

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

7:00 P.M.

**JUNE 19, 2018
To Be Reconvened JUNE 26, 2018**

MEMBERS PRESENT: Chairman David Rheaume, Vice-Chairman Jeremiah Johnson, Jim Lee, Christopher Mulligan, Arthur Parrott, Alternates Phyllis Eldridge and John Formella

MEMBERS EXCUSED: Peter McDonell

ALSO PRESENT: Peter Stith, Planning Department

I. APPROVAL OF MINUTES

A) May 15, 2018

ACTION OF THE BOARD

*It was moved, seconded, and passed by unanimous vote (7-0) to **approve** the May 15, 2018 minutes with minor amendments.*

B) May 22, 2018

ACTION OF THE BOARD

*It was moved, seconded, and passed by unanimous vote (7-0) to **approve** the May 22, 2018 minutes with minor amendments.*

Chairman Rheaume took the 75 Congress Street petition out of order because it was requested to postpone. See Section II, Old Business, Case 5-9, 75 Congress Street.

Mr. Mulligan and Vice-Chair Johnson recused themselves from the vote.

*It was moved, seconded, and **passed** by unanimous vote (5-0) to take the petition out of order.*

II. OLD BUSINESS - PUBLIC HEARINGS

Mr. Mulligan and Vice-Chair Johnson recused themselves from the petition.

A) Request for Rehearing regarding property located at 160-168/170 Union Street.

Chairman Rheume read the Request for Rehearing into the record. He noted that the denial was a tie vote of 3-3 at the original meeting and that the applicant provided additional information regarding the Board's concerns at that meeting.

Mr. Parrott said that it was interesting that there was information presented regarding the inconsistencies in the documentation. He said the new information cleared up those inconsistencies. He said he revisited the property and took note of the immediate neighborhood and orientation of adjacent properties, and he stated that he would approve a motion to rehear the petition. He said it was unusual but felt that it was warranted. Ms. Eldridge said she also revisited the property and agreed with Mr. Parrott.

Chairman Rheume said the Board typically didn't rehear cases, but felt that there were extenuating circumstances that allowed them to do so in this case. He said the Board really didn't have a great procedure when ending up in a tie vote and that they needed to work with the Planning Department on it. He said the Board had scant conversation with the applicant about why they felt the project didn't meet their needs, so combined with that fact and the additional information provided by the applicant, he felt that rehearing the case was warranted.

ACTION OF THE BOARD

*Mr. Parrott moved to **approve** the Request for Rehearing to be held at the July meeting. Mr. Formella seconded.*

Mr. Parrott said he would refer to his previous comments. He said the more he had thought about it, the more he considered the additional information that was provided, which clarified some of the inconsistencies the Board had seen, but not necessarily given voice to, during the hearing. He reiterated that, after revisiting the neighborhood, particularly the back property, he was convinced that the Board would be wise to rehear the petition.

Mr. Formella concurred with Mr. Parrott and said it was a unique combination of factors, including the new information presented, and he felt that it was probably the most compelling case for a rehearing that he had seen.

*The motion **passed** by unanimous vote (5-0).*

Mr. Mulligan and Vice-Chair Johnson recused themselves from the petition.

B) Case 5-9

Petitioner: Michael De La Cruz

Property: 75 (63) Congress Street
 Assessor Plan: Map 117, Lot 5
 Zoning District: Character District 5 and the Downtown Overlay District
 Description: Construct a basement indoor parking facility
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:

1. Variances from Section 10.1114.20 to allow the following:
 - a) eight parking spaces with less than the required dimensions; and
 - b) a 12'± wide maneuvering aisle where 14' is required.

Chairman Rheume read the petition into the record and stated that it was postponed once before. He explained that there were only five Board members available to hear the petition, in which case the Board normally let the applicant postpone his petition.

*Mr. Lee moved to **postpone** the petition to the July meeting, and Mr. Parrott seconded.*

Mr. Lee said the postponement seemed like a reasonable request, and Mr. Parrott concurred.

*The motion **passed** by unanimous vote (5-0).*

III. NEW BUSINESS – PUBLIC HEARINGS

Vice-Chair Johnson and Mr. Mulligan resumed their voting seats.

1) Case 6-1

Petitioner: Richardson Family Trust of 2016, Justin C. Richardson,
 Property: 586 Woodbury Avenue
 Assessor Plan: Map 236, Lot 2
 Zoning District: Single Residence B. District
 Description: Construct a 24'± x 17'± enclosure and keep chickens
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following:

- 1) A special exception under Section 10.440, Use #17.20 to allow the keeping of farm animals where the use is only allowed by special exception; and
- 2) A variance from Section 10.573.20 to allow a 5.7' rear yard.

SPEAKING IN FAVOR OF THE PETITION

The applicant Justin Richardson was present to speak to the petition. He stated that he wanted to construct a chicken line, and he also submitted additional information to the Board. He reviewed the petition, pointing out that the large enclosure would be appropriate for the area's square footage, and that the noise from the nearby highway would drown out any chicken-related noise. He said the chickens would be a Heritage breed and that they could end up being half-roosters, but he proposed a stipulation that he would remove the rooster(s) if a neighbor requested it in a

reasonable time, like two weeks. He said he wanted four chickens immediately but would want two more within a few years. He reviewed the special exception criteria.

Mr. Mulligan said he wasn't comfortable with the applicant placing the onus on the neighbors to request anything, and he also said that, if someone complained to the city, the code enforcement officer would visit the property. He said there should be a simple condition of having no roosters. The applicant said he thought that roosters suffered from the same stigma as the pitbull and didn't think they would be a problem but would remove them if they were. He said the highway was very noisy at 4 a.m. and would drown out any noise from the roosters. Mr. Mulligan said the applicant should just accept the condition of having no roosters, like everyone else, which he felt was the easiest way to prevent any problems.

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

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

DISCUSSION OF THE BOARD

Mr. Lee said he thought that if the Board approved the petition, a provision should be included stating if the roosters were a problem, they should be removed within two weeks or less. Chairman Rheume said the Board had been strict about roosters. He said the applicant was trying to convince the Board that there were potential ways out, like highway noise, but he felt that if a rooster was acting up, it could be a concern to the neighbors and the city in general. He said Portsmouth was a city with only one working farm. He said the Board wanted to accommodate people with requests for chickens but was reluctant to let their 'no rooster' policy go. He said the rest of the project was fine. Mr. Lee said he grew up on a farm and that roosters crowed because it was their nature. Mr. Mulligan said the roosters didn't crow just in the mornings.

DECISION OF THE BOARD

*Mr. Mulligan moved to **grant** the Special Exception, with the following stipulations:*

- *That there be no roosters, and*
- *That the number of chickens be limited to six.*

Mr. Mulligan said he concurred with the applicant's summation and that the use was permitted by special exception. He said granting it would pose no hazard to the public or adjacent properties on account of fire, explosion, release of toxic materials, and so on as a result of a chicken run. There would be no detriment to property values in the vicinity or change in the essential character of the neighborhood based on the location, scale, and so on of the buildings or other structures. Granting the special exception would pose no creation of traffic safety hazards and no excessive demand on municipal services. He noted that the amount of water needed for chickens was limited. He said the project would have no significant increase in stormwater runoff onto adjacent properties. He concluded that the project fit all the criteria.

Mr. Lee concurred with Mr. Mulligan.
*The motion **passed** by unanimous vote (7-0).*

The Board then addressed the variance request.

*Vice-Chair Johnson moved to **grant** the variance for the petition as presented and advertised, and Mr. Parrott seconded.*

Vice-Chair Johnson stated that the applicant spoke on a few points that made sense as to why he sited the pen where he did, and that it seemed to be a good size, although it was larger than necessary for four chickens. He said the applicant provided good documentation and that there were no neighbors speaking against it, so he felt that granting the variance would not be contrary to the public interest or to the spirit of the ordinance. He said there would be no threat to the public's health, safety, and welfare by having 4-6 chickens and that people probably wouldn't even know the chickens were there. He said substantial justice would be done because there would be no harm to the neighbors, especially with such a modest-sized pen and the quantity of chickens. He said granting the variance would not diminish the value of surrounding properties, noting that he couldn't see any reason why a small amount of chickens would have a negative effect on properties. Regarding the hardship, Vice-Chair Johnson said it was a sloping site with a centric siting of the house, so it made sense to push the pen back. He said the applicant could have avoided needing a variance by having a smaller pen, but it would not have been as humane. He said the new open air pen would be unnoticed and would replace an existing employee structure, which he felt was a smart choice. He asked Mr. Stith whether the Planning Department had worked on the 'chicken language' per the zoning ordinance, and Mr. Stith said they had not. Chairman Rheume said a planning zoning ordinance reflecting chickens was needed because the Board got several cases before them for chicken coops.

Mr. Parrott said that, given the location's topography, the location was the most logical place because the most affected neighbor was in the back, and the trees and fencing provided a nice buffer between the yards. He said that all those factors argued in favor of approving the variance.

*The motion **passed** by unanimous vote (7-0).*

Mr. Mulligan recused himself from the petition.

2) Case 6-2

Petitioner: Myles S. Bratter
 Property: 177 Bartlett Street
 Assessor Plan: Map 158, Lot 9
 Zoning District: General Residence A District
 Description: Convert a unit with an existing commercial use to a dwelling unit
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variances:
 1) from Section 10.440, Use #1.52 to allow five dwelling units where five dwelling units are not allowed; and

- 2) from Section 10.521 to allow a lot area per dwelling unit of 3,899± s.f. where 7,500 s.f. per dwelling unit is required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech was present on behalf of the applicant to speak to the petition. He pointed out that the property was once two lots, with a commercial building on the corner and a residential building adjacent to it, but the owner connected the two properties and now wanted to divide the property into two spaces. He said the 1500 s.f. space would have a residential unit. He said there was plenty of parking. He referenced a letter from an abutter in support of the project and said it would be more in keeping with the neighborhood. Attorney Pelech said there would be no external changes to the building, site, or parking area. He reviewed the criteria in detail.

Chairman Rheume said Attorney Pelech mentioned 30 parking spaces but that the diagram showed only 19 spaces. Attorney Pelech said there was an area for a row of parking as well as parking that extended further behind the building, resulting in 30 spaces. In response to further questions from Chairman Rheume, Attorney Pelech said the commercial tenant was someone running for Congress. He said the building would be converted and the one next to it would remain commercial. He said there were variances granted after the Supreme Court case that allowed the applicant to have commercial use. Chairman Rheume verified that the current four residential units were allowed by special exception and not by right in the GRC district.

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

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

DECISION OF THE BOARD

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

Vice-Chair Johnson said there were a couple of different aspects to the project in that specific location that made it work well, especially with its location on Bartlett Street, which was the GRA district but an eclectic mix of a few commercial units. He said Attorney Pelech made a good point in saying that the Board didn't usually account for commercial uses in their density calculation, so the applicant was looking for a variance in density but the density already existed and there was already a commercial use for that unit that was much more intense. He said the use would bring more parking and more noise, but it would be limited in time, so he thought there were pros and cons. He said the current commercial use already had residential uses associated with it, so it made sense to allow one more unit. He thought the unit would be imperceptible to anyone, noting that it would have curtains in the windows instead of the commercial sign.

Vice-Chair Johnson said that granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance because the neighborhood was generally residential, with a few mixes of commercial, and the project would maintain that spirit and feel.

He thought one added unit wouldn't make much difference. He said substantial justice would be done, posing no harm to the general public, and that he didn't see anything from the public's perspective that would outweigh the benefit to the applicant. He said granting the variances would not diminish the value of surrounding properties by adding an additional residential unit, and he thought it would bolster nearby property values. Relating to the hardship criteria, he said it was a corner lot, and an inherent character of the property was that the building already existed and had a parking lot, the location was proper as well as the size, and the use could be accepted without any great change. He said that the corner lot aspect wasn't as pertinent, but the existing use of the building was, and for those reasons, he approved of the project.

Mr. Lee said the applicant was just asking to substitute an existing commercial unit for a residential one. Chairman Rheume said he would also support the project, with some reluctance. He said the city allowed 3-4 dwelling units per lot by special exception, but it wasn't the overall character of the neighborhood, which was mostly single-family or two-family homes. However, he noted that the nature of the neighborhood was changing and said he could live with five units.

The motion passed by unanimous vote (6-0).

Mr. Mulligan recused himself from the petition.

3) Case 6-3

Petitioners: Francis T. Delbene and Gwyn M. Burdell
 Property: 32 Union Street
 Assessor Plan: Map 145, Lot 29
 Zoning District: General Residence C District
 Description: Construct a 26' x 32' carriage house/garage with a third dwelling unit
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variances from Section 10.521:
 a) a lot area per dwelling unit of 1,887± s.f. where 3,500 s.f. is required; and
 b) a 6'± rear yard where 20' is required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech was present on behalf of the applicant to speak to the petition. He said the applicant wanted to build a carriage house with one garage-style stall on the ground level and a dwelling unit on the second level. He said the project would meet the parking, setback, open space, and height requirements. He said the structure was sited to be six feet from the property line because the existing dwelling was six feet from the rear property line, which was actually a driveway to the Martin Hill Inn. He submitted a petition to the Board that was signed by two abutters and the neighbor across the street indicating that they had no problem with the carriage house. He reviewed the criteria and said they would be met.

Chairman Rheume noted that the drawing indicated five parking spots, one of which was the garage, and asked what the distribution plan was. The owner Francis Delbene said that one

person would park in the garage, and someone else would park behind that person. Attorney Pelech showed where the other three parking spots were located.

Ms. Eldridge asked whether any trees would be removed from the wooded lot. Mr. Delbene said he would only remove the tree in the corner.

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

Chairman Rheume said the Board had one letter in opposition from a neighbor. No one rose to speak, and Chairman Rheume closed the public hearing.

DISCUSSION OF THE BOARD

Vice-Chair Johnson said he was conflicted because the proposal made sense and could work, but the Board historically hadn't looked keenly on a lot that didn't have density requirements and bringing the density number lower. He said he had no issue with the setback relief and that his concern was mostly the density and what was somewhat of a congested portion of Union Street. He said he would echo his previous comments regarding the previous application the Board heard, noting that sometimes those pockets were good opportunities as long as they weren't overdone, and that he could probably support an approval. Mr. Lee said he agreed. Mr. Formella said he was also conflicted but would move to approve.

DECISION OF THE BOARD

*Mr. Formella moved to **grant** the variances for the petition as presented and advertised. Ms. Eldridge seconded.*

Mr. Formella said that, on one hand, the project made sense, given the lot size and location, but he noted that the Board didn't usually look kindly on proposals that took something that was already non-conforming and made it less conforming. He said it was already a dense area, however, and the open space was unique, so filling it in would not really alter the character of the neighborhood. He said that granting the variances would not be contrary to the public interest or the spirit of the ordinance and thought that making it denser would actually conform to the neighborhood's character. He said it was an open space on a large lot, and given the location of the existing structure, filling the lot would not change it that much and would preserve the character of the neighborhood. He said the public's health, welfare, and safety would not be affected. He said that it would be one additional unit in an already-dense area, and there was enough parking. He said that granting the variances would do substantial justice because not granting it would create more harm to the applicant than any benefit by denying the variance. He noted that the area would be improved by cleaning up the open space, so there would be no damage to surrounding properties. He said the lot was well suited for an additional structure and unit, so there was no substantial relationship between the ordinance and the application of it to the property because the lot was unique, and the purpose of the ordinance was not to preserve what little open space was left but rather to keep development from overdoing it. He said it was a modest proposal that he could approve.

Ms. Eldridge concurred with Mr. Formella and added that the addition of the carriage house would improve the look of the lot and not affect the character of the neighborhood.

Mr. Parrott said it was a close call and that he didn't feel it was a large lot, but the hardship was a stumbling block because the hardship had to be inherent in the current situation, and there was no hardship. He said it was a nice structure on a nice lot in a nice neighborhood and felt that the project would take up what little open space existed. He said he could not support the project.

Chairman Rheume said he was also torn but would support it. He said that open space in the neighborhood was rapidly disappearing, but the inn was there and operating well, and the parking was beneficial to the applicant, which helped to retain some open space. He said if there was an existing garage and the applicant proposed adding a small apartment above it, the Board could be okay with it, but the fact that it was a new structure was more disconcerting. He noted that the rhythm on that street as well as a rhythm with other structures in the neighborhood indicated that it was an open area that could be filled in. He said here was a need for housing stock in Portsmouth and felt that the proposal was reasonable, relatively modest, and looked like something that could have been there for a long time. Vice-Chair Johnson said that the fact that the property could add another unit and still account for all the parking and be surrounded by plenty of properties not able to do that got him over the hump.

*The motion **passed** by a vote of 5-1, with Mr. Parrott voting in opposition.*

Mr. Mulligan resumed his voting seat.

4) Case 6-4

Petitioners: Linda Preble McVay and John Frank McVay
 Property: 42 Hunking Street
 Assessor Plan: Map 102, Lot 8
 Zoning District: General Residence B District
 Description: Construct a 420± s.f. one-story addition
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including the following variances:
 1) from Section 10.521 to allow a 10'±rear yard where 25' is required; and
 2) 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.

SPEAKING IN FAVOR OF THE PETITION

The designer Hubert Kraha was present on behalf of the applicant to speak to the petition. He reviewed the drawing package, pointing out that one of the owners could no longer access the current second-floor bedroom and bath. He said they required a 10-ft setback in the back because the Historic District Commission (HDC) had asked that the original structure be more visible. Mr. Kraha discussed the addition in detail and reviewed the criteria.

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

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

DECISION OF THE BOARD

*Mr. Mulligan moved to **grant** the variances for the petition as presented and advertised, and Vice-Chair Johnson seconded.*

Mr. Mulligan said the project was tastefully designed and that the relief was minimal, given the lot constraints. He said there were already encroachments on the rear yard setback. He said the existing enclosure was 12 feet, but the HDC preferred to see a staggered line, so he felt that the 10-ft rear yard setback was not out of line for the property or the neighborhood. He said the addition was large in terms of footprint but was still within the lot coverage requirements.

Mr. Mulligan said that granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance. He said the essential character of the neighborhood would not change, and no threat would be posed to the public's health, safety, and welfare. He said granting the variances would do substantial justice because the loss to the applicant if the Board required the standard rear yard setback would not be outweighed by any gain to public. He said the only other available space would swallow up the front yard, which wouldn't make any sense, and the existing structure already violated the rear yard setback. He noted that properties in that neighborhood often had similar setback issues. He said granting the variances would not diminish the value of surrounding properties because the design was tasteful and would have a positive impact on the surrounding properties. He said there was already a pre-existing non-conforming setback on two sides, if not three, and the lot was large for that part of the street, so he thought that the lot had some unique character that distinguished it from others in the neighborhood. He said there was no fair and substantial relationship between the purpose of the rear yard setback requirement and its application to the property since it already violated it. He said the use was a reasonable one, a residential use in a residential zone, and met all the criteria.

Vice-Chair Johnson concurred with Mr. Mulligan, adding that the lot was 50 feet deep, the front setback was five feet, and the rear setback was 25 feet, so it was already limited, and he was hard pressed to find a piece of property in the neighborhood that could support that.

Mr. Parrott said the size of the lot and the placement of the house made it an appropriate and tastefully-sized addition that would have minimal if any impact on the neighbors.

*The motion **passed** by unanimous vote (7-0).*

5) Case 6-5

Petitioners: Steven DeSantis, Allen Jeffries, Tia Spagnuolo, and the Solano Group LLC

Property: **454 and 456 Middle Street**

Assessor Plan: Map 135, Lots 43, 43-1 and 43-2

Zoning District: Mixed Residential Office District
Description: Install two HVAC condensers
Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including variances from Section 10.515.14 to allow the following:
a) A condensing unit with a 3'± left side yard where 10' is required; and
b) A condensing unit with a 3'± right side yard where 10' is required.

SPEAKING IN FAVOR OF THE PETITION

The applicant Steven DeSantis was present to speak to the petition on behalf of himself and the three other applicants. He described the condensing units, noting that they were small and only reached a decibel count of 74, similar to a standard vacuum cleaner. He showed their proposed locations and said they would not be seen from the street. He reviewed the criteria.

Vice-Chair Johnson asked whether the applicant had been before the HDC. Mr. DeSantis agreed and said he received approval. Chairman Rheume verified that the condensers would be placed as illustrated by the red squares on the diagram.

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

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

DECISION OF THE BOARD

*Mr. Lee moved to **grant** the variances for the petition as presented and advertised, and Mr. Parrott seconded.*

Mr. Lee stated that granting the variances would not be contrary to the public interest and would observe the spirit of the ordinance, and substantial justice would be done because the condensers would keep everything cool. He said that granting the variances would not diminish the value of surrounding properties and would probably enhance them. He said the hardship was that the property was constrained by the existing setbacks, making a variance necessary.

*Mr. Parrott concurred with Mr. Lee. The motion **passed** by unanimous vote (7-0).*

IV. ADJOURNMENT

*At 9:05 p.m., it was moved, seconded, and passed by unanimous vote to **adjourn** the meeting.*

Respectfully submitted,

Joann Breault
BOA Recording Secretary