

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING  
PORTSMOUTH, NEW HAMPSHIRE**

**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**CONFERENCE ROOM A**

**7:00 p.m.**

**December 1, 2009**

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

**EXCUSED:** Carol Eaton

**ALSO PRESENT:** City Attorney Robert P. Sullivan, Planning Director Rick Taintor, Principal Planner Lee Jay Feldman

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**I. CHANGES TO STATE STATUTE GOVERNING VARIANCES (RSA 674:33)**

Mr. Feldman stated that the variance test would be changing, with no more distinctions between Simplex and Boccia criteria. They felt this would be an opportune time to bring in Bob Sullivan to talk about legalities and how the changes would affect how they look at tests. Attorney Sullivan stated that the overall purpose of the work session was to come together in an informal environment. Once he had outlined the statutory changes, he encouraged the members to break in with any comments or questions.

Attorney Sullivan stated that, for a number of years, they had watched the variance standards changed by the courts and more recently by the legislature and it was sometimes hard to understand the changes and why they were made. To put current law into context, he outlined a brief history of zoning and the concept of providing a release valve where zoning created a hardship. In the last half of the 1900's, the statutory criteria were affected by a series of Supreme Court decisions so that the test that an applicant would have to meet became more stringent. This peaked in the 80's with Governors Island v. the Town of Gilford, which said a hardship in the zoning sense only existed when the use of the property with the application of zoning prevented a reasonable use of the land. From 1983 to the Simplex case, the hardship element consisted of saying whether there was a reasonable use of the property permitted under the Zoning Ordinance and, if so, there was no hardship. Because the Justices started to feel that being so stringent might have constitutional implications and might deprive property owners of a reasonable use of their property, they had to lower the hurdle applicants had to get over to establish hardship which led to Simplex. Unfortunately, all five justices were lawyers whose job required them to parse fine legal distinctions so they produced a test in Simplex which was a careful parsing of a complex concept but the defect was that zoning boards were comprised of non-lawyers and Simplex became unworkable in a number of situations.

In municipalities like Portsmouth where there was a heavier load, to apply those fine legal distinctions and carefully analyze every part of the Simplex test for every case in a given month made the system of volunteer government such as they had break down. The legislature did provide some relief and produced the changes in the variance test which would become effective January 1, 2010. He stated that another point leading up to that was the prior adoption of the criteria resulting from the Boccia case, which instructed them to analyze use variances and area variances differently, presenting a slightly easier test on area variances. He felt, however, that there had never been a good test to determine what was a use and what was an area variance. One of the primary things the legislature accomplished was to simplify the hardship test and get rid of the last complication, eliminating the Boccia test. As of January 1, 2010, there would be only one standard. Attorney Sullivan distributed copies of the actual statute, noting that another thing the legislature did, kind of harking back to the Governors Island case, was add a way to the statute which would allow a Board to grant a variance where there was really no other reasonable use of the property available under the City zoning. In actuality, in many cases, they wouldn't have to go through all the other points. If they could form in their minds that no reasonable use was available under the zoning ordinance and the proposed use was not unreasonable, they could basically skip over the other elements of the analysis. This was a boon to zoning boards as everyone could understand it. They could ask staff what use could be made of the property under the zoning and, if there was none and the applicant proposed something reasonable, then they would meet the hardship test.

Chairman LeBlanc asked when the idea of monetary gain or loss was considered in deliberations as to the fair use of the property and Attorney Sullivan stated that monetary analysis was not part of it. Then, now, and next year the key element in hardship was some special condition of the property, not the bank account of the property owners.

The Work Session continued with a variety of topics relating including the following: the public interest test, motions and discussion, reasonable use and uniqueness of properties, statutes, case law and criteria, Zoning Ordinance changes, logistics and procedures.

### **Public Interest**

Attorney Sullivan stated that, in addition to what now would be the hardship test, would be all the elements they had worked with in the past, the first being that the variance would not be contrary to the public interest. Ms. Rousseau asked, where they have people on both sides of the issue, how they should define the public interest in decision making, he stated they should focus on the public and not on what the applicant or an abutter might say. The test was not how it affected them and their property but how it affected the city or some portion of the city. Mr. Taintor noted that an applicant could request a variance and the neighbors could support it and it could still be contrary to the public interest. Citing one particular application, Chairman LeBlanc stated that the flip side could also be true where everybody in the neighborhood was against it. Mr. Jousse stated he was also thinking of a vacant lot on which the applicants wanted to put a house and, although the neighborhood had similar pieces of real estate, they opposed it as they had been using the empty lot as a playground. Mr. Taintor stated that went to a different test, which was whether there was something unique about the property. If they had an area where everybody was substandard, a lot

similar to the others did not meet the test for a variance as there was nothing unique about the property.

Ms. Rousseau asked about the difference between personal interest and public interest. Attorney Sullivan stated that what neighbors had to say carried a lot of weight, but the public interest element really said you had to not just consider the neighbors, but the public and say that the public interest was not affected.

### **Motions and Discussion**

Chairman LeBlanc stated that this brought up something which he found important. He could look at a particular case and feel it was o.k., while another member felt it was wrong and opened up his eyes to an element he missed. He felt it was really important for them to bring forth their opinions and hash them out before the vote. Ms. Rousseau suggested discussing before it came to a vote and then putting a motion on the table. Attorney Sullivan stated that what had occurred was due to the application of Roberts Rules. In order for a group to act in a logical deliberate fashion there had to be a motion before them. If it wasn't seconded, they couldn't talk about it. Ms. Rousseau stated they could then make a motion to open discussion instead of a motion for or against, and then chat about it.

Mr. Taintor stated they could make a motion on the actual request and not just for discussion. As discussed at their last work session where they got hung up was having someone make a motion and then immediately go down through the criteria. He felt it would be better to have a simple motion, such as to grant the variance, then a second and then discussion to see which of the criteria were or were not being met. As it was now, the maker of the motion committed to it, and the second then agreed, citing the points of agreement. It would be better, as most boards do, to make a motion, then discuss which, and if, criteria had been met. Mr. Witham thought, with that format, there could be some understanding that whoever made a motion would give a general overview and, after general discussion, the maker of the motion would then come back and address the criteria so they could ensure that all five points had been covered.

Attorney Sullivan noted that somebody might make a motion for discussion purposes rather than to deny or grant and then vote against their motion. Mr. Taintor stated that it was cleaner to have a motion to approve rather than a motion to deny failing on a tie vote. Attorney Sullivan concurred noting that a failed motion to approve results in a denial, but a failed motion to deny does not result in an approval. Ms. Rousseau suggested there be a motion to approve for discussion purposes and Attorney Sullivan added that later on, they could state if they wanted to approve or not. Mr. Feldman offered as an aid to make up something like that on a card as a reminder of how they want the motion process to go, if that's how they wanted it. Mr. LeMay stated it came down to how difficult a case it was. If it was simple, they could easily dispose of it. On the other hand, if it was very complex, they could make a motion to approve and then try to get a consensus point by point. Chairman LeBlanc felt this all came back to the findings of fact and, as noted by Mr. LeMay, in some towns they go into a deliberative session after the public presentation and say what the facts involved were and the things that were verifiable and, once that was done, someone made a motion. In Portsmouth, however, they go by Roberts Rules which wants a motion on the floor. Attorney Sullivan added, "requires it."

Ms. Rousseau stated this shouldn't be a race to the clock. The presenters put a lot into it and they have to take their time and money and they should take their time to consider it. Mr. LeMay stated it went both ways with presentations and the time they took.

Mr. Jousse commented that, on a good note, he had been approached at a function by a spectator at the last meeting who commented that it was refreshing to see the board in action, able to disagree with one another in a civil manner. Attorney Sullivan stated that the Board was excellent and their record was fine. They won most of their cases and were well thought of in the community. They heard a lot of complaints but not much about the Board of Adjustment.

### **Reasonable Use & Unique Conditions of the Property**

Mr. Witham stated that he would like clarification of a reasonable use, citing an example of a front setback for a replacement of a covered porch on a house which had been there for 200 years and needed relief. Everyone might feel a covered porch was a reasonable use and were comfortable with it, but the second section in the ordinance dealing with unnecessary hardship says that a variance was necessary to enable a reasonable use. He felt it had been there for 200 years and was, therefore, a reasonable use. Attorney Sullivan stated they had to start with the special conditions of the property, not with whether or not the porch was going to bother anybody. Was there anything about this lot which distinguished it? Mr. Witham stated his point was that many homes predated zoning and they could almost blanket an area and say it was a reasonable use. He might feel an addition was reasonable, but that was not the way it was written. Attorney Sullivan responded that the test was not whether he thought it was reasonable. The theory was that the Planning Board and City Council made the primary decision and the Board's role was not to decide what was or was not reasonable but to grant relief within the limited scope given by the statute. He noted that the Portsmouth Board of Adjustment had seldom if ever applied the variance tests as they had been applied in many other places, with other boards denying variances at a rate of 70% and the Portsmouth Board granting them at a rate of 70%. He noted that, however they had used their role, the citizens were pretty happy with the way the Board had operated. They had not been contrary to the law, but interpreted it in a looser fashion. However they had been thinking in the past, they should keep thinking.

There was additional discussion among Mr. Witham, Mr. Taintor, Attorney Sullivan, and Mr. Parrott. Mr. Witham maintained again that, if a house had been reasonably used for 100 years, he felt it had established itself as a reasonable use. Mr. Taintor stated again that the property had to be special compared to surrounding lots and noted that this was an old, densely settled city with many lots which did not meet the standards. One of the reasons the Board had a high case load was because it was seen, not as a Board which rarely granted a variance, but part of the normal process to obtain one. He noted that they were trying to relieve their load by reducing some of the setbacks where it made sense with the lot sizes and recognized that if they took a purist view of the Board of Adjustment, nobody would be able to do anything. Attorney Sullivan stated that it was the odd shaped lot which the Council might not have considered where the Board of Adjustment was needed. For lots that were very much the same, the proper remedy was to request a change in the ordinance although the relief would not be immediate.

Mr. Parrott stated that he didn't write the law and didn't have to like it, but would apply it as it was written. They often heard that all the lots in the area were substandard and that was a good reason to allow the same for a given lot, but that was not what he believed. A variance should be from the norm and if there were nothing special about a lot, it didn't vary from the norm. Whether he liked it or disliked it was irrelevant. A house being there forever was not determinative to him. They had the Planning Board and the Council and it was not up to him to justify how it was written. If it was not correct, they should change it. Attorney Sullivan concurred. Chairman LeBlanc raised again the example of a house in place for 100 years and wanting a garage and stated that his position, then, would be that there was nothing unique. Mr. Parrott stated, yes, if there truly was nothing unique about the property. He noted the owners usually bought the property knowing its limitations.

Mr. Taintor stated that the requirement that a property needed to be unique made it much more difficult to get a use variance. There could be a number of reasons to relax a dimensional requirement difficult to find something unique in a lot which would speak for a use variance. They were going to go back and look at each of the neighborhoods to see if they can better tailor the standards. If the majority of homes violated a particular regulation then maybe that regulation was not applicable to that area. Mr. LeMay commented that it could become a large area if you continually define properties and keep expanding, and then you get the concept of reasonableness which was liberally sprinkled around. There was plenty of room to fiddle around there. Mr. Taintor stated that one good thing about this state law, and we actually misspoke because in some places they do talk about other properties similarly zoned, but the law actually says "other properties in the area." Mr. LeMay stated so then you define the area, what they thought was reasonable. Mr. Taintor stated they saw that last month where the argument was whether all the lots were duplexes in the neighborhood or whether they were single family homes. Mr. LeMay commented it depended on how thin they wanted to slice the baloney. Mr. Feldman stated to touch on that particular case, the way this Board looked at it and by the way the information was presented for them to look at, he thought it was very appropriate because it was the greater neighborhood. It wasn't anything outside that neighborhood and it wasn't anything myopic to just one block and looking at it the way they did and looking at the tests, they looked at an appropriate area and really established a position based on a greater area and not just one block. Mr. Taintor stated that there are certain things in the law that were clear, special conditions and that language, and there are other things that were vague, "reasonable", "the area," and he thought that, as long as they as a Board made their determination on that, a court would generally, give deference to the Board. Attorney Sullivan agreed noting that the statute said that their determination created a presumption and someone wanting to overturn their decision had to overturn that presumption.

### **Statute, Criteria and Case Law**

To get back to the changes in the statute, Mr. Feldman wondered what the changes would do to all the case law that went before. Attorney Sullivan stated that they almost all concerned hardship and the other tests were not usually the battleground. To the extent that the new statute contained the same elements, they could probably still use the old cases. The hardship test was in essence the Simplex test so any cases since that time would be valid. But, as you all know, lawyers will find ways to make issues out of seemingly small things, such as "in the area" as opposed to similarly regulated. That's very fertile ground for people and I'm sure we'll have those and cases will come here.

Ms. Rousseau said they should clearly define what they consider the area to be so that the court could say that they took that into consideration and they defined the area. Attorney Sullivan cited an example with commercial properties on one side of the street and residential on the other. If the applicant was residential, you might want to say, for the purposes of this application, the relevant area is the residential side of the street rather than the commercial even though some of the commercial properties might be closer than some of the residential. Chairman LeBlanc speculated about a rush of people coming in to try again under the new criteria and Attorney Sullivan stated that, if anything it would be harder because the pure area variance request was now lost and they would have to satisfy the same variance test as for a use. The mere fact that the statute or ordinance had been changed did not affect the issues for the applicant unless there was something really relevant to the particular application.

Attorney Sullivan distributed copies of the Local Government Center's "Requirements for Granting a Variance," which was similar to a checklist they were working on developing and which he felt could be helpful to them. The first four tests they had been dealing with all along, but the first step in any analysis was hardship and, if there was none, they want to end their analysis right there. He reemphasized that there needed to be special conditions of the property.

Mr. Taintor noted that, under Massachusetts law, it was possible to write a zoning ordinance in which you could do a modification to a dimensional regulation by special exception, for example, giving the Board of Adjustment the authority to reduce a side setback by a certain percentage by special exception so they wouldn't have to prove a hardship. Attorney Sullivan commented that it was the job of the Planning staff and the Planning Board and City Council, but it could be done. Mr. Taintor continued that it might be a way to solve some of the concerns that they were seeing because oftentimes he felt the Board would like to, and did, grant a variance because it seemed like a reasonable thing to do, closing their your eyes to the "no reasonable use" requirement issue. Attorney Sullivan stated that the special exception would be for a permitted use and the City Council would say "and we also would permit these things as long as these provisions are satisfied." The conditions would then be listed.

Mr. Jousse cited an example of a 200 year old house infringing in the setback where the owner might want to build a porch with the same setback. He didn't feel it made a lot of sense to require them to apply for a variance when they were not encroaching any more into the setback than the existing house. Mr. Taintor commented that probably the issue was where do you stop. It became a slippery slope.

Mr. Witham suggested that maybe they should attach the Requirements for Granting a Variance to every variance application so that people could have them as a guideline. Attorney Sullivan stated they shouldn't attach that document but could attach the statutes. Mr. Feldman added that, currently, they receive the basic five criteria which he advises them they have to meet. The biggest issue was hardship and they have to determine the uniqueness of the property and the hardship it creates. Mr. LeMay asked if the handout had a definition of hardship as it was rarely understood. Mr. Witham stated that it would make their job easier if they had an explanation of the criteria, along with the requirements. Mr. Taintor stated that one of the toughest was substantial justice where you have to weigh the benefit to the individual. Attorney Sullivan stated there was not much difference between that and the variance not being contrary to the public

interest. He noted that an ordinance couldn't cover every situation which was why a Board of Adjustment was needed.

Attorney Sullivan summarized that they had dealt with probably 1 through 4 and backed into the hardship. There were two important things to remember, one that you always have to start with special conditions and, two, that they could now can grant a variance even if they didn't find items 5(a) and 5(b) of the Requirements, if they established that the property could not be reasonably used in strict conformance with the Zoning Ordinance. That could be the most important part.

Chairman LeBlanc stated there were two parts to that. It had to be a special condition of the lot and the use was reasonable. It couldn't be one or the other. It had to be both. The other thing he thought was interesting about the LGC guideline was that the applicant must establish all of the following, so if they found any of them were missing, they could deny it.

Attorney Sullivan stated that they had started on a checklist and would try to make that all inclusive.

### **Zoning Ordinance, New and Future Considerations**

Mr. Taintor stated that, in the revised zoning ordinance, the variance criteria standards were spelled out. Basically it quoted from the statutes with a little more explanation tucked in. That was why, regardless if the adoption of the ordinance if it were prior to January, the effective date would be January 1 so that it would not go into effect sooner than the State law. Ms. Rousseau asked when they would be getting the new Zoning Ordinance and Mr. Taintor outlined the series of public hearings and comment period planned, with Attorney Sullivan commenting they would provide an opportunity for anyone having anything to say about the ordinance. She asked if there had been any particular outcry and Attorney Sullivan stated, there were a few concerns, but not a tremendous outcry.

Chairman LeBlanc stated that his only outcry was about curb cuts, citing a particular past case and noting that the Board didn't have the expertise or knowledge of how traffic patterns flow. Mr. Taintor stated they did not have to base everything on their observations but could definitely call on whatever expertise they needed. Their responsibility clearly was to make sure that traffic was not aggravated and a traffic and safety issue was not created. Mr. Feldman stated that, depending on how egregious the issue was for the Board, they could postpone the decision on an application and he could call in the Public Works Director or transportation official to come and testify at the next meeting. As an aside, Mr. Sullivan noted that the particular curb cut case referenced by Chairman LeBlanc had gone to the Supreme Court where the City won the decision.

Attorney Sullivan noted that it was their plan shortly into the new year to prepare an errata with minor amendments and asked that, if they heard anything belonging in that category to let them know. Ms. Rousseau stated that it was important to have a sense, in making decisions, of the intent of the ordinance. It helped to know community values and use the intent of the ordinance in forming their positions. Mr. Taintor stated that they had included a statement of purpose for each zoning district at the beginning of the section. They also provided clarification in other sections. The Historic District Commission was an example where the purpose was not to preserve history but to preserve a sense of place. There were some neighborhoods with this purpose which were

not in the district and they might look at this in the next round, change the description of what they want to get out of the historic district. Ms. Rousseau stated that would be helpful. She was familiar with the master plan but that was not telling her with the values were.

Attorney Sullivan agreed that the intent was crucial to them and to City staff every day in trying to apply the ordinance to situations. In trying to determine how the ordinance applied to a particular request, he liked to start with well, what was the ordinance trying to accomplish and, if the request seemed to be consistent with that, then he was more inclined to find that request was reasonable.

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## **OPERATIONAL ISSUES NOT ON AGENDA**

### **Board Packets**

There was a brief discussion of the internal and external reasons for some packets being received too late. The Board felt that even Saturday was too late to effectively review the issues and would like to receive them no later than Thursday. It was difficult to tell from the legal notice what the applicants wanted to do so earlier receipt of the packets was crucial.

### **Minutes**

Ms. Rousseau again raised her request that, when changes were specified to be made to the Minutes, a final version be submitted to the Board for their approval. A lengthy discussion ensued during which she reiterated her position that she didn't want to have to trust some city employee to accurately understand her language and/or correctly update the Minutes. Mr. Grasso stated that the motion was to approve the Minutes with the changes as discussed and Mr. Feldman noted that when changes were requested, they were amended and posted on the city's web site. Mr. Taintor stated that, presumably the requested changes were included in the Minutes of the approval meeting and Mr. LeMay stated that subsequent objections could go into subsequent Minutes. Attorney Sullivan noted that the Board's Minutes were handled the same as the City Council and, if they were problems, they could be brought back up. An issue was also the volume of paperwork. Mr. LeMay stated that he believed the Minutes were usually excellent and they didn't have extensive changes or major overhauls. Mr. Witham stated, once they voted, there was still an opportunity to ask for further amendment of the approved Minutes at a subsequent meeting. They did not need to review them for a word or two, have another whole stack of paperwork generated and, if someone else had another word, another whole stack. When Ms. Rousseau mentioned that the Minutes were a legal document, Mr. LeMay stated that the judges in Superior Court could see when someone was wordsmithing a document and chances were very slim that their decision would hinge on two or three words. He had served on a Board in Atkinson and they never did a redraft of the Minutes. They handled as this Board did and there was adequate opportunity to correct the Minutes.

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## **II. BOARD OF ADJUSTMENT REVISED RULES & REGULATIONS – REVIEW**

### **Recusal**

Mr. Jousse referred to proposed revised Board of Adjustment Rules and Regulations and raised the issue of a member recusing themselves and then not being able to speak on the petition. Since he had been on the Board, he had put in for a variance and had to recuse himself. According to this provision, he would not have been able to speak to his application. Attorney Sullivan responded that was the literal reading and was not intended to keep him from speaking to his own application. Mr. Jousse then asked about a situation where Mr. Witham might have a contract to build a house. If the applicant did not have the ability to present the case and could not hire a mouthpiece, they also could not use Mr. Witham. Attorney Sullivan stated this also did not apply to that situation. The intention was to avoid any appearance of impropriety. An applicant might be in the audience and see a Board member step off the Board and then argue in favor of another application. They might feel they should also have a Board member speak. Mr. LeMay stated that, as a member of the Board, he didn't give up his rights as a citizen and Chairman LeBlanc stated that he was under the impression that they had their rights as citizens when recused; Attorney Sullivan was pointing out how it gave a certain appearance.

Attorney Sullivan stated that all the Board members gave up some rights to work on City business relating an anecdote where he couldn't proceed with a personal liability claim due to his position. Ms. Rousseau stated that she felt this should be an individual decision, not legislated, and Attorney Sullivan noted this was a proposed rule and the Board's decision if the rule should pass.

Mr. LeMay suggested substituting the word "shall" for "should" in item VI.10 and Ms. Rousseau commented that if someone were in violation of that, they could be voted off the Board for violating a Board rule. Mr. LeMay stated that, if he were a member of a condominium association and someone else in that association made a request which was not connected to his unit but could affect him, he would want to appear. Attorney Sullivan noted that, if an applicant was denied and he had spoken, they might feel that his appearance influenced other members to vote against his petition. Mr. LeMay noted it was a question of judgment and Attorney Sullivan stated they were trying to avoid controversy such as they had the past year.

Mr. Witham stated that he was thinking about an application where his property was affected, such as Witches Cove where he now had to keep quiet. Before he was on the Board, an applicant was trying to put a whole project together and they got together and stopped it in its tracks while everyone else was sleeping and it would have been a huge development. Now, this time around, he's just going to have to call his neighbors and tell them they should go, although he understood how it was when they sat on the Board. Mr. LeMay asked if that was not participating, but just not public and Chairman LeBlanc noted there was no perception that he was doing anything. Mr. Witham ended by stating that, if a fish processing plant or similar were going, then he would be taking part.

When Mr. LeMay reiterated his suggestion about the "shall" to "should" substitution, Mr. Feldman stated it was just a recommendation. He asked if they still wanted language in the revised rules that said something like, "unless the Board member is the applicant?" Mr. LeMay stated he would. They still had to trust the Board to have integrity. Attorney Sullivan noted that it was important to maintain the appearance of propriety. The Board had an excellent reputation, which hadn't always been the case. With this section, they were trying to solve a problem which came up last year.

Ms. Rousseau stated that, if a Board member came before them and they didn't agree with him, she didn't think there was anyone here that would have a problem in their decision. Attorney Sullivan stated that was true, but for the person sitting at the back of the room who had their own application coming up and did not have a member of the Board coming to the podium and speaking for them, that person was going to feel mishandled. Mr. Feldman noted that Ms. Rousseau had, in fact, said that at a meeting. Ms. Rousseau stated that was a different situation. It wasn't a variance request but a Fisher vs. Dover issue and they wanted a rehearing. Mr. Feldman stated that it was still an action before the Board. Ms. Rousseau stated that if the Board member came before her on a variance, she wouldn't care. Mr. Feldman stated again it was still a Board action and she had made an almost direct quote that it was too bad that everybody in the City of Portsmouth couldn't hire some who sat on the Board to speak for them. When Ms. Rousseau stated she had, but in that particular situation the application had an attorney to speak for them and then somebody from the City and the other side had no one speaking on their behalf and wasn't heard.

When Mr. Feldman reiterated that she couldn't pick and choose situations, Ms. Rousseau added that also you couldn't have the City Attorney defending somebody's case. Her argument was that this was a rehearing. They should have made a decision on the board whether or not to proceed on that rehearing without all of this basically opening a public hearing for one party. That was her issue, not whether a Board member came before them or not. Attorney Sullivan stated that it sounded like she wanted to have it both ways, noting that she was the one who raised the issue about the Board member speaking and they were proposing the rule that would deal with that situation bringing about exactly the result she argued for that night. Ms. Rousseau stated he didn't understand the argument. They had only opened a one-sided hearing and nobody else had representation on their side. Attorney Sullivan stated he had not been arguing for any side and had made that point clear. Ms. Rousseau stated that he was.

Mr. Parrott stated that he would like to comment about the perception business. People have said to him, well informed people, "Are you still doing that city stuff?" They can't cut it too fine. Either they have an official position or they don't. People whom you would think would know the differences, just think of it all as that "city stuff." His point was to not make it too fine a distinction. Either they were involved or not. He related an incident where there was a strip of mud just off their property which they wanted to pave and they called up Public Works who agreed as long as he didn't expect the City to plow it. He had hired a contractor and had it paved, but the immediate reaction of many of his friends and neighbors was that the City had done that for him. He point was that what they do as Board members was very visible, and a lot of people are watching.

Attorney Sullivan stated, to get back to the rule, whatever the Board adopted could be a compromise. The worst appearance would be when someone comes down off the Board and argues for or against a petition. Maybe the rule could be that, if a member wants to appear at the podium, they would not sit on any proceeding that evening. Ms. Rousseau stated that everyone there owned property or was an abutter and she didn't feel anyone was influenced. When Attorney Sullivan reiterated it was the appearance, she stated it nothing was unethical, they should have to worry about it. Chairman LeBlanc stated they have to worry about perception and she

replied they couldn't control others' thoughts and opinions. Attorney Sullivan stated that citizens were entitled to a Board that was not only ethical, but that appeared ethical.

Mr. Witham stated that he always tried to keep his projects to one a year and hadn't spoke in ten years except for this one time. He didn't have any problem with prohibiting a Board member from speaking. It was a little more difficult if they received an abutter notice and had to recuse themselves but he understood that you give up some rights when you sit on the Board. Mr. Parrott stated that an abutters notice was almost irrelevant. The measurement was whether a member had an interest beyond what the others might have. Mr. Jousse stated that if he receives an abutter notice and is close, he steps down. Ten houses away, it might be a different story. Mr. Lemay stated that he's had to deal with neighbors who didn't like what he decided. Ms. Rousseau stated that she didn't hadn't an issue and was not asking for that rule. Chairman LeBlanc stated that what they were asking, then, was to change the "shall" to "should" unless the Board member was the applicant.

Mr. Feldman read what he had which was for rule VI.10, which was, "Any board member who recuses him/herself from the Board for any reason on any application should not participate in any fashion with regard to said application, unless the Board member is the applicant.

Ms. Rousseau commented, what if she didn't agree with that. She was an abutter on some of these petitions and was going to speak. Mr. Feldman stated then she could bear the consequences. There was a brief further discussion between Mr. Witham and Chairman LeBlanc about the impact of the word, "should" and that it left it open. Mr. Witham stated that everyone was good about knowing when to recuse. Chairman LeBlanc stated they should put off a vote on this.

### **Postponements**

Mr. LeMay referred to page 5, item 3 in the proposed Rules and Regulations regarding postponements. While he agreed they had to get their act together, this was not the way to do it. It was the responsibility of the Board to decide on a postponement, based on the evidence presented to them. If people and abutters plan to come on a particular night, to postpone as a matter of right was not correct. If an applicant wanted to postpone they should have to present or send in a valid reason. He cited a specific petition as an example where it was being postponed for a third time, one time because there was not going to be a full Board. They should take each individually, being careful about what the Board allows to be postponed.

The Board discussed the ramifications of postponement to a date certain, suggesting versus requiring withdrawal after a certain period of time, and denial without prejudice. Considerations included ensuring abutters were notified, whether there was a valid mechanism to hear with a presentation, and formal provisions for action in the Rules & Regulations. Attorney Sullivan stated the Board could not withdraw on an applicant's behalf, but could deny the petition if it was scheduled to be heard on a particular evening and the Board did not find sufficient reason to postpone. Then Fisher v. Dover would come in as the applicants had a chance to present their petition.

There was additional discussion about the sentence on page 5, Item 3. stating that, "If the applicant does not request the withdrawal of the application, then the board will hear the application based

on its merits with the information originally submitted by the applicant.” If there was nobody there to speak to the application, how could they hear it? Attorney Sullivan noted that they ask for anyone speaking to, for, or against the petition and, if no one stood up, it would constitute hearing it. They made decisions based on what was submitted supplemented by what was presented. There was a question as to whether the applicant could come back and say they were not heard and weren't they only going through the motions making a decision without the applicant if they could appeal. Attorney Sullivan stated the burden was on the applicant to be there if they were not excused. They could request a rehearing and there might be situations where it would be granted. Chairman LeBlanc questioned whether they could vote as there had not been a public hearing and Mr. Feldman stated they would rework that section for them to take action on it.

### **Multiple Applications**

A recent example was given where multiple applications were submitted to various Boards, as well as an argument against the application of Fisher v. Dover with a new, conditional application for the same property at the same Board of Adjustment meeting should that be invoked. Attorney Sullivan stated that his recommendation would be to consider one application at a time.

There was also a brief discussion of having only one variance request per application and how to handle motions and discussion where there are multiple parts.

### **Quorums**

The impact of quorums at a meeting was discussed and the question was raised as to whether an applicant has to be granted a postponement if only 6 members were sitting. Attorney Sullivan stated it wasn't in the law but an applicant had to receive 4 votes and, in fairness, should probably have a chance to get 4 out of 7. The number on the Board wasn't under their control. Chairman LeBlanc noted that, if there were only 5 members, the option had to be offered and Mr. Witham commented that, if the word got out petitions could be postponed on the basis of only 6 voting members, there would be one after the other. If they were going to do that, there should be a policy.

### **Memorandum Content**

It was felt that the content of the narrative was good in terms of information but that the Board should not be instructed as to how to judge, suggestions and recommendations, but not instruction. Mr. Feldman stated he was fine with that.

### **III. ADJOURNMENT**

It was moved, seconded, and passed by unanimous voice vote to adjourn the meeting at 9:25 p.m.

Respectfully submitted,

Mary E. Koeppenick, Secretary