

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

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

**December 22, 2009,
Reconvened from
December 15, 2009**

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice Chairman David Witham, Thomas Grasso, Alain Jousse, Arthur Parrott, Alternate: Robin Rousseau

EXCUSED: Carol Eaton, Charles LeMay, Alternate: Derek Durbin

ALSO PRESENT: Lee Jay Feldman, Principal Planner

IV. PUBLIC HEARINGS

- 7) Case # 12-7
Petitioner: William Genimatis Rev Trust of 1990
Property: 581 Lafayette Rd. Assessor Plan 229, Lot 8B
Zoning district: General Business
Request: Variance to operate a Motor Vehicle Sales and Repair facility for the Sale of Motorcycles, ATV's and Snowmobiles within 200' of a Residential or Mixed Residential district. Article II Section 10-208 Table 4 Use (35)

Chairman LeBlanc announced that this petition had been withdrawn at the applicant's request and, also for the benefit of those attending, that the applicant for the 187 Wentworth House road petition had requested postponement. With three regular members of the Board excused, Ms. Rousseau assumed a voting seat for the meeting.

- 8) Case # 12-8
Petitioner: Sarnia Properties, Inc., Owner and Jason Goulemas, Applicant
Property: 953 Islington St. Assessor Plan 172, Lot 8
Zoning district: Business
Request: To establish a Health Fitness Education Program with over 2,000 square feet of space as a Special Exception use in the Business zone. Article 4 Section 10.440 Use 4.40

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard W. Pelech stated that the applicant’s business was not a typical health club, as could be seen from the submitted photographs. There would be no machines. It was basically a training facility with classes for 6 to 8 people held mainly before work and in the evening. The operation had existed in Portsmouth since September and outgrew their facility. 953 Islington Street provided essentially a move-in situation. The application would come under the new ordinance so that a Special Exception was required to allow this training facility on Islington Street.

Attorney Pelech maintained that the non-intensive operation met all the standards for granting a Special Exception. There would be no emission of hazardous or toxic materials and nothing stored on premises which would pose a risk due to fire or hazardous substances. There would be no change in the essential characteristics of the neighborhood. The building always had commercial purposes and this would be less intensive. There would be no emission of odors, noise, pollutants, glare, heat, or vibration, or outdoor storage of materials. No traffic or safety hazard issues would be created as the maximum class size would be 6 to 8 students. He stated that there would be no excessive demand on municipal services. There were no shower facilities on the premises so there would no additional demand for water or sewer or increase in storm water runoff. This was an innocuous use and should be granted a Special Exception.

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

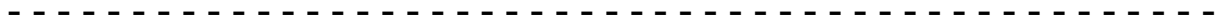
With no one rising, the public hearing was closed

DECISION OF THE BOARD

Ms. Rousseau made a motion to grant the petition as presented and advertised, which was seconded by Mr. Grasso. Ms. Rousseau stated that she had listened to Attorney Pelech’s arguments and couldn’t think of a better use for that space for the community. It was non-invasive. There would be no hazardous materials and she didn’t see a detriment to property values in the area. An increase in traffic was not an issue and there would be no demand on municipal services. She stated that it met all of the Special Exception criteria.

Mr. Grasso stated that he agreed. He noted that of letters in support had been received from some of the neighbors saying that this operation would be a good fit.

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



- 9) Case # 12-9
 Petitioners: J.P. Nadeau, Owner & Witch Cove Marina Development LLC, Applicant
 Property: 187 Wentworth House Rd. Assessor Plan 201, Lot 12
 Zoning district: Waterfront Business District

Requests: Variances to establish two (2) residential uses where residential uses are prohibited; To expand two (3) non-conforming residential uses and structures; to expand a non-conforming marine related structure; To allow for the encroachment of two(2) structures into the 100’ Tidal Buffer where the encroachment is not allowed. Article II Section 10-208 Table 4 (43), Article III Section 10-301(A)(2), Article III Section Section 10-301(A)(7)(a), Article IV Section 10-401(A)(1)(b), Article IV Section 10-401(A)(1)(c)

Chairman LeBlanc advised that the applicant had requested that the petition be postponed to the next month.

Mr. Grasso made a motion to postpone hearing the petition to the January 19, 2010 meeting, which was seconded by Mr. Parrott and approved by unanimous voice vote.

10) Case # 12-10

Petitioners: Paul D. & Margaret J. Batakis

Property: 4 Brackett Lane Assessor Plan 206, Lot 8

Zoning district: Single Residence B

Requests: Variances to expand the lot coverage from 22.8% to 27.1% where 20% is allowed; to allow a left side setback of 4.3’ where 10’ is required; to allow a front yard setback of 17.5’ where 30’ is required, and to allow for the expansion of a nonconforming structure. Article III Section 10-302(A) Table 8; Article IV Section 10-401(A)(2)(c)

SPEAKING IN FAVOR OF THE PETITION

Mr. Paul Batakis stated that his architect had been delayed but would be there shortly and asked if the Board could take the next case first. Chairman LeBlanc asked if there was any objection from the Board to postponing the petition to be heard after Case #12-11. With no objection, the petition was so postponed.

11) Case # 12-11

Petitioners: Eugene N. Short Revoc. Trust, Beatrice L Short Revoc. Trust, Owners, and Heidi N. Archibald Revocable Trust, Applicant

Property: 175 Gosport Rd Assessor Plan 224, Lot 1

Zoning district: Single Residence A

Requests: Variance to allow for a second dwelling unit on a parcel located in the SRB zone only single family homes are allowed. Article III Section 10-302(A) Table 8

Vice-Chairman Witham advised that he would be stepping down for this petition.

Chairman LeBlanc advised that, with only 5 members sitting on the petition, the applicant could request postponement to the next month. Mr. James Archibald indicated they would like to continue.

SPEAKING IN FAVOR OF THE PETITION

Mr. James Archibald stated that he was there with his wife, Heidi, and they resided on Odiorne Point Road. They were looking to acquire the property at 175 Gosport Road which currently housed two dwellings. He passed out a photograph showing both dwellings on the property which were in rough shape. They would like to tear down and rebuild one residence and rehab the second, maintaining a nonconforming use. He had submitted letters from several abutters he had contacted who felt the changes would be an improvement and received it very well. Mr. Archibald stated that one of their main purposes was that they had significant family who like to visit. One of the units was currently a rental and they would like to remove that situation with a possible in-law residence of some sort or a guesthouse to accommodate family and friends. Having both dwellings would suit their needs.

Noting that most of the others lots on the water had been subdivided, Attorney Douglas MacDonald stated that this was a unique four acre waterfront lot. The plan was to remove the current rental to a part-time situation so the use was less intense. There had been a primary residence since the 60's and the barn had housed some kind of residential use. He outlined the difficulty in maintaining the grandfathered nonconforming use in the current situation where the primary residence needed work, but renovation wasn't suitable due to foundation and structural issues. They were stuck with renovating in a sub-standard situation or demolishing the residence as proposed and losing the grandfathered nonconforming use. The ordinance applied literally would punish the applicants for improving it as they hoped. Attorney MacDonald stated that their plan was to replace the primary residence, at the same time tying into the city's sewer line and removing the leach field from a sensitive area, which would benefit both the area and public health and safety.

Attorney MacDonald stated that this was a Simplex analysis. He stated that the request would not conflict with the objectives of the ordinance. This was in a district where a one acre lot was required and this was four acres which would contain one full-time dwelling and one guesthouse, the current rental. He noted that the lot could accommodate three dwellings. In order to achieve the same result without a variance, they would be forced into an expensive subdivision, which represented a hardship due to the special conditions of the property. Attorney MacDonald stated that the use was basically a continuation of what had been there for 50 years. A hardship would also be created if, due to the need for improvements, the grandfathered use were lost. He stated that there was no fair and substantial relationship between the general purposes of the ordinance and the restriction on the property as the zoning ordinance allowed similar uses in the area. This was a reasonable use, consistent with the neighborhood, which had abutter support. He stated that the essential character of the neighborhood would not be changed and there would be no injury to the public or private rights of others. The property would be improved and concerns about the septic near the waterfront would be eliminated.

Storm water quality would be improved. This was a residential use on a large residential lot, consistent with what the ordinance sought to preserve in that area. Remedying any potential leach field issues and renovating the structures would only increase public health and safety. Attorney Macdonald stated that, in the justice balance test, if the variance were not granted, it

would be a detriment to the applicant with no gain to the public. Regarding surrounding property values, he cited the letters of support from the neighborhood and direct abutters. Values should only increase. He stated that, given the characteristics of the lot and what was proposed, this seemed a perfect case in which a variance should be granted.

Ms. Rousseau noted that a part of what they need to look at under the Simplex criteria was whether the zoning restriction as applied would interfere with the landowner's reasonable use of the property considering the unique setting of the property in its environment. She understood that the neighbors were happy, but that was not one of the criteria and they needed to be sure that what they were proposing would not injure the public or private rights of others. She was assumed the engineer could make a statement that the structure on the property was not sound and, therefore, required demolition. Was that what he was there to attest to?

Mr. Eric Weinrieb stated there were a couple of elements. The floor to floor height ratio did not meet current standards and, with an addition, the floors would not line up. There were also some structural deficiencies with rot around the foundation and the foundation walls had deteriorated due to poor construction practices and soil conditions. Function was also a factor. The way it was constructed now, there was a single car garage with a steep slope roof. To preserve the garage, they would have to tear off the roof and be left with a slab. Could the project be done with saving the building "per se?" Yes, it could be done by saving a couple of pieces of the foundation and a couple of walls but it really wouldn't do justice. When Ms. Rousseau asked if it would be occupiable, he stated that he lived in a building on the waterfront that most people would say was not occupiable although he found it to be. That was a very relative term. She stated she was asking for his professional opinion and Mr. Weinrieb stated that people had been living in it so, yes, it was occupiable. Ms. Rousseau said, so the house needed some maintenance to make it more sound. Mr. Weinrieb stated that it was more than maintenance with systems, rot, mold, all those things that people can live in. People in other countries live in much worse conditions than people would find acceptable here.

Chairman LeBlanc asked the location of the current leach field and Mr. Weinrieb pointed out the plan on display and identified various features on it, stating that no one had actually found the leach field. There was no documented septic system, although it treated the waste. He indicated the area where they believed it to be. He confirmed that it took care of both dwellings. They would also tie into the domestic water supply for both where there was currently a well.

Mr. Parrott stated that he was interested in the allegation that the property was sub-dividable where it was impacted on the left by wetlands; there was a 100' setback off Sagamore and zero road frontage. Mr. Weinrieb demonstrated how they could construct a roadway in to have three houses with a cul de sac, but acknowledged they would need relief from the Inlands Protection Act. When Mr. Parrott asked how they could have three houses with a one acre minimum lot size and 100' frontage without variances, Mr. Weinrieb stated it could be done easily, showing where each would be sited and how they would meet the setbacks.

Mr. Jousse commented, in reference to Attorney MacDonald's statements, that whether the Board approved or disapproved the request, they do not punish the applicants and Attorney

MacDonald responded that he was only suggesting that literal interpretation of the ordinance in this case would be punitive.

Ms. Heidi Archibald stated that the house right now was a rental property and she felt that renters didn't take as much care in entering and leaving. She stated her guests wouldn't add traffic. In response to the question of the house being habitable, she didn't feel it was. She couldn't go in for the smell. The windows were all wet and the doors wouldn't shut and there was a lot of mold and mildew. She felt there was nothing worth saving. The guesthouse would have to be gutted but it was not antique and was an eyesore. What they were proposing would be much more attractive for passersby going over the bridge.

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

With no one rising the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Parrott stated that the unique features of the lot were its sheer size and odd shape with zero frontage. The new house placement seemed logical and didn't violate the inlands protection setback or the setback from Sagamore Creek. He stated that four acres was more than enough for two dwelling units which had existed there for a long time in the same configuration. Considering the surroundings, nothing was likely to change.

Mr. Parrott stated that it was hard to see anything contrary to the public interest in one new replacement structure and one rehabilitated structure which would be more attractive than what was currently there. The special conditions resulting in a hardship were the configuration and unique placement of the lot with zero frontage impacted by two wetland protection zones. Given the large size of the lot, having two houses on the property would not impact the public or private rights of anybody including the neighbors.

Considering the Boccia analysis, Mr. Parrott stated that a variance was needed to enable the use of the property given the special conditions which, again, were the size, location and layout of the property. There was no other method to pursue if they wanted to preserve the house and have the two residences they have had. It was in the spirit of the ordinance allow the property owners to enjoy the maximum use of the land as long as there was no interference with the public and private rights of others and there was not in his judgement. He stated that, in the justice balance test, there was no overriding argument that the public would be served in denying the variance and the value of surrounding properties would not be diminished, but might increase to a certain degree. He felt it met all the tests.

Mr. Grasso stated that two residences had existed on the property for decades and it was reasonable to allow the applicant to continue the use, given the four acre lot.

When Ms. Rousseau stated that she thought they were looking at the Simplex test, Chairman LeBlanc stated that Mr. Parrott had gone through the Simplex analysis and threw in Boccia because, Chairman LeBlanc assumed, it was an area issue for two separate dwellings on a single lot. It made no difference there. When Ms. Rousseau persisted that it would in the findings of fact, which was why she questioned it, Mr. Parrott stated that his comments would be the same.

Ms. Rousseau stated that she would not support this particular variance request. She didn't see how the applicant got over the hurdle of a reasonable use of the property. It might be poorly maintained but there were plenty of properties like that in Portsmouth. She felt they had a reasonable use of the property without a demolition required and that point of the variance criteria was not met.

Mr. Jousse stated that he would support granting the variance. He was convinced that the foundation was in deteriorating condition and it was just a matter of time before there was a chain reaction to the rest of the foundation. He felt it would not be cost effective at that point to try and repair it. The fact that there was mildew and moisture and doors not closing was a major indication that there was a problem with the foundation and once mildew was in, it wouldn't go away. He didn't feel there was any other real course available to them. He stated that he was not usually in favor of two residences on one lot, but on four acres, there would not be much of an impact. They were also not granting something which hadn't existed before but, the way the ordinance was written, once removed, it was not grandfathered any more.

The motion to grant the petition as advertised, presented and discussed was passed by a vote of 4 to 1, with Ms. Rousseau voting against the motion.

Vice-Chairman Witham resumed his seat.

(Continuation of hearing on Case #12-10 regarding 4 Brackett Lane)

SPEAKING IN FAVOR OF THE PETITION

Mr. Jousse stated that he would not propose invoking Fisher v. Dover.

Ms. Wendy Welton stated that she was the architect for the project and noted that she thought everyone on the Board was familiar with the previous petition on this property. She stated that the applicants had reduced their design, indicating on the displayed plan the cross-hatched area representing the existing structure. The existing sunroom was one of the parts which was closest to the neighbors so they looked at it in their redesign and realized that, with a different shape and the tear down and rebuild of the section she indicated, they could stay completely within the setback. She mentioned a neighbor on the other side who had asked about drainage at the previous meeting. In addition to hard piping their gutters to drainage, they would be significantly pulling back from their property and making that situation easier.

Ms. Welton showed where they had shortened the garage. They stayed a little bit forward and were coming wider than the existing structure. They were proposing that for a number of reasons, one that the area she indicated on the plan which appeared white was the existing powder room. She tried not to move bathrooms if she could help it and there was no other place in the house to put it. The existing garage, in addition to not holding a car, had a roof which came low in the back. While it looked on the property where she indicated that there was a lot of space, there actually wasn't. If you looked at this house and where you thought the property lines would be, it would be at the stone wall and further over where she indicated. In fact, the property lines were shifted very far right and the neighbors retaining wall was significantly on her clients' property and was sagging. In addition, they had no access because of the location of their retaining wall, which she indicated, which left a 2'-3' wide passage so that her clients couldn't get a lawnmower to the back yard without going on the neighbors property. They couldn't drive a vehicle back there to take away debris and the back yard was effectively landlocked. Part of what they were seeking to do with the garage was both get a car off the street into a garage with a width which would accommodate it and put a door in the back of the garage for access. At the same time as they were doing the construction, they had been talking to the neighbors about bringing the side wall to the new garage up and actually constructing it in such a way that it became the retaining wall, solving that problem at the same time.

Ms. Welton continued outlining the changes they proposed to their plans for the structure, including relocating the proposed second floor deck over the existing bathroom on the first floor and making the proposed porch a little less grand and removing the temptation for somebody in the future to want to put a roof over it. She stated that this porch was in line with that of the neighbors and she indicated various points where volume had been reduced.

In response to questions from Ms. Rousseau, Ms. Welton indicated that in the first page of the drawing she had submitted, the cross-hatched part she indicated was the existing structure so that they would be going from 2.7' to a full 10' for the left side setback. She confirmed that they were looking for a 17.5' front setback where the existing was 24' and 30' was required, so they would align with the neighbors but still be encroaching. There was no variance needed for the right side. Ms. Welton stated that the garage would be wider than the existing one to get in a car but it would not step over the setback. In response to a question from Chairman LeBlanc, she stated that there were no markers to show the current property lines, but they looked at both how the neighbors houses appeared to sit on their property and what they had for records and it was consistent from one to the next about where the property lines were.

Ms. Peggy Batakis stated that, no matter how this turned out, they were excited to be in Portsmouth and just wanted a little more space in their kitchen. Mr. Paul Batakis stated that he was trying to give his wife her dream house. Their house had not changed since the 1940's and they would just like what their neighbors had, with a modern kitchen, master bedroom and bathrooms. They would like to move into a modern lifestyle.

**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. Rousseau stated that she would like to make a motion to approve as presented and advertised for discussion only. Mr. Grasso seconded for discussion and asked if she was approving for all the variances. Ms. Rousseau stated she was not going to go through the criteria, but would like some thoughts from the Board. She particularly had a question about the front setback issue.

Chairman LeBlanc stated they had a motion to grant as presented and advertised which had been seconded and asked Ms. Rousseau to speak to her questions. Ms. Rousseau responded that she was asking the Board. She had put it out for discussion to the Board and would like their thoughts about the front yard setback.

Mr. Witham stated that he was sensitive to front yards but tended to show some flexibility for open porches and also that the fact that in that neighborhood there were quite a few porches with a similar setback. He didn't believe there was one house in the neighborhood that would meet the 30' setback. He stated that a lot of the criteria for a variance came back to a change in the essential character of the neighborhood and one of the characteristics of this neighborhood was front porches with a similar setback. He did have some concern with lot coverage going from 23% to 27% but half of that increase was probably for the open porch, where again he was more flexible with what was in the area now and what it actually spoke to.

Ms. Rousseau stated she was looking at the variance criteria for Boccia where it stated an area variance was needed to enable the proposed use of the property given the special conditions and she was just wondering what they thought the special conditions were. Was it just that it was nonconforming essentially?

Mr. Witham stated that he thought it was a reasonable use to look for some protection at the front entry to your house. You could have some debate as to what size that should be given, but he had noted the fact that the front of the house as it existed with no coverage over the front entry was 24'. He considered it a special condition that obviously zoning came much later than when this house was placed.

Mr. Feldman stated that, in the new zoning ordinance which had been approved the previous evening to be effective January 1, 2010, one of the items in Article 5 addressed this situation. He read Section 10.516.10 from the new ordinance which provided that, as long as there was no further protrusion, the required front yard should be the average of the existing alignments of all such principal buildings rounded to the nearest foot. Chairman LeBlanc commented that he believed the applicant had said the rest of the houses on the street were similar. While he couldn't confirm or deny it, in driving through, it seemed like most of them were closer to the front lot line than this house.

Ms. Rousseau stated so they were then getting over the portion of the criteria dealing with the benefit sought not being achieved by some other method reasonably feasible by saying, “They’re 24’ now and going to 17’. There’s not much difference there. That seems to be a reasonable request.” Chairman LeBlanc stated, “right.”

Mr. Witham stated that, for the reasonably feasible alternative issue, you had to look at what the alternative was and that was to slide the whole house back. He thought that negated the reasonably feasible alternative in this situation.

Chairman LeBlanc asked if Ms. Rousseau would now address her motion and she stated she would.

Ms. Rousseau stated that they needed to go through the Boccia analysis for this particular variance requested. She stated that the variance would not be contrary to the public interest. She saw no evidence that this particular variance request would in any way be contrary to the public interest so therefore she believed they met that particular criteria. In the Boccia analysis, part b, an area variance was needed to enable the applicant’s proposed use of the property given the special conditions of the property. She agreed that this was a nonconforming lot and believed that there were special conditions for this property and therefore the request should move forward. Ms. Rousseau stated that she believed it was true that the benefit sought by the applicant could not be achieved by some other method reasonably feasible for the applicant to pursue other than an area variance. She agreed with the finding that it was a 24’ setback and now they were asking for 17’. She stated that was not a major issue and she thought the variance request was reasonable for this site.

Ms. Rousseau stated that the variance was consistent with the spirit of the ordinance. She didn’t see any reason why it would in any way infringe on the spirit of the ordinance for the setbacks. She thought the request was reasonable. Substantial justice was done for the applicant. She thought that was wonderful. Addressing the segment of the criteria requiring that the value of surrounding properties would not be diminished, she stated that she saw no evidence of that, therefore she would support her own motion to move forward with the variance.

Mr. Grasso stated that the house existed in the late 40’s prior to zoning and it currently went over the front and left side setbacks so that almost anything they did would have to come before them. He found that this request was scaled back a little from the previous application, agreed with Ms. Rousseau, and would support the motion to approve as presented and advertised.

Mr. Witham stated that he had voted against the previous petition and a lot of his concerns had been addressed. They were asking for 4 variances, 3 of them directly related to a covered front porch for which, if that were the only part of the project, he would vote in favor. There was quite a bit of work being done on the side and rear of the house and all of that work was conforming with regard to setbacks. The bulk of the work was conforming and it was the front porch that made it seem like quite a bit of a request but he found that a front porch was not going to change the character of the neighborhood.

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

Ms. Welton thanked the Board for letting the last half of the meeting go home the previous week and requested that be done regularly as sometimes their support cannot wait and goes home. Chairman LeBlanc stated they try, but the problem was that they can never anticipate how long some petitions would take.

V. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 8:10 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary