

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

7:00 p.m.

CITY COUNCIL CHAMBERS

January 24, 2006

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice-Chairman David Witham, Nate Holloway, Alain Jousse, Bob Marchewka, Arthur Parrott, and Alternate Duncan MacCallum

MEMBERS EXCUSED: Steven Berg

ALSO PRESENT: Lucy Tillman, Chief Planner

Chairman LeBlanc called the meeting of the Board of Adjustment to order at 7:00 p.m.

I. ELECTION OF OFFICERS

Mr. Jousse nominated Mr. Witham as Vice-Chairman of the Board, which was seconded by Mr. MacCallum and unanimously approved.

The Chair was assumed by Vice-Chairman Witham.

Mr. Holloway nominated Mr. LeBlanc as Chairman of the Board, which was seconded by Mr. Parrott and unanimously approved.

Chairman LeBlanc reassumed the Chair.

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**II. OLD BUSINESS**

A) Petition of **Hill Hanover Group, LLC, owners**, for property located at **349-351 Hanover Street** wherein a Variance from Article III, Section 10-303(A) was requested to allow open space to be reduced by adding two nonconforming parking spaces from 29% to 22% where 25% is the minimum required. Said property is shown on Assessor Plan 138 as Lot 64 and lies within the Mixed Residential Office district.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Brown introduced the principal, Mr. Bruce Somer, and Mr. Corey Colwell, the engineer who would explain the plans and address the criteria for granting a variance.

Mr. Colwell stated this was an existing six-unit condominium property with 5,404 s.f. total parcel area. They would like to add two crushed stone parking spaces to angle in to the building, accessed via the adjacent right-of-way.

Attorney Brown stated that this was a large building on a narrow lot and was a minor request, representing only 3% of relief. The applicants feel it would be beneficial to move two parking spaces off the street and help relieve congestion.

Further speaking to the criteria, Attorney Brown stated that, under the Boccia test for hardship, a large older building on a smaller lot qualified as special conditions. There was no room to do other than what they were requesting. Substantial justice would be met because they would be taking parking spaces off the street. These same factors would help meet the spirit of the ordinance. Common sense would dictate that property values would not be affected and, in terms of the public interest, it would make the property more attractive and usable and help lessen congestion on the street.

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

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

Mr. Parrott stated he would like to note for the record that he was a former owner of the property but had no connection with present owners. Chairman LeBlanc stated it was solely up to the Board member to recuse themselves if they felt there was a conflict. Mr. Parrott stated he didn't feel there was a conflict and would proceed.

Mr. Parrott made a motion that the petition be granted as presented and advertised, which was seconded by Mr. Witham.

Mr. Parrott stated this was a minor issue. The street was lightly used and putting in angled parking spaces wouldn't interfere with any public interest.

Addressing the criteria, Mr. Parrott stated that the special conditions in this case would be the large building on a small lot and the very small area surrounding the building that would be suitable for parking. It's clear from the plot plan that there was really no other feasible way to handle the parking. The lot was constrained by the driveway for the adjacent building, the common right-of-way, Hanover Street and the back street. The spirit of the ordinance was to minimize the parking on the street, particularly in a congested area of the city and this proposal would help. Substantial justice in this case would be to provide adequate parking for the apartments. This would not affect the surrounding properties because all have the same parking constraints.

Mr. Witham, in seconding, added this was a very dense area and this lot coverage was probably very consistent in the neighborhood so he didn't see any adverse effect or change in character. Access to these additional parking spaces would come off an existing parking lot which was not a public right-of-way so flow would be better.

The motion to grant the petition was passed by unanimous vote of 7 to 0.

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B) Request for Rehearing on petition of **Raymond A. Ramsey, owner** for property located off **Kearsarge Way**.

Messrs. Jousse and MacCallum declared they were stepping down for this request.

Mr. Witham made a motion that the rehearing be granted, which was seconded by Mr. Parrott.

Mr. Witham stated that he felt an error had been made by the Board and the petition deserved a rehearing. This was a complicated case. When the Board received it from the courts, he looked at where the court was at that time. He stated that the courts had decided that this variance request had met the first four and a half prongs of the variance test and had sent the request back to clarify the second part of the fifth test. The court’s ruling had stated that it was unclear on the record whether there were reasonably feasible alternative methods to implement the proposed use, a 100 room hotel, without undue financial burden to the landowner that would obviate the need for variances.

He stated that the court had decided on four and a half of the issues and sent back half of one issue because they didn’t have anything in the record on which to base a decision. It was up to the Board to make a decision and put something on the record, and what the courts were looking for were alternative methods that had not been previously presented. He felt that when the applicants came back in December, they did propose some alternative methods to build the 100 room hotel along with providing a financial analysis. It was maybe not exactly what the Board wanted, but it was a reasonable analysis and enough to make a judgment.

Mr. Witham stated it was their job to look at whether the applicant had met the criteria that there was no other reasonably feasible method for them to pursue and he thought that what clouded the issue was discussion of methods to build another 100 room hotel, or should they be looking at 60 rooms. He felt that when the court’s decision was read, it consistently referred to a 100 room hotel and it was not intended for them to consider the spectrum of all size hotels. He felt that the decisions were not based on financial analysis, but on wanting to see a different size hotel. The issue became clouded and he felt the petition should have another chance to be heard.

Mr. Parrott stated he agreed but for different reasons. When he went back through and studied the record again, he had highlighted the same paragraph on page 9 of the proposal for reconsideration that Mr. Witham had cited. He felt the record was still unclear and, for that reason, the subject should be reconsidered and perhaps both sides could give reasonably feasible specific alternatives, or prove that there were not any. The financial aspect had not been defined by the court so it would be up to the Board to determine that. He felt a rehearing should be granted.

The motion to grant a rehearing passed by a vote of 4 to 1, with Chairman LeBlanc voting against the motion.
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**III. PUBLIC HEARINGS**

2) Petition of **Mark H. Wentworth Home for Chronic Invalids, owner**, for property located at **346 Pleasant Street** wherein Variances from Article II, Section 10-206(18), Article

III, Section 10-302(A) and Article IV, Section 10-401(A)(1)(c) were requested to allow two additions to the existing nursing home/assisted care facility as follows: a) demolition of existing glass side entrance portico and replacement with a 404 sf (13' x 26' plus 4' x 16'6") ADA compliant entranceway, b) construction of an 875.6 sf (8' x 75' plus 7'6" x 36'8") one story additions to the garden level nursing care area; and c) 47% building coverage where 30% is the maximum allowed. Said property is shown on Assessor Plan 109 as Lot 10 and lies within the General Residence B and Historic A districts.

Chairman LeBlanc stated that the applicant had requested that the petition be tabled until the February meeting.

A motion was made by Mr. Witham to table the petition until the February meeting, which was seconded by Mr. Parrott and passed by unanimous voice vote.

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3) Petition of **Benoit R. and Andrea M. St. Jean , owners**, for property located at **54 Humphreys Court** wherein Variances from Article IV, Section 10-402(B) and Article III, Section 10-302(A) were requested to allow a 24' x 24' one story detached garage with an 11"± left side yard and a 1'± rear yard where 10' is the minimum required and b) 36.2% building coverage where 30% is the maximum allowed. Said property is shown on Assessor Plan 101 as Lot 46 and lies within the General Residence B and Historic A districts.

SPEAKING IN FAVOR OF THE PETITION

Mr. Roe Cole referred to the plans that had been submitted by his firm. He stated the garage was unstable and the applicants were asking the Board to add two and a half feet to the east side while retaining the 11" setback. This would put them over the lot coverage by 6.2%.

In response to a question from Chairman LeBlanc, Mr. Cole stated the retaining wall was actually the back wall of the garage and wraps around the back right side of garage as well.

Mr. Marchewka asked if they had looked at alternative locations that might pull garage to a more reasonable space further away from lot line.

Mr. Cole responded that the back yard was fairly small and they were trying to maintain some kind of green space. They would be adding very little pavement to the driveway and, if they kept to the right hand side, they could conform to current setbacks and not take up all of the back yard.

Mr. St Jean stated that they had a petition of support to present to the Board that had been signed by the neighbors, except for the owner of the fenced square piece the length of the garage and 5' or 6' wide. He was not sure to whom that belonged.

Ms. Carol Stowe stated she lived at 53 Humphreys Court and felt that the garage would be a nice addition to the home. She supported the petition.

SPEAKING IN OPPOSITION TO THE PETITION

No one rose to speak.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Harold Whitehouse stated he was a direct abutter and, if approved, the garage would be 28’ to 30’ from his property line. He suggested that 11” on the left hand side and 1’ to the rear is unreasonable and there should be some space allowed for maintenance. He felt the garage was unsafe. While it didn’t apply under the ordinance, he mentioned that a beautiful elm tree would have to be removed. He stated that a new garage would be an asset to the neighborhood and he basically approved and thought the Board should make a stipulation to allow space for side and back maintenance.

With no one further rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. MacCallum made a motion to deny the petition, which was seconded by Mr. Jousse.

Mr. MacCallum stated that a garage was not a necessity. The only question was granting a garage as big as they want it. He felt the request was contrary to the zoning ordinance as the purpose for setback requirements was to avoid overcrowding. He stated that the Boccia standards were not met and he was not convinced that applicants couldn’t build a garage that met zoning requirements. After inspecting the property, he felt the plan was misleading and there was more room available.

Mr. Jousse stated it was unreasonable to allow rebuilding a new structure a foot or less away from two property lines. If maintenance was needed in the future, the applicants would have to use neighbors’ property for access and that was unreasonable.

Mr. Witham stated he would also support the motion. He understood that meeting the requirements of 10’ would put the garage in the middle of the yard, but he didn’t think 11” was the answer. Buildings had to be maintained and they would have to go onto the abutters’ property to do so. He was also concerned about lot coverage and felt a one car garage might be more appropriate for this area of town.

The motion to deny the petition passed by a unanimous vote of 7 to 0.

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4) Petition of **Gene J. Bona and Stephanie A. Parry** , owners, for property located at **68 McDonough Street** wherein the following were requested: 1) Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) to allow a 12’ x 21 ½’ two story addition with: a) a 3’± left side yard and a 0’ right side yard where 10’ is the minimum required, b) a 9’± rear yard where 20’ is the minimum required; and, c) 67.2% building coverage where 35% is the maximum allowed, and 2) a Variance from Article XII, Section 10-1204 Table 15 to allow no parking to be provided where 2 parking spaces are required. Said property is shown on Assessor Plan 138 as Lot 40 and lies within the Apartment district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. David Galkins stated that the applicants were trying to renovate their property as others in the neighborhood had done. They were a growing family and needed to expand their space, but in so doing, have run into these few setbacks.

Mr. Marchewka asked, in terms of the 0’ setback, had they looked into any other alternatives.

Mr. Galkins stated the left side had a 3’ setback and the front and right side had 0’. To the rear, where they are proposing the addition, there is a 23’ setback and the commercial property abutting the rear had installed a fence. There was no other place to put the needed addition except to the rear. They were also trying to allow for one parking space.

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

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

Mr. MacCallum made a motion to deny the petition, which was seconded by Mr. Parrott.

Mr. MacCallum stated that the property already exceeded the coverage limit and granting this proposal would almost double it. The purpose of the coverage limit in zoning was to prevent neighbors piled on top of each other which was what the applicants were proposing with 67.2% coverage. The area was already overcrowded and there was no hardship associated with the property because it was typical of others in the neighborhood.

Mr. Parrott, in seconding, stated this was an extremely large request in terms of the lot. With a small 1,100 s.f. lot it was important to maintain as much open space as possible for light and air considerations and they were already over coverage by a fair amount. He felt that having 2/3 of the lot covered by structures would be contrary to the ordinance. There would only be a very small space for one car to park and no useful yard space. When buying a building that covers a substantial amount of the lot, owners should recognize that it would probably have to stay that size. They should look at other alternatives to the extent possible.

The motion to deny the petition was passed by unanimous vote of 7 to 0.

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5) Petition of **Marcy Street Investments, owner, Win Rhoads, applicant**, for property located at **359 Marcy Street** wherein the following were requested: 1) a Variance from Article II, Section 10-208(2) to allow a retail wine and cheese store in a district where such use is not allowed, and 2) a Variance from Article XII, Section 10-1204 Table 15 to allow no parking to be provided for said use where 2 parking spaces are required. Said property is shown on Assessor Plan 102 as Lot 26 and lies within the Waterfront Business and Historic A districts.

Mr. MacCallum advised that he would be stepping down for this petition.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard Pelech indicated the location of the applicant's property on the displayed map, noting that it was in the Waterfront Business District which allows the retail sales of marine goods, groceries and ice providing it was in a space less than 2,000 s.f. The current use was for two residential dwelling units, which was not an allowed use. The proposal was to use the first floor for a wine and cheese shop of approximately 600 s.f. He noted that he had rarely seen so much support from people in the city. In the packet was a petition of support signed by over 400 people and there were over 30 letters submitted by him or sent directly to the Planning Department. The one letter in opposition was based on the incorrect premise that this was a residential district.

Attorney Pelech passed out an aerial photograph to show the general area and stated they were seeking two variances. One was to allow a wine and cheese store and the second was to allow no parking on-site where two spaces were required. When Marcy Street was reconfigured, the curbed off area in front of this building which is big enough for 3 or 4 cars was created and that's where most of the residents of that building and customers park. This area is city property, with the only access from South Mill Street.

Addressing the criteria, he stated that the zoning restriction interfered with the reasonable use of the property and this was a reasonable use given the fact that many more intensive uses were allowed. The unique conditions included a small lot size and location on a corner in a little peninsula surrounded by water and two streets.

He maintained there was no fair and substantial relationship between the ordinance and the restrictions on the property. The ordinance was written in 1995 and allows some uses and not others as set forth in the departmental memorandum. If seafood could be sold next door, wine and cheese should be allowed to be sold at this location.

He stated that the number of people supporting the variance indicate that this would be in the public interest. The applicants would also have to go before the Historic District Commission to ensure that the façade was appropriate for the neighborhood and not diminish any property values. It was also consistent with the spirit of the ordinance to promote the public welfare. The support received should indicate that there was no benefit to the public in denying the variance.

Mr. Witham asked if the parking behind the building was part of this and Attorney Pelech indicated it was not.

Former and prospective neighbors and other area residents spoke in support of the petition. Their comments included the following: that there was adequate street parking in the area of the proposed shop and many customers arrive on foot to visit the fish market; with the hours of operation, the shop will not interfere with traffic and parking; the shop will fit the tradition of the neighborhood; the owners have been excellent neighbors in their former location and would be expected to bring value to the new neighborhood; this is less of a non-conforming use than the current one.

The following spoke in support:

Ms. Cynthia Harriman, 67 South Street
Mr. William Manfull, 12 South Street

Mr. Charles Vaughn, 50 Pleasant Point Drive
Mr. and Mrs. Stowe, 53 Humphreys Court
Ms. Katherine Towler, 125 South Street
Mr. David Farrington, 579 Sagamore Street
Ms. Lynn Schweikart, 579 Sagamore
Mr. David Bird, 151 South Street
Mr. Nick Allen, Baycliff Road
Mr. Harold Whitehouse, 58 Humphreys Court
Resident, 10 Newcastle Avenue
Mr. Jack Kelly, 137 Newcastle Avenue
Mr. James Horrigan, 35 Elwyn Avenue
Mr. and Mrs. McElwain, 259 South Street
Ms. Megan Rice, 196 South Street
Ms. Xanthi Gray, 251 South Street
Ms. Jeannine McCoy, 499 Marcy Street
Mr. Stanley Hodges, 270 South Street

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Nicholas Johnson stated he lived on Franklin Street and, while he knew this was a nice business, the issue was that this type of business was against the spirit of the ordinance, which was there to protect the neighborhood. He felt they were probably going to change the face of the building to look more like a storefront and that other less desirable types of operation might follow.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Pelech stated he had the three more letters to submit.

Mr. Lou Panier stated he liked to see independent retailers because the big stores are encroaching more and more. He liked the community aspect.

With no one further rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Witham made a motion to grant the petition as presented and advertised, which was seconded by Mr. Holloway.

Mr. Witham stated that the Waterfront Business District was one that he wanted to protect and one that he felt needed their attention more than any other. He noted the property has a non-conforming use and the next step would be to condominiumize the two apartments. When he looked at the uses that were allowed and permitted by special exception, he couldn't see many of them on this property. Many couldn't be there because of the lack of actual waterfront. He thought this could benefit the community as a whole. While the use was not specifically permitted in the ordinance, the change would be more conforming than what currently exists.

Mr. Witham stated that the public has shown that it is not contrary to the public interest. The ordinance does interfere with reasonable use considering the unique setting as they do not really

have access to water, which is needed for many of the uses in the ordinance. He didn't see that any rights would be injured or property values diminished. Speaking to the parking, he stated that the benefit was that there was public parking right in front. Although it was on the street, it was well suited for the two business there.

In seconding, Mr. Holloway stated that he agreed and would support the motion.

Mr. Marchewka stated he also would support the motion. He noted that retail sales of wine and cheese were not allowed but marine goods, groceries and ice were allowed. The store carried what he considers groceries. Regarding parking, he stated he did not see where a 600 s.f. store would negatively impact the parking in neighborhood.

Mr. Jousse stated he would also support. The neighborhood supports and these type of stores should be preserved. The parking there was not a problem and a non-conforming apartment would be restored to something more conforming.

The motion to grant the petition as presented and advertised passed by unanimous vote of 6 to 0.

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**IV. ADJOURNMENT.**

The motion was made, seconded, and passed to adjourn the meeting at 8:54 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary