

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

**7:00 p.m.**

**CITY COUNCIL CHAMBERS**

**AUGUST 28, 2007  
Reconvened From  
AUGUST 21, 2007**

**MEMBERS PRESENT:** Vice Chairman David Witham, Alain Jousse, Charles LeMay, Arthur Parrott, Alternates: Derek Durbin, Thomas Grasso

**EXCUSED:** Chairman Charles LeBlanc, Carol Eaton, Henry Sanders

**ALSO PRESENT:** Lucy Tillman, Chief Planner

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Vice-Chairman Witham opened the meeting at 7:10 p.m.

**I. PUBLIC HEARINGS**

7) Petition of **Michael J. and Leanne A. Edwards, owners**, for property located at **64 Brackett Road** wherein a Variance from Article III, Section 10-302(A) was requested to allow a Lot Line Revision between Lots 22 and 21 on Assessor Plan 206 with: a) Lot 22 decreasing in area from 6,738 s.f. to 6,338 $\pm$  s.f. where 15,000 sf is the minimum required, and, b) street frontage for Lot 22 decreasing from 65.99' to 61.99' $\pm$  where 100' is the minimum required. Said property is shown on Assessor Plan 206 as Lot 22 and lies within the Single Residence B district.

Vice-Chairman Witham announced that he was stepping down for this petition.

Mr. Parrott assumed the Chair and advised that there would only be five members voting on this petition.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Michael Edwards referred to a 4' x 100' strip of land to the right in the photograph he had submitted. This strip of land, which they had believed to be on their property, was discovered in a previous hearing process, to be on their neighbors' lot. The Board had requested that they correct the issue, which was handled temporarily with an easement to give them time to research the properties. He briefly outlined the history which their neighbor, Mr. LaCroce had researched. An area variance was needed to allow the restoration of property lines to the original locations. Both lots were nonconforming. The benefit could be achieved by no other method as this was along a common property line which couldn't be changed. Moving the neighbors' driveway was not feasible. He stated it would be in the spirit of the ordinance to correct an error which occurred prior to the ordinance. Justice would be done by balancing the two properties and returning

permanent use to the appropriate property. The property values should, if anything, improve as future owners will not be affected by the error.

**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. Jousse made a motion to grant the petition as presented and advertised, which was seconded by Mr. Grasso.

Mr. Jousse stated that he remembered the previous discussion before the Board. He believed they may have sent the applicant back to have the land surveyed and this was the result. Although the Board was not in the business of approving a reduction in a piece of property, there was an error down the road. There was no gain or loss to the applicant.

Mr. Jousse stated that this would not be contrary to the public interest. The special conditions were the fact that everybody thought the property line was in one location while it was actually in another and they were just trying to make the correction. There would be no injury to the rights of others and the spirit of the ordinance and justice would be served by granting the variance. No indication had been made at the property values would diminish.

Mr. Grasso added that this seemed like a very favorable action to eliminate a problem that had been apparently unknown.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 5 to 0.

Vice-Chairman Witham resumed the chair.

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8) Petition of **Robert J. Chaffee and Barbara A. Trimble, owners**, for property located at **32 Miller Avenue** wherein a Special Exception as allowed in Article II, Section 10-207(18) was requested to allow a Home Occupation II office for “Extended Family” with one non-resident employee. Said property is shown on Assessor Plan 136 as Lot 18 and lies within the Mixed Residential Office district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Robert Chaffee stated this petition was very similar to one approved in 2004 when the Board approved an office for his wife, which was subsequently moved downtown to State Street. They would now like to move it back and had provided floor plans showing the office location in their building, which also functions as a bed and breakfast and private residence. Their submission had also included a site plan and brochure on her business.

Vice-Chairman Witham asked if he would like to address the criteria for the granting of a special exception, such as the impact on traffic and presentation of any hazards. Would he describe how the space would be used.

Mr. Chaffee stated the operation provides support services to the elderly. Caregivers work from their homes and receive their assignments by phone. They have someone who handles scheduling and administrative functions.

In response to questions from the Board, Mr. Chaffee stated that the hours would be from 8:00 a.m. to 5:00 p.m. Visitors would be rare. Two or three times a week an employee might come by to drop off a time sheet, but no clients would visit. There would be no new construction as the proposed room was the same as that approved in 2004. There would be a maximum of one non-resident employee.

**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. Grasso made a motion to grant the petition as presented and advertised, which was seconded by Mr. Parrott.

Mr. Grasso stated that this was the same as what had been previously granted. There would be no hazard to the public or detriment to property values. With very few visitors, no traffic or safety hazards would be created and there would be no excessive demand on municipal services.

Mr. Parrott agreed. This was a low impact use, which is one allowed by the ordinance. There would be no detriment to the neighborhood.

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

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9) Petition of **Seacoast Trust NH General Partnership, owner**, for property located at **150 Route One By-Pass** wherein a Variance from Article II, Section 10-206 was requested to allow the placement of a mobile coach for diagnostic services in the existing parking lot in a district where such use is not allowed. Said property is shown on Assessor Plan 231 as Lot 58 and lies within the Single Residence B district.

Mr. Parrott announced that he was stepping down for this petition.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Peter Weeks reviewed the packet of information that Seacoast Trust had submitted. He stated that this had been a medical facility since the 1960's and, when first built, was not in a district zoned residential. He reviewed actions of the Board since 1986 of Board, noting that with any

change in the property, they have to come before the Board. He stated that, with the increase in medical technology, they now found it desirable to have a diagnostic facility on site and would like a mobile coach to provide MRI services. The facility will be there permanently and will be landscaped. Mr. Weeks identified the photographs on display which showed the mobile coach from various viewpoints. They had sent out letters to their neighbors, one of whom visited and he felt they had answered their questions. The practice and their neighbors have an excellent relationship and he doesn't believe anyone opposes this.

Addressing the criteria, Mr. Weeks stated there would be no diminution in property values and justice would be done as the medical facility had been part of the neighborhood for years with no problems. The mobile coach should also not present any. Regarding the public interest, the same medical use had been in operation since rezoning to residential with no impact. The property sits right on Route One By-Pass, with woods on one side. A hardship would be created by denial as the proposed use is reasonable and the restriction would interfere with that reasonable use. With appropriate landscaping, he stated there would be no injury to the public or private rights of others. He felt it would benefit the public to have a diagnostic service right with the practice. The character of the property will not be altered and it would be in the spirit of the ordinance to ensure that the property owners continue to live together in harmony.

In response to questions from Mr. Grasso and Mr. LeMay, Mr. Weeks stated that the mobile coach would be skirted and landscaped on three sides. It was intended to be a permanent structure. They had not proposed a new addition or building as the company that supplies the mobile coach updates it as technology changes. It is more difficult to update equipment installed in a building.

Mr. Grasso asked Ms. Tillman if it would be allowed to replace the mobile coach in one year, for example, if one with new technology was developed.

Ms. Tillman responded that the exact mobile coach would be allowed if the Board granted a variance to have the facility on site. She would double-check if they would have to come back for another variance if it were not the same size. She felt fairly safe in assuming that it would be there for some time.

Mr. Jousse asked if this was a leased piece of property on the parking lot and Mr. Weeks stated it was.

Vice-Chairman Witham noted that the Planning Department had expressed some concern based on the use, or construction type.

Ms. Tillman stated they generally don't see a lot of mobile units associated with medical facilities and it is in a residential zone.

Mr. Weeks stated this was not a hot dog stand. It would not be inappropriate to the area.

Mr. Witham stated he was wondering what would happen with the handicapped ramp in the winter with snow blowing. Mr. Weeks responded that the handicapped ramp would expose the office area for about 40 seconds as someone was going in or out, the same as when one can look into an office when a door is opened.

Mr. LeMay asked him to comment on the ways in which this structure varied as other than a hot dog stand or a shelter. He felt it wasn't clear how swapping out an MRI unit in an addition to a building would be a whole lot more inconvenient than swapping out this trailer.

Mr. Weeks stated that the difference was probably the same reason Portsmouth Hospital has a mobile unit. If you build a brand new facility and just put equipment inside, the removal of that equipment would be entirely different than just taking this coach and replacing it. This is different from a hot dog stand as it will only be used 3 or 4 times a day, with no odors and with landscaping done in such a way that it becomes a part of the campus.

Mr. LeMay stated he was looking for a justification as to why this was needed, as opposed to a structure, for any reasons other than the convenience of the operators.

Mr. Weeks stated that doctors will be involved in the operation. In this type of facility, they will always be able to offer future technology as it becomes available, as opposed to having to replacement equipment installed in a building.

In response to questions from Mr. Jousse, Mr. Weeks stated that, if the unit became obsolete or nonfunctional, a new fully operational unit would be in place within 24 hours. If the equipment were installed, it might not have the same use to another practice as this mobile facility. It would probably take several weeks to dismantle and replace installed equipment.

### **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. LeMay made a motion to grant the petition as presented and advertised, for the purpose of discussion. The motion was seconded by Mr. Jousse.

Mr. LeMay stated that the mobile facility will be part of the support equipment that the practice will be using, which makes it more unique than a mobile home or something of that nature. It would not be detrimental to the public interest to be in a zone where that type of work was done. In terms of hardship, he felt it was needed to take into consideration that this was a pre-existing nonconforming use. The mobile facility was a reasonable expansion of that type of use. Justice would be done in terms of allowing the continued operation of the business and there was no evidence that surrounding property values would be diminished.

Mr. Jousse stated that granting the variance would not injure the public or private rights of others. This could be seen as a natural expansion of the nature of the business and a novel way of providing the services required.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 5 to 0.

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10) Petition of **Public Service Company of New Hampshire, owner**, for property located at **400 Gosling Road** wherein the following were requested: 1) Variance from Article IV, Section 10-402(B) and Article III, Section 10-305(A) to allow a 9.1'± front yard where 70' is the minimum required and a 16.9'± right side yard where 21' is the minimum required, and 2) a Variance from Article V, Section 10-503 to allow no landscaping to be provided where landscaping is required for all new buildings. Said property is shown on Assessor Plan 214 as Lot 1 and lies within the Waterfront Industrial district.

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

Mr. David Still pointed out various features on the site plan which was on an exhibit board, the same plan as in the packet. He indicated where the warehouse facilities were being removed and the location of the new one. He stated they were trying to take a site that currently functions for warehousing and improve functionality. The two buildings were nearing the end of their useful cycle. While he acknowledged it sounded like a lot, he noted several features of the existing site that would allow them to actually improve conformity. There was a lot of on-site parking within setbacks. In terms of property values, the new building would be an improvement over the existing ones. He stated the spirit of the ordinance would be preserved as the Schiller facility developed over time and some pieces were not in conformance. This will result in a slight improvement in conformance. The existing facility is 16 feet off from railroad and the new facility will be 20 feet off with a side ramp. There would be no benefit to the public interest in not allowing needed changes to the facility consistent with current use.

### **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 made a motion to grant the petition as presented and advertised, which was seconded by Mr. Grasso. He stated that replacing two obsolete warehouses with one in the same location was more of a change in size than in kind. The site is not near residential areas. The impact on the site will be minimal.

He stated that he didn't see any impact on the public interest because this was on an industrial site where 99% of the people there were workers. The applicants were requesting to operate their business more efficiently and it would be a hardship for the City to say they can't make the change. There was no other alternative to fulfill the function of a warehouse. He stated that it would be in the spirit of the ordinance to not hamper the efficient operation of businesses and property values would not be affected.

Mr. Grasso stated he agreed. While it initially seemed like a lot of relief, it was presented as replacing two warehouses with one new one which was less nonconforming.

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

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11) Petition of **Two Girls Realty LLC, owner, Craig Welch and Stefany Shaheen, applicants**, for property located at **261 South Street** wherein the following were requested: 1) a Variance from Article II, Section 10-206 to allow the building to be used as office space for the applicants (real estate office and consulting office) and 2) a Variance from Article XII, Section 10-1204 to allow the office without parking being provided where 5 parking spaces are required. Said property is shown on Assessor Plan 111 as Lot 34-2 and lies within the General Residence B and Historic A districts.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Craig Welch stated he was speaking on behalf of himself and Stefany Shaheen, his wife. They live down the street and had been looking for space for their offices. He is self employed as a real estate advisor and she is an independent consultant handling public policy and communications for clients based in Washington and Cambridge. They both travel a lot. The location of this building down the street from their house and close to school is ideal. He stated this would be a low impact use of the property. They were not a retail business. They work during business hours and don't have walk-in clients. They will not be residing in the building.

Attorney Bernard W. Pelech stated he was appearing on behalf of the owner, Two Girls Realty LLC. He stated this was a unique parcel of land with special conditions. There were two structures, one of which was a single family residence. This structure had been there since the 50's and was usually a convenience store, never residential. He reviewed several of the past uses and stated it would not be conducive to residential because there was no cellar. There would also be two dwelling units on a single lot, for which they would need a variance. The proposed use was less intense than others in the past and was only for personal offices.

Attorney Pelech stated it would be in the public interest to have a building which had been vacant for two years used for something. They were not going to require police or fire protection or require school or substantial municipal services. The special conditions creating a hardship were, again, that this was two buildings on the same lot, with this building being non-residential since construction. The zoning interferes with reasonable use as this use would have a more appropriate effect on the neighborhood. There is no special relationship with the general purposes of the zoning ordinance as it would be applied to this property because there is this non-residential structure sitting in a residential district which can't even be used as residential without a variance. He stated this was a low impact use which would not injure the public or private rights of others or the neighborhood. The intent of the ordinance is to protect the safety and general welfare of the public, but also to allow uses that were not inconsistent with abutting uses. If denied, there would be no benefit to the public, but a severe hardship would be created for the owner. There would be no diminution in the value of surrounding properties. The lack of on-site parking was no problem as the applicants would usually walk to work.

Mr. Jousse asked what unit one was, if this was unit two. Attorney Pelech responded that it was a residence. There were two separate owners of the condominium property.

Ms. Marian McElwain stated they were also petitioning that evening and were the owners of unit one. She noted the building had been vacant since January of 2006. They were in favor of the

petition and felt this was an appropriate and low impact use with no delivery trucks and the parking situation alleviated.

Mr. Dave Marple of 64 Mt. Vernon Street stated there was no reason to deny and they see the benefit of not having an empty building. Places that foster mixed uses seem to thrive and they believe this will enhance their community.

Mr. Harold Whitehouse of 58 Humphreys Court stated that the property had been idle and was deteriorating a little bit. He felt this was an ideal use.

Mr. Welch submitted to the Board letters from neighbors who supported the project but could not appear.

### **SPEAKING IN OPPOSITION TO THE PETITION**

Ms. Susan Alex of 50 Mt. Vernon Street stated that this use of the property will benefit one family and when it was a store, it benefited everyone. She felt a similar store would add character to the neighborhood.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

With no one rising, the public hearing was closed.

### **DECISION OF THE BOARD**

Mr. LeMay made a motion to grant the petition, which was seconded by Mr. Grasso for the purposes of discussion.

Mr. LeMay stated that, having seen this property through previous applications, this is one of the lowest impact you can have in an area where there is virtually no parking. He agreed with Attorney Pelech's addressing of the criteria points.

Mr. Grasso stated he had seconded for discussion. He stated this was a residential area and Mr. Pelech had said it couldn't be used as residential because it had no cellar, but this is not necessary. He noted that a variance goes with the land and an office use in a residential area was not compatible. While Mr. Welch had a good presentation about their proposed uses, in the future there might be other uses the Board would not want.

Mr. Parrott stated he would like to be in favor, but looking objectively, this was a 100% residential area. The argument seemed to be that a real estate office would be the same as convenience store, but require less parking. A convenience store was a neighborhood meeting place and he found it hard to argue that a real estate office employing a number of people has the same effect on the neighborhood as an enterprise where people come and go and don't park all day. It also could be argued that a convenience store serves the neighborhood and these businesses would not. A variance was permanent and, once approved, a business office could be turned around next year with a negative impact on neighborhood. The fact that the neighborhood changed over the years and no one chose to go in for a food related business was not the concern of this Board. He felt



this would be contrary to the public interest and justice would not be done because the public interest would be as defined by the neighbors who live in that particular area.

Mr. Jousse agreed. Mr. Pelech said, if they were to convert the structure into a dwelling, they would need a variance, but they need one anyway. He would look more favorably to a variance for second dwelling on same piece of property than this type of business moving in.

Mr. LeMay stated that he could respect that a business with no discussion of employees or parking could be a timebomb, but this application was specifically for a building used for an office with no outside employees. While he was sympathetic to the idea of a neighborhood gathering spot, that had been before this Board and the hurdle was high enough that the proposal didn't make the grade. He wasn't convinced it would pass.

Ms. Tillman clarified that, when it was initially advertised, it was specified as with no outside employees. They had amended the notice to delete that.

Mr. Grasso stated his concern had been no specification of employees. It could be zero or an infinite number of employees.

Vice-Chairman stated that, in this situation, this was really the only commercial use in this neighborhood and had always been a neighborhood convenience store. To put this business in would almost be a black hole. He didn't want to handcuff the owners to find a convenience store, and maybe there wasn't another one, but there may be compatible uses. He wasn't ready to give up on the possibility.

The motion to grant the petition as presented and advertised failed to pass by a vote of 0 to 6, with Vice-Chairman Witham and Messrs. Durbin, Grasso, Jousse, LeMay, and Parrott voting against the motion.

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12) Petition of **Robert M. and Mary Lou McElwain, owners**, for property located at **259 South Street** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)92)(c) were requested to allow: a) a 12' x 17' one story addition to the back of the existing dwelling with a 7.75'± right side yard where 10' is the minimum required, and b) a 192± sf irregular shaped deck to the back of the dwelling with a 7.8'± right side yard where 10' is the minimum required. Said property is shown on Assessor Plan 111 as Lot 34-1 and lies within the General Residence B and Historic A districts.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Robert McElwain stated that they would like to put a 12' x 17' addition in the back with a deck which would fit right into a blank space. They were seeking refuge from the increasing noise on South Street and, to have a room less than 12' x 17' would be pretty pinched. This would be a one-story addition, with the roofline to the bottom of the windows on the second floor. He reviewed the exhibits he had provided, noting that, on the site plan, they were asking for roughly 2' into the right setback. He passed out letters of support from neighbors.

When Vice-Chairman Witham asked if he could speak to why the deck couldn't be less than 31' wide, Mr. McElwain stated it could be; they were open.

**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**

Vice-Chairman Witham noted that the applicant was open to stipulations on the deck and that the two variance requests could be taken together or separately.

Mr. Grasso made a motion to grant the variances as presented and advertised, which was seconded by Mr. Parrott.

Mr. Witham asked if the makers of the motion were open to asking that the deck have a side setback of 10', thus, not requiring a variance. This would bring the deck width down to 29'.

Mr. Grasso and Mr. Parrott stated they were agreeable to the stipulation.

Mr. Grasso stated that this was a very doable project a minimum size room that the applicants would like to construct. The special conditions were the way the house currently sits with one corner into the setback. The proposed addition would be about 7.7' from the property line. He stated that the variance was necessary to enable the proposed use as the house was closer to the property line than the proposed addition, which would be about 7.7' from the line. Granting the petition would allow the owners to use the property as they would like, while denying would not benefit the public, as there was no public interest involved. This would be consistent with the spirit of the ordinance and there would be no diminution in property values.

Mr. Parrott stated that this was basically an infill project and would not lie closer to the property lines. All the construction would be in the back yard and would not affect neighbors.

The motion to grant the petition, with the stipulation that the deck be reconfigured so that it would meet the right side yard setback of 10' and not require a variance, was passed by a unanimous vote of 6 to 0.

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**II. ADJOURNMENT.**

The motion was made, seconded and passed to adjourn the meeting at 8:45 p.m.

Respectfully submitted,

Mary E. Koeppenick, Secretary