion there that the abutter might have done. He said the City plowed about half of the fronting portion of the proposed consolidated lot. Chairman Rheume asked which lots had tried to exercise rights on the paper streets. Attorney Durbin showed a depiction of it to the Board.

Chairman Rheume asked whether Attorney Durbin felt that whatever the City Council did would not affect his proposal. Attorney Durbin said that they agreed to disagree with the City on the status of the legal street and assumed that the request would be granted. He said if a legal determination was made saying that the paper portions were public, the applicant would have the relief he needed and there would be no issue, but the Planning Department said the rights reverted back to private ownership, which was the reason for the applicant's proposal. He said he thought it would alleviate most of the abutters' concerns and provide the needed access.

Chairman Rheume asked why the Board should act before the City Council action. Attorney Durbin said the City Attorney and the Planning Department agreed that the proposal was the appropriate process. He referred to a Statute that stated that if someone proposed to develop lots off a private street and there had never been an Ordinance stating that the City could issue a building permit, then the applicant had to seek approval from the City Council, which was contingent upon the entry of an agreement regarding the maintenance of that private roadway. Attorney Durbin said the applicant disagreed because he was creating a private driveway, not a roadway. Attorney Durbin said he thought they would present the proposal to the City Council after asking relief from the Board so that all the City Council could do was determine whether it could issue a building permit off a non-private way.

Chairman Rheume asked whether the proposed structures on the two lots were the same as those on the previous application. Attorney Durbin said that the only thing that changed was how the applicant might have to access the lots.

Attorney Durbin addressed the criteria. He noted that the licensed appraiser said there would be no diminishment of surrounding properties and that there were actually five lots of record. He said the applicant tried to appease the abutters and the City, and that the proposal would give the applicant and landowners the ability to develop the lots.

Mr. McDonnell said it could be argued that there might be emergency services needing access. Attorney Durbin said that they would provide private access and a safe turnaround for both consolidated lots.

Mr. Calkins said he tried to develop the process in a way that would be acceptable to the City. He said he had been unable to move forward because he encountered more complexity with the roads but was trying to work with the City and make the development reasonable for everyone. He said that the emergency service access would be incorporated at a later date.

SPEAKING IN OPPOSITION TO THE PETITION

Attorney David Howard stated that he represented Duane Hoeman of 175 Swett Avenue. He stated that the Staff Memo and the agenda had a discrepancy. The agenda only listed Section 10.521 of the Ordinance that the applicant was seeking a variance from and that was the only part of the Ordinance that he was prepared to object to. However, he noted that Section 10.521 was something that he felt would have to be re-notified to the public or there would be grounds for an appeal on that.

Attorney Howard stated again that he represented Mr. Hoeman and his family in opposition to the petition. Mr. Hoeman and his family had lived at 175 Swett Avenue since 1971 when the house that existed there was built. 175 Swett Avenue directly abutted the property, and his driveway was part of the paper portion of Moffat Road. He said the centerline of that portion of the paper street which abutted Mr. Hoeman's home belonged to him by law. He said the whole driveway had been acquired by the Hoemans by adverse possession and that they had maintained the driveway for over 20 years. Attorney Howard said the developer would not be granted permission to utilize that driveway, and that private property rights had to be addressed. Attorney Howard said that the applicant had to meet all five criteria, but he failed the first two because if the variance was granted, it would injure the public rights of others and would diminish surrounding properties. He said the owner would potentially have to share his driveway with other property owners. He said a developer could not build if access did not exist.

Attorney Howard requested that the Board deny the application. He said the analogy with the Dodge Avenue property wasn't viable because the owner was the only one affected. Attorney Howard also requested that, if the petition was approved, the stipulations from the previous time be included and that it be sent back for site review. He noted that the two plans submitted were not provided to the public and reiterated that they had to be re-advertised or there were grounds for an appeal.

Chairman Rheume asked, to fully understand, if his argument was that his client had improved that portion of Moffat Avenue leading to Swett as a driveway and was now saying that, because of that action, they had a claim for adverse possession. Attorney Howard stated that was their position. He stated he had heard the term, "reverts" but it was their position that it was actually vested as with the prior statute, the property vested back to the property owner if they weren't

developed within 20 years.. Chairman Rheaume asked if, in that 20' they were also indicating that their client had done some additional development beyond the 20' mark and Attorney Howard they were, adding that Mr. Hoeman had been using it for over 20 years.

Mr. Lee asked if one of the elements of that possession had to be hostile and Attorney Howard that that was the case. Attorney Howard agreed. Mr. Lee said that he drove to the area and didn't see anything that would keep anyone out. Attorney Howard said the hostility element of the cause of action had to do with putting other people on notice that they were using the property in hostility and that the people who had a claim to it should assert their property rights.

Mr. Parrott also said he had been in the area and didn't see anything that Mr. Hoeman had erected to show that he claimed half of the paper street, like markers, bushes, or a fence. He said he wouldn't guess that another 20 feet belonged to that house or yard because he didn't see anything physical. Attorney Howard said the argument could be made that Mr. Hoeman had used it under the elements of adverse possession for the statutory period.

Mr. Parrott said that Attorney Howard's client owned the property for a lot of years, and he asked what he had attempted to do with the City in a formal way to clarify the status of the part of the paper street that he suddenly claimed. Attorney Howard said he didn't believe any action was taken before the application. Mr. Parrott then concluded that it wasn't the client's concern all the time he owned the property, and Attorney Howard said he couldn't comment.

Neal Robinson of 170 Swett Avenue said he thought Mr. Hoeman had a vested interest in the lot because he had made improvements to it. He said that having zero-foot frontage would have a negative impact on the neighborhood because most houses were built on multiple lots. He noted that it turned into wetlands halfway back and that they didn't need an emergency turnaround.

Mr. Johnson noted to Mr. Robinson that many of the previous concerns were about connecting the loop, more traffic, and children playing in the street. He said that, legalities aside, the proposal seemed better by having a dead end on the street. Chairman Rheaume asked Mr. Robinson how he felt about having two dead-end streets. Mr. Robinson said they were currently two dead-ends and didn't see how the proposal would be accomplished without using Mr. Hoeman's driveway.

Mrs. Anderson of 170 Swett Avenue stated that there was no turnaround beyond her house and asked how the delivery trucks would get to the new homes.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Durbin said that some of the issues raised by Attorney Howard and the subsequent speaker included the procedural issue of having to name all the abutting landowners as co-applicants, as stated by the Planning Department. He said that a recommendation was made based on the plan that still showed public access, and if the access were converted to a private drive, the Planning Department felt that they would be crossing over abutting properties, which would require co-application. He said that was the impetus behind his recommending that they bring forward a few conceptual plans to show how they could achieve access without infringing on abutting properties. He said the arguments were centered around whether the applicant would

cross over someone's driveway but that they could reconfigure access he wanted without infringing on anyone's abutting property rights.

Attorney Durbin said it also ignored the fact that someone could not adversely possess land that the City owned. He noted that there were conflicting opinions from abutters on whether they wanted a connecting loop or driveway access. He said the applicant was sympathetic to the fact that it had been open space for everyone to enjoy, but the lots in question were purchased by the current landowners with the intent that they would eventually be developed. He said the development would be consistent with everything in the neighborhood. He also noted that the Hoemans owned the majority of the five lots that the applicant proposed to consolidate into two and had utilized the existing access to get to their lot.

Attorney Durbin said the City had not determined whether the paper streets were public or not, and that the Planning Department had acted on the only information it had, believing that the rights of the paper streets had reverted back to the abutting landowners. He said the City Attorney said there had never been a legal determination, and that was the reason there was conflicting information about the streets.

Vice-Chair LeMay asked whether Attorney Durbin felt that, if the streets did revert, 20 feet of Moffat Street would be associated with the two lots. Attorney Durbin agreed. Vice-Chair LeMay said he could use that strip no matter what, and he asked what his argument for Woodworth Avenue would be based on. Attorney Durbin said they would have an implied easement by right to have the most direct access to the two proposed lots and that they could come down Moffat Street and onto Woodworth Avenue the same way as the plan showed.

Mr. Calkins stated if the streets were released and were no longer public use, Swett Avenue would still go down to his property and twenty feet would revert back to the lot. He said he could stay within his 20 feet and still access both lots.

Mr. Robinson stated that all the abutters still felt that a connector was a negative option. He said that Mr. Hoeman and his father were the only ones improving that 20-ft section of Moffat Street. He said that Swett Avenue turned to dirt and was the lowest point in the wetland area.

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

DECISION OF THE BOARD

Chairman Rheume stated he wanted to quickly address the additional variance item. It really was, to his mind at any rate, sort of "belt and suspenders." The Ordinance covers in two places needing to have street frontage and one is Section 10.521 and the other is Section 10.512 that really basically just said that you have to have some level of street of frontage. Section 10.521 then sort of defines exactly what that length was. We basically in two variances were saying the same thing – that this property had no street frontage so therefore it was failing both elements. He asked Ms. Walker if she had any further comments and she did not. Chairman Rheume, noting that this was obviously a little more complicated than the first time it came before them, asked for further thoughts from the Board. There was additional discussion among several members of the Board.

*Mr. Parrott moved to **grant** the variance as presented, and Mr. Johnson seconded.*

Mr. Parrott said the proposal was to build single-family houses in a single-family residence zone, which was compatible, and also noted that the lots were combined. He said the Board was satisfied previously with the requested variances, and those had not changed. He said the special conditions were associated with the land in front, which was wide enough for a public street or private driveway, so there was no restriction there. He said there were comments made that it would likely be the last development, which he thought was obvious because of the way the property dropped off to the wetlands. He said his reaction when he saw the property was that it was obvious why it hadn't been developed before, because the sites weren't easy. He however thought it was feasible to put two houses there in a safe and appropriate manner. He said he was a fan of the loop connecting road if only from a public safety aspect and thought it was always better to have more than one way out of a neighborhood. He said he hoped that emergency vehicle access was still a possibility. He said he thought the folks who lived there as well as future residents would be very happy with the configuration. He noted that the proposal in front of them was of a technical nature because it was physically impossible to build on a 0' frontage but that meant, generally speaking 0' access on a public street.

Mr. Parrott stated that granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance. He said there was plenty of discussion and that the public interest was defined in part as representing the wishes of the City as expressed in the Master Plan. He said it was single-family housing in a single-family neighborhood, on lots that had been recognized for a long time as buildable house lots and taxed accordingly, so someone had been paying money and expecting that the City would grant permission to build on the lots at some time. He said that granting the variance would do substantial justice because the property owner had rights to develop a house on a recognized lot in a recognized subdivision. He said the overriding public interest had been expressed, but it struck him as a convenience factor. He said no one who lived next to woods liked to see it developed. He said granting the variance would not diminish the value of surrounding properties because it was hard to see how new built-to-code single-family houses in a single-family residence district would diminish the value of surrounding properties in any way. As for hardship, he said the land was situated such that there were hardship factors, including the legal status of the property in front, a paper street, and the wetlands in the back, which he thought were legitimate to recognize in association with the lots.

Mr. Johnson stated that the intensity of the proposed two single-family homes was appropriate for the neighborhood. He said if something was more intense or would increase traffic or utility use, it would be harder to support, but he didn't see the request being much more minimal than it was, single-family homes on buildable lots. As for the frontage requirement, he said that although the request was for quite a bit of relief, frontage was to provide appropriate access, safety, light and air, and so on, and the applicant had shown that there was an opportunity to mitigate concerns when it came to accessing the site. He said it seemed that the applicant would work with the Boards and the City Council to figure out the access issues.

Chairman Rheaume noted that the site plan review was listed on the Staff Report and believed it was because of a stipulation of the previous approval, which he said carried forward. He said there was no need to re-state the site plan approval. He said that he would approve the motion but was torn. He said that he at first thought the connector road was a good thing for the neighborhood and would solve a lot of problems. He said the Board saw applications for zero or

minimal street frontage and that a lot of those lots stood vacant for many years but were becoming valuable enough that it made sense to develop them. He said the Board approved them because they were straightforward, but he thought the proposal was less obvious. In terms of street frontage, he felt there was enough there. The way these lots were situated was sort of creating the street frontage question and there were many legalistic viewpoints on paper streets. The fundamental idea was that these were once laid out streets and that there would be some required frontage had those streets been exercised by the City gives them some basis that this made sense from this Board's standpoint. He still believed that the case had a lot of hurdles to cross and there would be other opportunities for the public to discuss the proposal.

*The motion **passed** by a vote of 7-0.*

III. ADJOURNMENT

*It was moved, seconded, and **passed** by unanimous vote to adjourn the meeting at 8:30 p.m.*

Respectfully submitted,

Joann Breault
BOA Recording Secretary