

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

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

**March 23, 2010,
Reconvened from
March 16, 2010**

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice Chairman David Witham, Carol Eaton, Thomas Grasso, Alain Jousse, Charles LeMay, Arthur Parrott, Alternates: Derek Durbin, Robin Rousseau

EXCUSED: None:

ALSO PRESENT: Lee Jay Feldman, Principal Planner

I. APPROVAL OF MINUTES

A) February 16, 2010

It was moved, seconded, and passed by unanimous voice vote to accept the Minutes as presented.

II. NEW BUSINESS

No new business was presented.

III. PUBLIC HEARINGS

- 2) Case # 3-2
Petitioner: Jennifer A. Carsen
Property: 121 Northwest Street Assessor Plan 122, Lot 1
Zoning district: General Residence A
Requests: **Variance** to construct a single story 16'X 20' addition with an 8' rear yard setback where 20' is required
Section 10.521 Table of Dimensional Standards
Section 10.324 To allow the expansion of a nonconforming structure

SPEAKING IN FAVOR OF THE PETITION

Ms. Jennifer Carsen stated that they would like to add an addition as the family expands. The submitted plans illustrated what they wanted to do. When she asked if there were any questions, Chairman LeBlanc stated that usually the applicants had to have a reason why they wanted a variance.

Ms. Carsen stated that the addition would move them closer to the back of the house and to the Route One Bypass rather than the street. Ms. Rousseau noted that the Board had a whole list of criteria to look at and they had a nonconforming structure. They were looking for an 8' rear yard and she wondered what their rear setback was currently. Were they increasing the nonconformance?

Mr. Richard Boutin responded that the nearest point was 5' which should be in the submitted plans. The proposed addition started at an 8' rear yard setback and went to about 16' (12'). To their mind, they were not increasing the nonconformance as the house was already nearer to the lot line. When Ms. Rousseau questioned again whether he knew the current setback, he reiterated that it was 5' to the nearest point. In response to further questions from Ms. Rousseau, Mr. Boutin confirmed that the house was already nonconforming; the nearest point was 5', and where the addition was going would be from 8' to 12'. The house sat at an angle to the setback and the addition started at a further point and went deeper into the property rather than further out. He confirmed that they were demolishing a shed and creating an addition with an 8' setback.

Chairman LeBlanc asked what sort of easement there was between their lot line and the travelled area. Mr. Boutin stated that there was a large fence and Ms. Carsen stated that her guess would be that it was about 10' to where the pavement started. Mr. Jousse added that he drove by there daily and it seemed more than 10' from the pavement to the fence.

Mr. LeMay noted that the submitted sketch was not a survey and asked how the picture or outline was located. How did they know the 8' dimension was right. When Mr. Boutin stated that this was an actual picture taken from the tax map on which they had marked the lot.

Ms. Eaton stated that they were demolishing an existing shed and she assumed there was no structure going back in its place. Ms. Carsen stated that was correct. She asked if the distance at the furthest point, the new dimension, was 12' and Mr. Boutin stated that it could be a little greater than 12' as it was not pinned out. They were not going any further than the existing rear wall. When Mr. Jousse commented that the 8' setback was an actual corner of the existing house so they were not encroaching further, Mr. Boutin confirmed that was correct. By demolishing the existing shed, they were actually pulling back the structures rather than encroaching further.

Ms. Rousseau asked if they could put the addition somewhere else so that they would not be in nonconformance, adding that one of the criteria was whether they had considered other options. Mr. Boutin stated that the right hand side was not an option because it abutted the line and, on the left side, the entire leg was open porch right now so it would involve demolition of things they hadn't planned on. Ms. Carsen added that they had considered other options, but where the house was already indented seemed a logical place to put it. It didn't increase the nonconformance because the shed was being demolished.

**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. Witham.

Mr. Grasso stated that the applicant simply wanted to add a 16' x 20' addition to a little inset into their current building. The proposed structure would not increase the setback and the boundary to the back was the Route One Bypass so he didn't feel that would be a negative.

Addressing the criteria, he stated that there would be no real public interest with the addition in the back next to the Route One Bypass. There was no fair and substantial relationship between the general purposes of the Ordinance and the restriction on the property. The house was already in the setback and almost anything they wanted to do would require coming before the Board. They were trying to expand living conditions by putting on an addition, which was reasonable given the odd shape of the lot. With regard to the value of surrounding properties, there would be no negative impact as the addition, again, was in the back next to the Route One Bypass. In the spirit of the ordinance, there would be plenty of light and air and no coverage problem. In the justice test, there would be no negative impact on the general public if the variance were granted.

Mr. Witham agreed, adding that the most adversely affected property would be the Route One Bypass and he couldn't see how that would be harmed. If anything, it would be the other way around. It seemed the applicant did give this some thought and couldn't go to the right of the front of the left hand side. It was reasonable to establish this addition where there was a jog in the rear and, by removing the shed, they were bringing the property into greater conformity.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 7 to 0.

Chairman LeBlanc announced that the Board had a request for a postponement for 800 Lafayette Road and asked if there was any objection. Ms. Rousseau asked the reason for their request and Mr. Feldman responded that Attorney Loughlin was representing the applicant and, as they had planned on appearing the previous week, had scheduled a trip out of town and was unable to be there that evening.

Mr. Witham made a motion to grant the postponement, which was seconded by Mr. Parrott and passed by affirmative voice vote.

3) Case # 3-3

Petitioner: 45 Pearl Street Properties LLC, Owner and Cindy Dodds, Applicant

Property: 45 Pearl Street Assessor Plan 126, Lot 30

Zoning district: Mixed Residential Office

Request: **Variance** to install 10”x 4” duct work on the outside of the structure with a 1’10” setback where a 15’ rear yard setback is required.

Section 10.521 Table of Dimensional Standards

Section 10.324 To allow the expansion of a nonconforming structure

SPEAKING IN FAVOR OF THE PETITION

Ms. Cindy Dodds stated that she was the owner of the property at 45 Pearl Street. They had submitted a packet of information which she would like to walk them through. Letters had also been submitted by the Preservation Alliance, the Islington Street Association and the chair of the West End Business Association, which they should have. A letter had also just been received from an abutter, which she passed out.

Ms. Dodds reviewed her packet, which included a tax map showing the property as a large building on a small lot. She detailed what each page of photographs illustrated, including the building, the proposed duct work and how it would be situated 10” high and 4” out on the building, the interior orientation, and the alleyway used for cable boxes and existing venting in the back. Noting that this was an historic building, Ms. Dodds outlined some of its history. They had a preservation easement which was significant because there were a lot of restrictions and they had to run anything they did by the Preservation Alliance. In their paperwork, they had tried to provide their reasons for proposing the changes. They felt this proposal met the criteria. This would be a small amount of ductwork in relation to a large structure and would be hard to see. An observer would have to look into the alleyway to see it placed 15’ up on the building and only sticking out 4”. They would be happy to paint the ductwork to match the building if the Board felt that was important.

Addressing the criteria, Ms. Dodds stated that granting the petition would not be contrary to the public interest as they would be putting the ductwork on the side that was the least visible from any point. Their goal was to get the heat out of the small kitchen. The spirit of the ordinance would be upheld as there were already cable boxes and vents back in the

alleyway where they were proposing to put the ductwork. They had looked at other options for venting, either going up through the roof or out some other way and strongly felt, as did the Preservation Alliance, that this was the best way. It would be the least obtrusive and maintain the historical character of the building. In terms of hardship, she stated that this was a unique structure and situation. While they own the property, they can't just go and do what they want but always have to strike a balance between maintaining its historical character and providing a locale for functions. They also have to go through an approval process with the State of New Hampshire.

Mr. Jousse asked if they were going to have to punch a hole in the building and Ms. Dodds responded that there would not be an additional hole in the wall as there was a space already for a fan which needed to be replaced. When Mr. Grasso asked what they had to do differently on this installation to satisfy the request that it be reversible, she stated just ensure that it could be taken off if the building were sold. Ms. Eaton asked why they were not going straight up on the outside. Ms. Dodds responded that they had considered it but then they would have a unit on the roof which would present a service issue. It also could be seen as you drove down Pearl or Hanover and they felt it would detract from the historical character. The existing hole they wanted to utilize was right in the middle of the building and the ductwork would be coming up right at the peak of the building and be visible from the Hanover Street side. Mr. Jousse observed that a horizontal line would be less visible against the clapboard.

In response to questions from Chairman LeBlanc, Ms. Dodds stated that they had run a noise test and, because the fan would be up to code and working property, it was actually quieter and the ductwork would further reduce the noise. She confirmed it would be installed to code. The kitchen hours of operation would be no later than 7:30 p.m.. The functions ended between 9:00 and 10:00 at the latest and were usually on the weekends. Most of the cooking would be done in the afternoon or early evening and they cleaned up as soon as the guests exited. When the cooking stopped, they could open up the kitchen doors and utilize the air conditioning so that there was no reason for the fan to run.

Ms. Eaton stated that she didn't see the reason for not venting in the back, why it would have to be above the roof. Mr. Witham stated that, if the owner vented it off the back, she would be 2' from the property line and code required her to be 10' from the property line so where she was proposing to exit the vent was about the only spot on the property where she could exit the vent and meet the mechanical code. When Ms. Eaton again mentioned the height, he responded that the code didn't look at height, only the distance from the property lines. It was just a matter of how the applicant got there, up through the roof and skirt over or along the side and skirt over. It was not a variance for code because it met the code. The only variance the owner was going for was the structure, the 4' by 10" ductwork.

**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, which was seconded by Mr. Parrott. Mr. LeMay stated that the application was fairly straightforward and the discussion had touched on the topics of interest.

Addressing the criteria, he stated that nothing would be contrary to the public interest. This was just a utility and it would be an advantage to vent the heat as politely as possible to the neighbors. In the spirit of the ordinance, it appeared to be the best solution where the buildings were on top of each other. Mr. LeMay stated that in the justice test, they were considering the building itself and not wanting to damage the building and there would be no gain to the public in denying the request. The applicants had addressed sound and odor issues so that the value of surrounding properties should not be affected. Regarding hardship, the applicants had explored other alternatives but had to comply with the New Hampshire Preservation Alliance as much as possible. He stated that there was no fair and substantial relationship between the zoning and its application to the property and he believed the proposed solution was reasonable.

Mr. Parrott stated that he agreed and had nothing to add.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 7 to 0.

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- 4) Case # 3-4
Petitioners: Lee H. Rubin & Lucy Salyer
Property: 1 Kane Street Assessor Plan 142, Lot 22
Zoning district: General Residence A
Request: **Variance** to replace an existing 13' x 26' shed with a 12' x 20' shed and a 6'± side yard setback where 10' is required
Section 10.521 Table of Dimensional Standards

Mr. Jousse announced that he would be stepping down for this petition. Mr. Durbin assumed a voting seat.

SPEAKING IN FAVOR OF THE PETITION

Mr. Lee Rubin stated that he and his wife, Lucy Salyer, were the owners of the property and were seeking a variance to replace an existing 13' x 26' shed with a new 12' x 20' shed within the existing footprint. The existing shed was built some years back and was in serious disrepair with the lower portion rotted out and the structure sagging. It was unsafe and not serviceable in the current condition. They had determined it would be more cost efficient to build a new structure than to try and repair the existing one.

Referring to the site plan in the packet, he stated that the location was currently set back at 6'. Their lot was relatively deep but only 50' wide. The existing shed with a 6' setback went almost to the middle of the property. They could see in the photographs on the second page of their packet that just opposite the shed was a large maple tree which, when leafed, had a broad canopy and covered the yard. If the shed were any further to the center, the roots and canopy would intrude. The location of the existing shed was about as far into the yard as conditions permitted. Mr. Rubin pointed out that the tax map in the exhibits showed that most properties had sheds and he noted two abutting properties which had variances for similar structures with less than a 10' setback. Given the odd sizes of the lots, he felt this was a pretty common occurrence. They had asked their abutting neighbor at 149 Dennett to send a letter to the Board, which Chairman LeBlanc acknowledged they had received. Mr. Rubin stated that the neighbor had indicated that he felt his property would improve by replacing the dilapidated structure and that the 6' setback would not affect his enjoyment. When Mr. LeMay asked if they were proposing the same footprint and height, Mr. Rubin stated it would be slightly smaller but in the same footprint. It would be a simple gable and they were putting in a pier foundation so it would be a little higher off grade than current, but the height in essence would be the same.

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. Durbin made a motion to grant the petition as presented and advertised, which was seconded by Ms. Eaton.

Mr. Durbin stated that there really wasn't a public interest involved here other than protecting against an encroachment into the neighboring property, which they didn't see in this instance. That also related to the spirit of the ordinance. The ordinance was really designed to protect from encroachments of structures into neighboring properties in certain zoning districts and obviously this didn't encroach because it was basically within the same footprint. Substantial justice would be done. The hardship to the applicant by denying such a variance would outweigh any benefit that accrued to the general public. Regarding the diminution in the value of surrounding properties, he stated that there would probably be a slight benefit to neighboring properties in this case. Literal enforcement of the provisions of the ordinance would result in unnecessary hardship if they were to deny this type of variance request which was potentially slightly more conforming than what existed. They were dealing with essentially a dilapidated shed, so there would be a hardship to the applicant.

Ms. Eaton added that, if they weren't replacing it with a new structure, they wouldn't need a variance, but she felt it was a much better option to replace this with a decent

foundation for safety issues. The planned location really didn't impact abutters because it was abutting another structure so wouldn't interfere with their view or light or air.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 7 to 0.

Mr. Jousse resumed his seat and Mr. Durbin resumed alternate status.

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- 5) Case # 3-5
Petitioners: Thomas P. Coakley
Property: 231 Bartlett Street Assessor Plan 162, Lot 31
Zoning district: General Residence A
Request: Variance to add a third floor dormer on to the house which has an 8'± side yard setback where 10' is required
Section 10.521 Table of Dimensional Standards
Section 10.324 To allow the expansion of a nonconforming structure

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard W. Pelech stated that he was representing the applicant, who was passing out additional material to the Board. He noted that the property was depicted in the photographs and plans that the Board had. Presently, this was a two and a half story building sitting 8' from the left property line. They were not proposing anything except a vertical expansion requiring two variances: to expand vertically within the 10' left setback and to expand a nonconforming structure.

Attorney Pelech stated that granting the variance would not be contrary to the public interest nor to the spirit of the ordinance. He cited the two part determination test in Chester Rod & Gun. The Court said the variance would not be contrary to the public interest or the spirit of the ordinance if the proposal would not adversely affect the health, safety and welfare of the general public or alter the essential character of the neighborhood. Raising the roof and adding dormers to the existing building would not do either. He noted that material they just received included letters of support from four neighbors, two of whom were abutters.

Attorney Pelech stated that there would be no benefit to the general public in denying the variances but a hardship would be created for the application. The value of surrounding properties would not be diminished, as evidenced by the letters of support. Addressing Section 10.233.32, Attorney Pelech stated that due to special conditions, no fair and substantial relationship existed between the general purposes of the Ordinance and the specific application to the property and the proposed use was a reasonable one. This was a single family residence and was an allowed use. The general purpose of the ordinance in establishing a 10' setback was to allow for adequate light and air and passage of emergency vehicles. The 8' setback existed for probably 100 years. The proposed

vertical expansion was not going to affect anything on the ground. There were adequate light and air and area for access. There was no expansion of the footprint and it was not going to result in overcrowding of the land. They believed all five criteria were met.

Chairman LeBlanc asked if the new gable would be roughly 5' higher than the existing and Mr. Tom Coakley stated that, if they looked at the plans as laid out, the total height of the building was approximately 30'.

When Ms. Rousseau noted they were not increasing the nonconformance at all, Chairman LeBlanc stated they were. Ms. Rousseau stated that "he said he's not." and Attorney Pelech stated that they were but it was vertically. Ms. Rousseau continued that, as far as nonconformance, it was a nonconforming building so any time they wanted to do anything to it, they needed a variance but they were not increasing the footprint. Attorney Pelech stated they were not getting any closer to the property line and Ms. Rousseau stated, "right. It's 8 (feet) already so you're not increasing that." Attorney Pelech stated that was correct. She continued, "given the unique structure and the position it's in, you're really not increasing." Attorney Pelech stated that was correct.

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. Witham made a motion to deny the petition, which was seconded for discussion by Mr. Grasso.

Mr. Witham stated that he didn't have issues with people trying to utilize attic space but this one needed to go back to the drawing board. Essentially, except for maybe the front 2' of the third floor, the whole roof structure was being ripped off. Full height walls were being built and a new roof put on top. To him this was not an issue of adding dormers with which, again, he had no issues. They were traditional in the Portsmouth area. He cited a similar scenario on Broad Street where they went up a full flight and it just looked awful impacting, he felt, property values. Mr. Witham stated that the additional height would present, not so much air, but light issues. They were not simply just adding dormers. Except for 2' at the front, they were adding a whole third floor. Other than the downtown area, you would be hard pressed to see a three story single family home and he felt the proposal was aggressive for the site and the neighborhood.

Mr. Witham suggested that, if the applicant revisited the drawing board and made it more like just adding dormers, it might be more acceptable. He felt this would change the character of the neighborhood by being a three story structure. There would be issues with light as they were going up quite a way as opposed to just adding dormers. It was possible there would be some diminution in surrounding property values. While he did give weight to the abutters' support, he was concerned that maybe they didn't fully

understand the impact. If they came back with just dormers, he could maybe get on board.

Mr. Grasso stated that he agreed. The height on the affected side would be close to 30', which seemed like a lot. He agreed about the possible restriction of light and felt the proposal might injure the neighbors.

Ms. Eaton agreed that this was a third floor addition and not a dormer. She was familiar with the Broad Street property cited and agreed with the comments. She felt that this would be disproportionate in height.

The motion to deny the petition as presented and advertised was passed by a vote of 5 to 2, with Mr. Jousse and Chairman LeBlanc voting against the motion.

- 6) Case # 3-6
Petitioners: Sureya M Ennabe Rev. Trust & CN Brown Co.
Property: 800 Lafayette Road Assessor Plan 244, Lot 5
Zoning district: Gateway
Requests: **Variance** to allow off street parking spaces between the principal building and the street right-of-way
Section 10.1113.20 Location of Parking Facilities on a lot

The Board postponed this petition by a vote earlier in the meeting.

- 7) Case # 3-7
Petitioner: John J. Vendola
Property: 290 Miller Avenue Assessor Plan 130, Lot 12
Zoning district: General Residence A
Request: **Variance** to remove a set of stairs on the exterior of the home and add a second story deck and building addition that will increase the building coverage from 32% to 38% where 25% is allowed
Variance to allow a zero side yard setback where 10' is required
Section 10.521 Table of Dimensional Standards
Section 10.324 To allow the expansion of a nonconforming structure

SPEAKING IN FAVOR OF THE PETITION

John Vendola stated that they had purchased the property the previous October and planned to completely renovate it and construct an addition to the rear, enclose the outdoor stairs, and add an attic. This required them to seek a variance to expand the building coverage from 32% to 38% and eliminate the 10' side setback on Spring Street at the third story level. The first and second floors of the house currently eliminated the

setback at the street level. Noting that most of the homes in the area had been similarly remodeled and refurbished, he stated that the work would enhance the safety of the property. The stairs and porch were not constructed well and were rotting out. He had talked to a number of neighbors and showed the drawings and everyone he talked to supported the project. One commented that the home was an eyesore and he welcomed the changes.

Addressing the criteria, Mr. Vendola stated that the proposal would result in improved safety and improve the character of the neighborhood so it would not be contrary to the public interest. There would be no change in use and the property would become more like others in the neighborhood which he felt was in keeping with the spirit of the ordinance. Substantial justice would be done and, in fact, property values would be enhanced if the petition were granted. He stated that literal enforcement of the ordinance would result in a hardship. The building currently exceeded 25% and a modest increase would not alter the character of the neighborhood. The first and second stories of the house that existed on his lot encroached on the sideyard setback at the rear of the property. Adding an attic only continued the line of the existing encroachment. He stated there was no fair and substantial relationship between the general public purposes of the ordinance's side setback provision and the specific application of that provision to his property. Finally, he believed that the improvements would be in keeping with the neighborhood and residential zone in which the house was located.

Ms. Rousseau stated that she was looking at the rear elevation he had provided and asked if he had any intention of making this into a two family and Mr. Vendola responded that it was a two family. Ms. Rousseau stated they didn't have that indication there. It looked like a single family. Mr. Vendola stated it was already a two family and they would keep the first floor as a rental property. Mr. Grasso asked how high the addition would be and Mr. Vendola responded 34'. Ms. Eaton asked if he had surveyed the property line on Spring Street as it looked like it was encroaching across the property line and Mr. Vendola responded that he believed the existing home did do that. When Ms. Eaton noted that, on his plan, it indicated 32% existing coverage and asked if he realized it was 25%, Mr. Vendola replied that the existing coverage was 25%. His home was 32% as it currently existed. It would go from 32% to 38%. Mr. Grasso stated that what he submitted said 30%. Mr. Vendola stated that was a mistake. Mr. Witham asked how many bedrooms the upper unit would have, Mr. Vendola stated there would be two and a sitting room. He had 5 daughters so he needed as much room as possible when they visit.

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

Ms. Eaton made a motion to deny the petition as presented and advertised and Mr. LeMay seconded for discussion.

Ms. Eaton stated that she just could not support the request and felt it was, again, a third story going up. Mr. LeMay stated that it appeared to him that the way the addition was planned, it would crowd the neighborhood. The property was already pretty developed with a three car garage taking up a lot of space.

Mr. Witham stated that he had had the same concerns and thought it was overpowering. He was concerned with the amount of new construction with a 0' side setback and 50% over on lot coverage. In looking at the existing front elevation and the proposed, the existing looked like a single family home made into a duplex. The proposed almost looked like a condo development. There was already quite a presence on the site and the scale, the dormers on the third floor, the addition to the rear and the encroachment on the side property line felt like an over-aggressive plan. They were trying to get two large units on a tight lot and the scale was overpowering for the neighborhood. The way the rear elevation was designed almost looked like the front of the house. Three floors of windows and two doors was asking a lot of the abutter to look at as a rear elevation. He felt this needed to go back to the drawing board and be scaled down.

Mr. Jousse stated he was in agreement. The lot coverage was excessive and the proposed dimensions of the building were overwhelming as far as what was in the neighborhood.

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

IV. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 8:15 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk