

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

CONFERENCE ROOM A

7:00 p.m.

JANUARY 27, 2009

MEMBERS PRESENT: Chairman Charles LeBlanc, Carol Eaton, Thomas Grasso, Alain Jousse, Charles LeMay, Alternate: Derek Durbin

EXCUSED: Vice Chairman David Witham, Arthur Parrott, Alternate: Robin Rousseau

ALSO PRESENT: Lucy Tillman, Chief Planner

I. PUBLIC HEARINGS

2) Petition of **CCV Group, LLC, owner, Craig and Mollie Sieve, applicants**, for property located at **4 Sagamore Grove Road** wherein the following were requested to allow the rebuilding of a single family dwelling in a Waterfront Business District: 1) a Variance from Article II, Section 10-208 and to allow a residential use by rebuilding of nonconforming use on the existing foundation (600 sf) with an addition (568 sf), two stairway areas and a chimney in a district where residential uses are not allowed, 2) a Variance from Article III, Section 10-304(A) to allow a 20' x 30' (600 sf) 1 ½ story single family dwelling on the existing foundation with a 12'± left side setback and the 568 sf irregular shaped addition with a 16'± left side setback where 30' is the minimum side setback required; and, 3) a Variance from Article III, Section 10-301(A)(7)(a) to allow the following: a) the proposed 600 sf portion on the existing foundation to have a 46'± setback, b) the stairs to have a 41'± setback, c) the landing and to have stairs a 55'± setback; and, d) the proposed 568 sf addition to have a 77'± setback all from the salt water marsh wetlands and mean high water line where 100' is the minimum setback required for all. Said property is shown on Assessor Plan 201 as Lot 4 and lies within the Waterfront Business district. Case # 1-2 (This petition was continued from the January 20, 2009 meeting)

SPEAKING IN FAVOR OF THE PETITION

Mr. Craig Sieve stated that he and his wife currently live on Brackett Lane and have owned and operated a business in Portsmouth for 5 years. They purchased this property in July after meeting with city officials and confirming that a residential use was acceptable for the property. After sharing their hopes of improving and expanding the property, the City stated that any changes would need approval from appropriate boards. Subsequently, they had familiarized themselves with the zoning ordinance and worked with others who understood it. He stated that the City had expressed concern about the dock indicating that continued commercial use of the dock should be part of any proposed changes. Based on all this, they had gone forward with Attorney McNeill and the architect to put together a plan that might be acceptable.

Mr. Sieve stated that the present house and land were assessed for some five hundred thousand dollars and they would like to use the property in a way that was commensurate with the high evaluation. They do not want a mansion, but simply wanted to reasonably expand the house to accommodate raising three children and also allow them to stand up on the second floor. The home would be a modest 3 bedroom cape in scale with other properties on Sagamore Grove.

They had met with surveyors, engineers, architects, the inspectors and neighbors to create a plan which met the following goals: reducing the many nonconforming aspects of the lot with regard to setback and tidal aspects; maintaining the dock for commercial uses per the city's request; addressing the concerns and receiving the support of neighbors and abutters; and not altering the essential character of the neighborhood. They understood that change was difficult but to retain the status quo was to freeze this property in time in 1943 and was not reasonable, which was why they sought the Board's approval. He distributed and read into the record letters of support from two abutters and from the previous owner.

Attorney McNeill outlined the previous request to the Board of Adjustment to allow this property to be used as a single family residence, noting that it had been denied in a close vote. He quoted comments made in that hearing by two Board members regarding the unique characteristics of the property and the associated hardship. After the decision, the owners of the property revisited the issue with city officials, resulting in the March 11, 2008 letter from City Attorney Bob Sullivan confirming the "lawful pre-existing non-conforming use of that property," but noting that "any structural or other changes to the building which would lead to an expansion of the area used for the non-conforming residential use would require that prior relief be granted by the Board of Adjustment." Attorney McNeill stated that, if this building burnt down, the owner could put it right back up and use it as a residence. In Portsmouth, however, if an owner voluntarily takes down a nonconforming use, a variance was required to rebuild it.

Attorney McNeill indicated on the displayed plan the existing building which they would like to tear down and rebuild on the same footprint, but slightly higher. He stated that this lot was unique. The existing building, shed and the garage were all nonconforming as to setbacks and the 100' tidal buffer, and the property does not meet the minimum lot size. Stating that the Waterfront Business District was the most restrictive zone in Portsmouth, he gave examples of permitted uses in the zoning ordinance and why those could not be accommodated. Others could be accommodated, but were not permitted. He indicated on the plan a small 12' x 12' section which would be the only area in which something could be built and meet all the setback requirements on this parcel which was valued at \$521,000. The dock at low tide sits on mud so it was used on a limited basis by the previous owner. Commercial activities were limited by the physical nature of the property and limited parking.

Referring to the handout he submitted showing the surrounding lots, Attorney McNeill indicated that the areas in yellow only have frontage on Sagamore Grove and contain single family residences. He pointed out a number of parcels which were nonconforming, in addition to the Sieve property and showed how they could not be used for waterfront businesses. Others had commercial uses, but were on a main street. In terms of the waterfront commercial district, the unique lots were all of those on Sagamore Grove, because all were residences. There were really two different neighborhoods in one zone.

In terms of actual uses, Attorney McNeill stated that his client and others have docks which were occasionally rented out. In part because of the sensitivity of the city, his client intends to continue the commercial use, including use by kayakers. The applicant wants to slightly modify the existing house and add on to it so it will have three bedrooms. One of the constraints in the placement of any expansion was the septic system as there was no municipal sewer. They would also like to move the addition as far back as possible from setbacks and place it so that it would not upset the infrastructure which supports building. They were proposing to remove the outbuildings which were in violation.

Attorney McNeill indicated on the plan what the applicants would like to do. The lot coverage would stay at 32% and they would take down the nonconforming sheds and a garage, leaving a pad for a patio but no structure and adding an additional footprint of approximately 550 s.f. to the house. The upshot would be less nonconformity after the changes. He outlined options that they had considered, but stated that renovation would be more expensive than tearing down the structure and rebuilding. Increasing the square footage to 2,350 s.f. would accommodate the applicants' needs and meet all codes. They would also remove gravel and concrete areas closer to the water and the City's tidal buffer zone so the impervious surface would be reduced to approximately 20% instead of 32%, increasing the likelihood of also receiving the necessary permits from the State. The ultimate result will be a larger house, greater conformity and continued commercial use of the dock.

Addressing the Simplex criteria for the use variance, Attorney McNeill stated that the nonconforming structure would be rebuilt from the foundation up and the two wood sheds would be removed. The concrete slab would be the only remaining component of the structures that exist on the other side of the building. Every effort had been made to reduce nonconformity so the variance would not be contrary to the public interest. It might be argued that, if the Waterfront Business District uses were applied on this property, there would be many more abutters complaining because the project would be totally inconsistent with the uses that surround the property right now. In terms of the public interest, the nonconforming footprints would be lessened; there would be a continuation of the historical marine uses on the site; the site would not get overused with regard to the commercial uses because of the parking limitations; and a reasonable use would be permitted of a lot that was severely compromised with regard to its zoning restrictions and its dimensional controls. It would not adversely affect other waterfront uses in the area; nor would it be contrary to the uses that were directly contiguous to the property. The health and welfare of the community would be advanced by "compliant structures" as opposed to what was there. Environmentally, and very importantly, the proposal would have fewer structures within the tidal buffer and comply with the lot coverage requirements.

Attorney McNeill stated that the zoning ordinance interfered with a reasonable use considering the unique setting as the rest of Sagamore Grove Road was residential but zoning prohibited this use. This would fit in with the characteristics of the neighborhood and property values would benefit from the improvements. There was no fair and substantial relationship between the zoning and the restriction on the property as the lot already contained a valid nonconforming residential use. Applying waterfront restrictions would be unfair and unreasonable. He maintained that the rights of others would not be violated as the use was consistent with the neighborhood. He stated that it was in the spirit of the ordinance to allow a reasonable use of any property and he felt it was arguable that the zoning in this area was in

error. Taking it lot by lot was a better method than rezoning so that the uniqueness of each property could be considered and whether its components lend themselves to waterfront businesses.

Attorney McNeill stated that substantial justice would be done on this high valued piece of property for which absolutely no use and no structure of any consequence were permitted at all. This would be a relatively small addition to the existing valid nonconforming use. It would be code compliant and the benefits to the community would be an improvement that would be environmentally sensitive. They had a realtor present who could attest that the long overdue improvements to the house would upgrade the neighborhood and not be out of scale or have an adverse effect on other properties.

With regard to the setback issues, Attorney McNeill noted that the existing building would be slightly modified with a smaller section added to the footprint. There was simply no other place to put the building and every component now violates dimensional requirements. He indicated again on the displayed plan how the property would be less nonconforming with the same relationship to the tidal setback. The stairways provided needed access given the topography and were not significant incursions into the tidal zone. It would be in the public interest to reduce the existing nonconformity and the impervious surface would be substantially reduced. He stated that there was no other reasonable alternative considering the location of the septic, the diminished lot size, the street setback, the ledge and the general nonconformity of the lot. In the spirit of the ordinance, the nonconforming nature of the structures would be reduced. Justice would be served as this was a reasonable expansion of an existing residence which would not adversely affect surrounding properties. Eliminating unattractive structures and adding a well designed structure would not diminish the value of surrounding properties.

Ms. Jane James spoke to the application as a real estate broker. She had reviewed the applicants' proposal and visited the site to consider the impact. She didn't feel that the abutters or the neighborhood would be adversely impacted or that the value of their properties would diminish. If anything, the proposed changes would advance the values in the neighborhood.

Mr. LeMay noted that the lot as it existed appeared, with the driveway going down to the dock, to have been used as a commercial waterfront with an ancillary use as a residence. His concern was that cutting off the driveway appeared to cut off much of the ability of any future owner to continue even that modest use by allowing for a pick-up to unload a boat. If they were doubling the size of the house and rebuilding from scratch, they would have to do something substantial to the septic preventing anyone going over that part. They seemed to be cutting off access to the dock.

Attorney McNeill replied that it was stated in Mr. Golter's letter that the primary use of the property had been as a residence. They had indicated willingness to provide access to the dock for a boat to refuel but they were limited as there was not a great water depth at the dock. What would change is that any unnecessary concrete would be removed and nonconforming structures which have not recently been used for commercial purposes would be removed. He maintained this was a realistic use in an area where the primary use was residential not waterfront commercial.

Mr. Sieve stated that one of the reasons the primary use had not been commercial on that lot was due to a 15' ledge which, even at high tide, was a 10' drop. It was difficult to get up from the dock.

In response to questions from Chairman LeBlanc, Mr. Grasso, and Ms. Eaton, Mr. Sieve stated that the previous owners had put in a sophisticated shoreland leaching system three years ago. There would be an open canopy over the slab after the garage was removed. Three bedrooms were proposed.

Mr. Jousse asked why the applicants had not sought the variances prior to buying the property. He questioned why they would buy a piece of property only to change it to something else within a year if it didn't fit their particular needs.

Attorney McNeill stated that the applicant had gone through the process of discussions with the City about the uses and constraints on the property and retaining some form of commercial use on the property consistent with the past. After also considering the environmental changes he was sensitive to and the realistic need to modify the building to make a reasonable use for him, Mr. Sieve came to the conclusion that it was reasonable to bring this to the appropriate Board for consideration. The process was not, in Attorney McNeill's view, one of second guessing why he didn't do it earlier but whether the grounds existed to provide the relief that he sought. He described a similarly restricted lot in Durham where, with all the controls, there were only 2 square yards of area where anything was permitted on the site. He added that people buy properties and seek change later all the time.

Mr. Durbin asked about the limited commercial use of the dock. Attorney McNeill stated the use would be the refueling of a lobster boat and unloading lobsters if that was what the boat owner wished, who was Mr. Golter. Some neighbors would also use it for kayaking.

Mr. Durbin asked about the need, if the variance were granted, to stipulate regarding the commercial use, which Chairman LeBlanc confirmed. Ms. Tillman pointed out the need to make sure there was proper parking for any commercial use.

Chairman LeBlanc asked about the state requirements for setbacks from the mean high water which, after a brief discussion, were decided to be from 50' to 250', depending on the impervious surfaces. Chairman LeBlanc asked about the condition of the foundation and Attorney McNeill responded that was the only solid component of the house.

SPEAKING IN OPPOSITION TO THE PETITION

No one rose to speak (verify from tape)

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Walter Allen stated that he was a diagonal abutter. He felt that the applicant had entered into an agreement with Mr. Golter to refuel his boat but, he maintained, Mr. Golter never saw the plans and agreed that it was physically impossible to fuel the boat there. Mr. Allen outlined the logistical difficulties he felt were involved.

Ms. Diane Coughlin stated that she lived directly across the street at 3 Sagamore Grove Road and would be the most affected. She indicated the new structure and how she felt it would impact her view, which is already partially obstructed by trees. She bought her property for the water view and felt that the value of her property would be diminished. She had an email from a realtor who advised that her value would go down as it concerned water views. If everything was nonconforming anyway, why couldn't the structure be built in such a way that it would not impact others. She stated that the other houses, sheds and garages on the street were small.

In response to a question from Mr. LeMay, she stated that she can see the water over their house now. It was tricky. Because of the perspective, it would appear 5' higher for the addition and another 5' for where they were putting it on the lot.

Attorney McNeill stated that, in terms of the options for adding onto the nonconforming residence, there were constraints throughout the property. They tried to move as far away from the lot line while still considering the location of the septic and providing a reasonable view to the abutter who just spoke. They were also planning on removing the other offending structures which were nonconforming. In response to Mr. LeMay's concern, they believe that the historical use that they propose for the dock is both doable and consistent with the recent commercial utilization of the lot.

Mr. Sieve stated that, regarding Mr. Golter's position, they had actually asked if they could come and speak in favor but because of emotions in the past, he had asked that they not do so. Mr. Golter had been kept up to speed throughout the process. He had wanted to make sure that refueling trucks would fit in a standard parking space and that the trucks had hoses adequate to do the job from the new driveway location. Chairman LeBlanc commented that it would be over a 200' hose and Mr. Sieve stated that the supplier claimed that they had the necessary capacity.

When Mr. Grasso asked if they had discussed the option of building a two and a half story home, Mr. Sieve stated that his architects had advised them to stay in the footprint of the existing foundation and that going taller would not be looked upon favorably by the Board. Abutters could see water over the garage but not the house.

When Chairman LeBlanc asked what the existing height was standing in front of the house and looking up to the roof, Mr. Sieve stated that the current ridge line was 22' and the proposed was 26'. Attorney McNeill commented that the maximum height in that zone was 35'.

DECISION OF THE BOARD

Ms. Eaton asked if the issue about refueling and waterfront use applied to what they needed to consider that evening. Ms. Tillman stated it would be a separate use, but one which the applicants found important to present. Ms. Eaton referred to a letter from the City Attorney stating that the property could remain a residential use and Ms. Tillman noted that it also stated that any change would require approval from the Board.

Ms. Eaton made a motion to deny the petition as presented and advertised, which was seconded by Mr. LeMay.

Ms. Eaton stated that, while this was a thoughtful presentation and she could understand why they wanted improvements, she felt that, with the view affected, the value of surrounding properties would be impacted and that was the one thing that was not doable.

Mr. LeMay stated that he didn't disagree that this was an existing nonconforming use which they could continue but he was concerned with the almost doubling of the footprint. The result would be a "squeezing of the door" to any good faith use of the property in the spirit of the zone in which it was located. He didn't feel that granting the variance would be in the public interest and did feel that property values would be adversely affected. He had no problem with the tearing down and rebuilding of a two story building but he believed the addition could be placed in a different configuration to make easier access for the fueling of boats at the dock and to preserve the neighbor's water view. The way the addition was situated blocks the view of the water which adversely affected property values.

Mr. Grasso stated that the use of the property as a residence was acceptable but he also would like to see something redone with the addition, or some other configuration to the proposed structure.

Mr. Durbin stated that he would not support the motion. He would have liked to hear something more from a professional about how the view on that back property would be affected. All they had heard was circumstantial evidence.

Mr. Jousse added that the environmental impact would be less than it was now.

Attorney McNeill asked the Chairman for clarification that, with the Board treating this all as one at this stage, they were truly objecting to the rebuilding of the structure on the existing foundation.

When Chairman LeBlanc stated that he didn't think anyone was objecting to that, Attorney McNeill maintained that he felt the effect of the motion would be to deny that (the rebuilding of the structure) and the dimensional relief they were requesting. He thought the Board was saying that the use variance for the addition was something they were not going to grant.

Chairman LeBlanc clarified that the motion on the table was to deny everything which would, in effect, deny rebuilding the structure even on its existing foundation.

After Attorney McNeill asked again if that was the intent of the Board, there followed a brief discussion with Ms. Tillman clarifying that what Attorney McNeill was trying to get at was whether they could come back and request to build on the existing footprint. Chairman LeBlanc stated they would then run into Fisher v. Dover which, Attorney McNeill commented, they were trying to avoid. Ms. Eaton stated that would be a different proposal as they would not be putting on an addition or expanding the footprint.

Ms. Tillman stated that, if they deal with building on the existing foundation and the addition as two separate components instead of one, the Board's objection to the addition would not give the applicants a denial on rebuilding on the footprint and they could come back with another proposal to amend the approval on the footprint. Attorney McNeill agreed, adding that they

don't want to be in the position to have to appeal the result to preserve their rights to rebuild on the existing footprint.

Mr. Jousse stated that his intent was to approve the rebuilding on the existing footprint and his objection was to the addition. Ms. Eaton concurred but added that they needed to see how high the rebuilt structure would be. After another brief discussion, Ms. Eaton stated that she would like to rescind her motion to which Mr. LeMay agreed.

A discussion followed among Ms. Eaton, Chairman LeBlanc, Attorney McNeill and Ms. Tillman about what a new motion would cover. They also discussed items shown on the plan such as the chimney, the proposed landing, the bay window and proposed stairs – whether some were structures and how they would be impacted. Ms. Tillman stated that she thought, in essence, that they wanted to grant anything that had to do with the existing footprint and deny anything to do with the proposed. This was rephrased as meshing the dimensional and use relief and granting it for the existing structure and denying the dimensional and use relief for the new structure.

Ms. Eaton made a motion to grant the continued residential use in a single family dwelling as presented and advertised with the existing setbacks. Her motion was seconded by Mr. Jousse.

Ms. Eaton stated that she believed the intent of the Board was to allow continued residential use of this property. She felt that rebuilding the structure on the existing foundation was consistent with the intent of the ordinance and the character of the area. A special condition existed on the property in consideration of its size and its history. Substantial justice would be done and the owner could upgrade his property, bring it into code and make it more livable without impacting the neighbors. Without a direct impact on the view, the value of surrounding properties would not be diminished.

Mr. Jousse stated he had nothing to add.

Mr. LeMay stated that he wanted to be clear on the rest of the plans for the lot such as the removal of the garage structures, the patio and so forth. He wondered if it should be stipulated that the rest of this should be as presented. When Chairman LeBlanc referenced the garage and all the attendant blacktop, the impermeable surfaces, Mr. LeMay stated that was correct.

Chairman LeBlanc stated those weren't included as part of the variances and he believed Ms. Eaton's motion was as presented and advertised. Ms. Eaton stated that was correct. Mr. LeMay stated that, then, their exception to presented and advertised would be to remove the addition and Chairman LeBlanc agreed.

Attorney McNeill asked for clarification and Chairman LeBlanc stated that the garage and some of the impermeable surface would be removed as they had presented. Attorney McNeill stated that the problem was that, if he's left with simply rebuilding the building, the applicant may wish to retain the garages, which was what he had right now. He could already use the house, just not in its present form. The reason for removing all of those structures was to provide an argument that the nonconformity was reduced, which justified the addition. They didn't feel they should be burdened with tearing down the buildings if they were not getting the complete result.

Ms. Tillman asked how the building coverage would be affected and Attorney McNeill stated it would be the same as it was currently. Ms. Tillman asked if it was exceeding the maximum allowable building coverage and Attorney McNeill responded that, to his recollection, it was exactly the same. They were on the same footprint. Mr. Jousse stated that, according to the plan it was 32% now and Ms. Tillman noted that the maximum allowed was 30%. Attorney McNeill concurred but stated that 32% was where they currently were. Ms. Tillman stated that, if they rebuilt the house on the footprint without removing those garages, they would not have reduced the building coverage and would have to re-advertise for that variance.

Mr. LeMay commented that they were returning to Ms. Eaton's earlier point that they were not voting on what was now in front of them. A brief discussion followed among Ms. Eaton, Chairman LeBlanc, Mr. LeMay and Ms. Tillman about whether the issue should be postponed and re-advertised as the lot coverage was not part of the original advertisement. Ms. Eaton made a motion to postpone the hearing until the next month so that a plan could be put together and re-advertised for the lot coverage, if necessary.

Attorney McNeill asked if they were going to make their decision that evening providing the relief they were speaking to, but conditioning it on compliance with lot coverage. He was trying to stay away from the box where they were denied being able to build on a nonconforming lot. He would rather have them impose the condition than put off the decision.

With Chairman LeBlanc and Ms. Eaton both indicating they disliked delays, Chairman LeBlanc noted that Ms. Eaton could amend her motion to add a condition regarding lot coverage.

Ms. Eaton stated that she would amend her motion to add that the maximum lot coverage of 30%, as required by the zoning ordinance, must be met.

Chairman LeBlanc asked if the amended motion as just made by Ms. Eaton, was acceptable to Mr. Jousse. Mr. Jousse stated it was.

Chairman LeBlanc asked for further comments from the Board and, hearing none, asked for the vote which was to grant relief for the rebuilding of the structure on its current foundation and conditional on the lot coverage of 30% being met, as well as all the setbacks for the original structure.

When Ms. Eaton stated she had to bring up another point, which was whether he could raise his roof, Attorney McNeill stated that was part of the plan and Ms. Tillman commented that the approval would be as presented, so this would be just a portion of that illustration.

The motion to grant the continued residential use in a single family dwelling to be rebuilt on the existing foundation, as presented and advertised with the existing setbacks, was passed by a unanimous vote of 6 to 0, with the following stipulation: That the lot coverage (including the proposed landing and stairs to the building to be built on the existing foundation) meet the 30% maximum structure coverage requirement in the zoning ordinance.

Chairman LeBlanc announced that they would now need a motion to deny the addition and all its setbacks. Attorney McNeill interjected that he would need to know the reasons for the denial.

Ms. Eaton made a motion to deny the proposed addition as presented and advertised and the associated setback requirements and lot coverage. She stated that, while there would have been a trade-off in the lot coverage, adding an ell to the existing small structure would represent a significant change to the neighborhood. It would also significantly change the way the house was situated on the property and the access to the water, along with affecting the water views of some of the abutters across the way. The bottom line was that substantial justice was not done and the value of surrounding properties would be diminished which she didn't think was consistent with the spirit of the ordinance. She also felt that the change in access to the water would be contrary to the public interest.

Mr. LeMay seconded the motion.

Mr. LeMay stated that he would like to incorporate the same arguments he had previously stated having to do with access to the water and he agreed with Ms. Eaton's comments.

Ms. Tillman stated that she needed clarification about the landing and stairs listed in part c) of the variance request and whether the entry was into the old building or the new one. Mr. Jousse stated the new building and Chairman LeBlanc agreed.

Attorney McNeill stated that the proposed landing and stairs were to the old building and the proposed stair that was closest to the water was to the new building. Ms. Tillman stated she wanted to clarify that for the record and Attorney McNeill stated that they would be subject to the lot coverage stipulation, but dimensionally they were linked to the old building.

The motion to deny the addition with its attendant dimensional relief was passed by a vote of 5 to 1, with Mr. Durbin voting against the motion.

IV. ADJOURNMENT

It was moved, seconded and passed to adjourn the meeting at 8:45 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary