

**MINUTES OF THE RECONVENED  
BOARD OF ADJUSTMENT MEETING  
PORTSMOUTH, NEW HAMPSHIRE  
CITY COUNCIL CHAMBERS**

**7:00 P.M.**

**NOVEMBER 23, 2004  
(Reconvened From  
November 16, 2004)**

**MEMBERS PRESENT:** Vice-Chairman James Horrigan; Nate Holloway, Alain Jousse, Bob Marchewka, Arthur Parrott, Alternate Steven Berg and Alternate Duncan MacCallum

**MEMBERS EXCUSED:** Chairman Charles LeBlanc and David Witham

**ALSO PRESENT:** Lucy Tillman, Planner

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**I. OLD BUSINESS**

- A) Request for Re-Hearing, by Charles A. Griffin, Esq. for the abutters, of Petition by 150 Greenleaf Avenue Realty Trust, James G. Boyle Trustee, for property located at **150 Greenleaf Avenue** wherein a Variance from Article II, Section 10-208(35) was requested to allow the outdoor storage of vehicles upon existing pavement within 200' of a residential district where a 200' buffer to a residential district is required. Said property is shown on Assessor Plan 243 as Lot 67 and lies within the General Business district. Case # 9-10

Mr. Parrott made a motion to grant the Request for Re-Hearing, with Mr. Jousse seconding. Mr. Parrott stated that there were several points raised in the Memo, which he saw as valid and all the facts in the case support the position of the neighborhood that was there long before the dealership moved in. The facility is unique. It's the only Toyota dealership in Portsmouth so nobody should be surprised and stumble upon it. It also has a very prominent and attractive sign that advertises what it is. He noted that a person can't come down the roadway, suddenly decide to look at one of the vehicles parked there and immediately turn in to look at it because the immediate right is a limited access road with a large swale. An individual must go to the light and take a right for access into the lot where they can then view several hundred vehicles. There also is no walkway so people aren't walking along that road and stopping to see a vehicle displayed there. Mr. Parrott stated that he did not think that the argument that you need to have vehicles out there to let people know that Toyota cars are sold at this location has validity. Mr. Parrott also stated that the purpose of the 200' buffer is to protect the neighborhood. Although it's a little unusual in that there is a road dividing the dealership and the homes, the homes pre-date the dealership and, when the property was purchased, everyone was aware of limitations of the zoning – the houses were there and they were less than 200' across –and so, everybody started out being treated fairly.

Mr. Parrott also expressed concern that, if the variance were to stand, future requests would come in to fill in the swale or take some other action so that cars could be parked right up onto the edge of the road as they are at the Dodge dealership, with the argument being equal treatment and that will further destroy the frontage. The building is set back, not a long way, but at least a decent distance and the fact is that the

Mr. Jousse stated that the applicant never made a point as to the hardship in this particular case. He felt the Board had not been consistent, denying the variance in August and, then in October, granting a variance which is more intrusive than the one denied. He also felt that the decision should not be left standing when the Board has an opportunity to view other options available to the applicant as far as the storage of automobiles on this particular lot is concerned.

Mr. Berg stated that he would not support the Motion, primarily because, by drawing the line in an area where there can never be any development, namely US Rt. 1 By-Pass, the buffer has been effectively increased to 250', which he didn't feel was fair. He also didn't think that an error in law had been made or that the applicant making the Request for Re-Hearing had presented any new evidence.

In advising his support for the Motion to Re-Hear, Mr. MacCallum stated that, if he had been present on the evening the application had been presented, he would have voted against the variance because he believes the concerns expressed by the abutters were legitimate. Mr. MacCallum stated that he did not see the hardship associated with this property unless it is, as stated in the decision in the case of Hill v. Town of Chester, 146 NH 291 (2001), a self-created one. In that circumstance, the applicant bears a heavier burden of proving the need for a variance and the applicant did not meet that burden.

Mr. Marchewka stated he would not support the motion as the board had already deliberated the case, made a reasonable assessment and came up with a workable compromise between the parties. He felt nothing new had been presented.

The Acting Chair advised that he would vote for the motion as the petitioner had raised one issue which he did not consider when previously voting and that was the actual impact of the wetland buffer on the number of cars parked on the site. Mr. Horrigan stated that his previous concern was that there would be space for an adequate number of vehicles to be displayed. He was unaware of the area to the rear and, after viewing it and the vehicles parked there, considered that the wetlands buffer was not acting as a restraint and, on that point alone, the petition should be reheard.

The motion to grant passed via a 5-2 vote with Mr. Marchewka and Mr. Berg voting in the negative.

- B) Request for Re-Hearing, by Bernard W. Pelech, Esq. for the applicant, of Petition by 150 Greenleaf Avenue Realty Trust, James G. Boyle Trustee, for property located at **150 Greenleaf Avenue** wherein an Appeal from an Administrative Decision was requested concerning the determination that parking of vehicles "For Sale" is "outdoor storage" as defined by Article I. Said property is shown on Assessor Plan 243 as Lot 67 and lies within the General Business district. Case # 9-10

Mr. Berg moved to grant the request for rehearing. Mr. Holloway seconded the motion for discussion.

Mr. Berg indicated that they may know what the intent of the Zoning Ordinance may have been but unfortunately it does not state it. There are many ordinances and there appears to be a distinction between parking cars and outdoor storage of materials. He had no choice but to say that if the Zoning Ordinance is so written then they have made a mistake in denying the request from an appeal of an Administrative Decision. He stated that the applicant had requested that they reconsider the Zoning Ordinance in light of how it was written and he believes an error was made in denying that request so he therefore is moving to grant.

Mr. Holloway indicated he only seconded for discussion and he has no comments.

Mr. Marchewka indicated that he would not support the motion and, once again, he felt that the Board already went through all of this. He didn't see anything new. It was discussed and voted upon previously and he did not see any reason to go through it all again.

Mr. MacCallum agreed with Mr. Marchewka. The Board went through all of this on two separate occasions and he did not believe Mr. Berg was right. He felt that it originally was in the context for the Administrative Appeal and it was discussed and they went back and forth with Mr. Pelech regarding the intentions of the Zoning Ordinance at that hearing. He wanted to echo Mr. Marchewka's comments that his own decision was absolutely right and there was only one reasonable way that one could interpret the Zoning Ordinance. The City's Planning Department interpreted it correctly in the first instance and the BOA interpreted it correctly in the second instance when they voted to deny the Administrative Appeal.

The motion to grant a rehearing failed with a 1-6 vote, with Mr. Jousse, Mr. Marchewka, Mr. Holloway, Mr. Parrott, Mr. MacCallum, and Acting Chair Horrigan voting in the negative.

## II. PUBLIC HEARINGS

- 7) Petition of **909 Islington Street LLC, owner, Geoffrey K. Crosby, d/b/a Construct Design LLC, applicant**, for property located at **909 Islington Street** wherein a Variance from Article II, Section 10-208 is requested to allow 2,300+ sf of the building to be used for the manufacture of counter tops and associated wood, metal and concrete items in a district where manufacturing is not allowed. Said property is shown on Assessor Plan 172 as Lot 7 and lies within the Business district. Case # 11-7

### SPEAKING IN FAVOR OF THE PETITION

Jeff Crosby, owner of Construct Design, LLC, spoke on behalf of the petition. He explained what his business consisted of and passed out pictures of examples of his work to the Board. He followed the *Simplex* standard and explained how he satisfied the same. He noted that he had spoken with his abutters and everyone was very supportive of his business and desire to use the space in question for his business. He felt that his business would fit in well with the surrounding businesses and increase surrounding property values. He urged the Board to grant his request.

Mr. Berg asked Ms. Tillman in light of the fact that monument works and manufactured goods sold at retail on premises are permitted uses, why the applicant was before the Board.

Ms. Tillman replied that they considered both sections and determined the applicant's business was a little more industrial than the two permitted uses mentioned.

Acting Chair Horrigan asked the applicant how he proposed to handle dust problems.

Mr. Crosby answered that dust was not a problem since he uses dust reflection on all of his tools.

Mr. Marchewka asked the size of the space.

Mr. Crosby said the total would be 2,300 sq. feet and he proposed to use 300 sq. feet for office space and the showroom.

Mr. Berg asked if the applicant made wooden products.

Mr. Crosby answered yes.

Mr. Holloway asked the applicant where the storage for the store would be located.

Mr. Crosby answered that all of his storage would be kept inside the facility.

Acting Chair Horrigan asked where the waste materials would be stored.

Mr. Crosby said he generates water and concrete waste. The concrete waste is cured and taken to the town dump for waste disposal and the water waste is put into a holding tank until such a time that it can be pumped out.

Acting Chair Horrigan asked where the concrete would be stored before hauled off to the dump.

Mr. Crosby answered in some bucket storage inside.

Acting Chair Horrigan asked if there was anyone who wished to speak to, for or against the petition.

Seeing no one rise, the Acting Chair declared the public hearing closed.

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

Mr. Marchewka made a motion to grant the petition as presented and advertised.

Mr. Parrot seconded.

Mr. Marchewka thought given the nature of the applicant's business and on such a small scale, it fits in with the environment proposed for the applicant's business. He thought the neighborhood was an industrial area and that no one would be bothered by it. He went through the analysis for a variance and identified how the applicant satisfied the criteria. He thought the type of business was well-suited for the building and its inhabitants.

Mr. Parrot concurred with Mr. Marchewka's reasoning. He thought this was one case of where the ordinance did not work so well and thought it was a good use of the space and the property.

Mr. MacCallum noted that he would not support the motion. He thought that the variance was like a diamond, forever. He thought it was too risky not knowing how well the business would do and he thought that the property was a substantial amount of space and if the variance was granted, it would allow a manufacturer to go in that space for perpetuity.

Mr. Berg asked if the variance that was being granted for manufacturers or for manufacturing countertops and associated wood, metal and concrete items in a district where manufacturing is not allowed.

Ms. Tillman answered as presented and advertised.

Mr. Berg stated that he would support the motion and noted the many letters of support that had been submitted voicing their support of the petition.

Mr. Jousse noted one of the persons that sent a letter said that the business was in keeping with the nature of the other abutting users of the building. Mr. Jousse stated he would support the motion.

Acting Chair Horrigan thanked the applicant for addressing the criteria necessary to obtain a variance and commended him for getting the approval of his abutters.

Acting Chair Horrigan called for the vote on the motion to grant as presented and advertised and the motion passed via a 6-1 vote with Mr. MacCallum voting in the negative.

- 8) Petition of **Mark B. Kim and Chong Jou Kim, owners**, for property located at **3002 Lafayette Road** and **TDSG Real Estate LLC and Alberto F. and Grace M. Jentimane owners** of **2992 Lafayette Road** wherein a Variance from Article XII, Section 10-1201(A)(2) is requested to allow a portion of the 24' travel way to be located on Lot 14 to access the rear of Lot 13. Said property is shown on Assessor Plan 292 as Lots 13 & 14 and lies within the Mixed Residential Business district. Case # 11-8

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

Attorney Bernard Pelech spoke on behalf of the owner and petition. He reiterated that they were back to seek a variance for the 24' travel way located behind their business, which was approved at the August meeting. He stated that he had worked with the abutting property owners to come up with a plan whereby they would meet the requirements of the zoning ordinance. Attorney Pelech noted a letter written by John Burke, the City's Transportation and Parking Director, outlining concerns all of which they had addressed in their plan. He submitted the revised plan to the Board and explained the same. He pointed out that the variance sought was more of a dimensional variance and addressed the criteria necessary to meet in order to obtain a variance and explained how they satisfied the same. He thought it was a proposal that made a lot of sense and urged the Board to grant their request.

Acting Chairman Horrigan asked if there were any questions.

Mr. MacCallum asked if there was an agreement entered into by his client and the abutters.

Attorney Pelech answered that there would be reciprocal easements that would be recorded.

Mr. MacCallum asked Ms. Tillman if the applicant had met the concerns addressed by Mr. Burke.

Ms. Tillman stated that she did believe would be met and have been met and any other details left could be addressed at site review.

Mr. Berg asked if the existing entrance would be closed off.

Attorney Pelech answered that is correct and added that the existing entrance to the Ferrari Gendermain property.

Mr. Berg clarified that two existing driveways would be combined into one.

Attorney Pelech said right.

Acting Chair Horrigan asked if there was anyone who wished to speak to, for or against.

Seeing no one rise, the Acting Chair declared the public hearing closed.

**DECISION OF THE COMMISSION**

Mr. Parrot made a motion to approve as presented and advertised.

Mr. Witham seconded.

Mr. Parrot thought the shared driveway proposed addressed several concerns that were raised at the prior meeting and raised by Mr. Burke. He thought the traffic using the shared driveway would be low to minimal and thought there were no issues of safety there. He felt it was consistent with the ordinance and not contrary to the public interest.

Mr. Witham agreed with Mr. Parrot and added that the plan submitted was very good for the owner, the abutters and the public. He thought having a driveway marked would be very beneficial to everyone involved.

Mr. Parrot clarified that the plan he was approving was known as Rev 3 of the Millette, Sprague and Colwell plan and dated November 23, 2004.

Acting Chair Horrigan suggested a stipulation that the parking be reconfigured subject to the approval of John Burke.

Ms. Tillman noted that Mr. Burke would be sitting in on the TAC meeting and would have his input and vote on it.

Ms. Tillman asked if he still wanted to add the stipulation.

Acting Chair Horrigan answered no and called for the vote; the motion passed via a unanimous vote of 7-0.

- 9) Petition of **Whispering Pines Estate Inc., owner**, for property located at **936 South Street** wherein a Special Exception as allowed in Article II, Section 10-206(18) is requested to allow an expansion of the number of patient rooms to 18 by converting the existing sunroom into two private rooms with ½ baths. Said property is shown on Assessor Plan 221 as Lot 88 and lies within the Single Residence B district. Case # 11-9

Let the record reflect that Mr. Jousse recused himself.

**SPEAKING IN FAVOR OF THE PETITION**

Bill Bland, property manager of the owner and spoke on behalf of the petition. He stated that they were requesting permission to convert an existing sunroom into two private rooms without changing the footprint of the building. They have an increased demand for private rooms and the existing room as built was not being used for its intended purpose. He stated that most of the residents congregate in the living room area.

Mr. Berg asked what the entity was.

Mr. Bland stated it was a shared elderly facility.

Mr. Berg asked if they were permitting an existing home to accommodate two additional elderly people.

Mr. Bland stated they would go from a 15 room licensed facility to an 18 room facility.

Mr. Marchewka asked about the Certificate of Need.

Ms. Tillman answered it may not be needed in this case.

Mr. Parrot asked what the minimum square footage for each room.

Ms. Tillman answered that there is no minimum square footage in the building nor land area, the use is a special exception and they are expanding the use, as far as building code issues, that would be up to the building inspector.

Mr. Bland informed Mr. Parrot that the State mandates that each resident have a minimum of 80 sq. feet of living space.

Mr. Parrot said that was what he was getting at since none of that information was contained in the materials submitted to him.

Mr. Witham asked how many residents would come as a result of the expansion.

Mr. Marchewka answered 3 people.

Acting Chair Horrigan asked if there was anyone who wished to speak to, for or against.

Seeing no one rise, the Acting Chair declared the public hearing closed.

## DECISION OF THE BOARD

Mr. Marchewka made a motion that the application be granted as presented and advertised.

Mr. MacCallum seconded.

Mr. Marchewka stated that since the proposed was a special exception, which meant it is allowed given the fact that it meets certain standards, he did not think it was a major expansion and it was simply being reconfigured to allow three additional elderly people to be cared for. He went through the standards necessary to meet to obtain the special exception and explained how the applicant met the same. He didn't think the request would create any problems and therefore would vote in favor of the petition.

Mr. MacCallum concurred with Mr. Marchewka's statements.

Acting Chairman Horrigan called for the vote and the motion passed via a unanimous vote of 6-0.

- 10) Petition of **Sotirois and Parask Georgopoulos, owners**, for property located at **8 Central Avenue** wherein a Variance from Article III, Section 10-302(A) is requested to allow the construction of a second attached dwelling unit on a 14,449 sf lot (7,245 sf per dwelling unit) where the minimum lot area required is 15,000 sf (7,500 sf per dwelling unit). Said property is shown on Assessor Plan 209 as Lots 17 & 18 (combined) and lies within the General Residence A district. Case # 11-10

Let the record reflect that Mr. Berg recused himself.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech spoke on behalf of the owners and the petition. He gave some history on the subject property and explained when the owners had purchased the same. They wished to develop the undeveloped Lot #18 and noted that he had worked with John Chagnon to resubdivide the lot into two lots in a more appropriate manner to construct a second dwelling unit. It was determined that the best method was to add an addition on to the existing structure. He informed the Board that the property was situated within the General Residence A district and noted that up to 4 dwelling units per lot were allowed with a reduction in lot area if the footprint is not expanded or increased. He stated that they had increased the footprint but only intended to place two units on the property. The property has dimensions of 155/100 but it was not a true rectangle as it slightly skews so that it is roughly 500 square feet short of the 15,000. He said that all of the dimensions were accurately depicted on the City's tax map as they had John Chagnon survey the same. He reiterated that it was an area variance that the owners were seeking and went over the *Boccia* analysis to prove that they had satisfied all of the criteria to obtain the same. He urged the Board to grant their request.

Acting Chairman Horrigan asked if there were any questions for the applicant.

Mr. Marchewka asked about the *Boccia* analysis. He thought it might be a *Simplex* analysis since the use wasn't allowed because the lot was too small.

Mr. Parrot did not agree, he thought that it was clearly a dimensional variance.

Mr. Marchewka replied that they were not seeking any dimensional relief.

Mr. Parrot replied yes he was, he was asking for a bigger lot.

Acting Chairman Horrigan asked if there was anything comments.

Mr. Marchewka had a question about the characteristics of the neighborhood, said that Attorney Pelech had mentioned that there were many multi-family homes in the area.

Attorney Pelech apologized for not providing a map, but he explained that there were duplexes in the area and other multi-family units.

Acting Chairman Horrigan noted a letter of objection submitted to the Board by an abutter and read it aloud. The abutter felt that it was too close to the property line and therefore, she would not have any privacy and it would bring too much noise to the neighborhood as she worked many different hours and needed her rest.

Attorney Pelech asked which property was in opposition.

Acting Chairman Horrigan answered 1 Ashland Street, Lot 16.

Attorney Pelech stated that they did meet the setbacks on that side.

Acting Chairman Horrigan asked if there was anyone else who wished to speak to, for or against the petition.



Mr. Steven Berg was an abutter, 10 Ashland Street and provided some additional information to the Board. He noted that his lot was a duplex as well as other multi-family homes within the neighborhood. He explained that the primary reason him and his wife were not opposed to the addition was because the access was not off of Ashland Street.

Acting Chairman Horrigan declared the public hearing closed.

### **DECISION OF THE BOARD**

Mr. Parrot made a motion to approve the application as presented and advertised.

Mr. Jousse seconded.

Mr. Parrot stated that the principle issue was square footage. He felt that the area was an interesting mixture of lot sizes. He pointed out that there were at least 5 other lots that were listed as 4,800 square feet and noted that both units on the combined lot if approved would be on a larger footprint of over 7,000 square feet and he didn't think that would be consistent with the other lots in the neighborhood. He thought the proposal was close enough in lacking 500 square feet was a small deviation from the allowed standard and the placement of the addition on the lot seemed logical to him. He thought it fit within the neighborhood and for those stated reasons he would grant the request.

Mr. Jousse thought substantial justice would be done by granting the variance and it would be consistent with the spirit of the ordinance. He did not believe that there was any other method that the applicant could achieve with what they were trying to do. He stated that the request was only three percent from what was required and that was minimal enough for him to approve.

Mr. Marchewka said that benefit sought by the applicant could not be achieved by some other method reasonably feasible and would not effect the environment any differently. He stated that the proposed application was reasonable and thought the new construction was well within the setbacks required by the City. He would support the motion.

Acting Chairman Horrigan asked if there was anything other comments, hearing none the Chairman called for the vote and the motion passed via a unanimous vote of 5-1 with Mr. MacCallum voting in the opposition.

### **III. ADJOURNMENT**

At 8:43 PM, a motion was made and seconded to adjourn the reconvened meeting of the Board of Adjustment to the next months meeting.

Respectfully Submitted,

Christina V. Staples  
Acting BOA Secretary