

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE
CITY COUNCIL CHAMBERS**

7:30 P.M.

APRIL 15, 2003

MEMBERS PRESENT: Chairman Charles Le Blanc, Alain Jousse, Bob Marchewka, Nate Holloway; David Witham, Alternate Arthur Parrott and Alternate Steven Berg
MEMBERS EXCUSED: Vice-Chairman James Horrigan, Christopher Rogers
ALSO PRESENT: Lucy Tillman, Planner

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**I. Approval of the Minutes**

Mr. Witham requested a revision on Page 2, 2<sup>nd</sup> paragraph, last sentence, which was one of his sentences. Change from "... because the Applicant claimed there was another use for the site didn't prohibit him from seeking another use." to "...because the Applicant claimed there was another use for the site didn't prohibit him from seeking the requested variance."

Chairman Le Blanc requested a revision on Page 6, 6<sup>th</sup> paragraph, first sentence. Add "about", thereby changing the sentence to read "Mr. Jousee asked about the trees in the rear of his property."

A motion was made and seconded to accept the corrected minutes from the March 18, 2003 meeting and it was approved unanimously with a vote of 6-0, with Mr. Parrott abstaining.

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II. Old business

A. Request for Re-Hearing for Alan J. Watson, Owner, and David R. Lemeux, Applicant, requested by Bernard W. Pelech, Esq., for property located at **43 Cornwall Street**. Said property is shown on Assessor Plan 138 as Lot 42 and lies within the Apartment district. Case #2-5.

Mr. Jousse made a motion to deny. There was no second. Mr. Berg made a motion to approve the request. Mr. Witham seconded. Mr. Berg stated that, after reviewing Attorney Pelech's submission, he felt it was a good restatement of everything that was said at the first hearing. He felt that an error had been made relative to the hardship issue. He felt that the property is unique in its setting and therefore deserving of consideration for a variance. Although he did not vote at that hearing, he was present and heard the hearing.

Mr. Witham felt that the two points for a re-hearing have always been a little bit of a gray error. The new information requirement is fairly straight forward. He spent some time going through the manuals trying to clarify the error requirement. In looking at what the abutter's lawyer had presented, he quoted Peter Loughlin stating that "the Board is free to grant a re-hearing to correct its reasoning in a decision even if it feels it reached the correct result". Mr. Witham felt that meant that if the Board made an error in reasoning, it doesn't have to be a procedural error. On that basis, Mr. Witham felt that there was an error of reasoning because he felt the lot was unique in its setting and there was also

some discussion about the lot not being able to support four units. He believes that was in error because the building that is there can have four, or even up to eight units by zoning through the process of a variance.

Chairman Le Blanc stated that he would not be supporting the motion. He did not believe that there were any errors in judgment or reasoning. Nor did he feel that any new information had been brought forth. He felt the Board thoroughly discussed the issues and he believed that everything that they ruled on last month was perfectly reasonable and within the scope of their jurisdiction.

The motion to grant a re-hearing was **granted** with a vote of 4 – 2, with Mr. Jousse and Chairman Le Blanc voting in the negative and Mr. Parrott abstaining.

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**B.** Petition of **Dunya Kutchev Revocable Trust, Joan Gittlein, Trustee, owner, Kris Rick Realty Trust, applicant**, for property located at **6 Sagamore Grove Road** wherein Variances from Article II, Section 10-208 and Article IV, Section 10-401(A)(1)(b) are requested to allow the addition of a 20' x 40' front dormer to create 2<sup>nd</sup> floor bedroom space for the existing dwelling and a 12' x 22' one story garage addition to an existing garage in a district where residential uses are not allowed. Said property is shown on Assessor Plan 201 as Lot 5 and lies within the Waterfront Business district. Case # 2-7.

Withdrawn by applicant.

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III. Public Hearings

1) Petition of **City of Portsmouth, owner, Jonathan Howard, applicant**, for property located at **98 Brewster Street** wherein a Variance from Article III, Section 10-303(A) is requested to allow an 893± sf three story single family dwelling including an 88 sf rear deck and a 20 sf spiral staircase with: a) a 2' front yard where 5' is the minimum required, b) a 3" left side yard where 10' is the minimum required; and, c) 47.7 % building coverage where 40% is the maximum allowed. Said property is shown on Assessor Plan 138 as Lot 56 and lies within the Mixed Residential Business district. Case # 4-1

SPEAKING IN FAVOR OF THE PETITION

Ms. Tillman advised the Board that the City had entered into a Purchase and Sales Agreement with the Applicant and he is moving forward with his plans. When the City was before the Board requesting a variance previously, it was based on the building that was on the site that the City demolished. The City retained the rights to those extremely non-conforming front and side yard setbacks. Mr. Howard was coming forward with his design and with somewhat less relief being requested.

Jonathan Howard spoke on behalf of his petition. He indicated that he was proposing to move the building back 2' from it's original location because he was planning to build it up 13" above ground due to a water problem. This would make room for a step to get into the house. He was also moving the building in about 3" from the property line where it originally sat.

Ms. Tillman added that the Applicant has had a survey done at his own expense so the information that was before the Board was now surveyed information rather than tax map information. In the Legal Notice, she advertised coverage based on both the tax map as well as the survey because the survey was not recorded yet. Using the survey, he would not need a variance, he would meet the building coverage.

Mr. Marchewka asked if the requested building coverage was the same as what was previously granted? Ms. Tillman indicated that it was slightly different.

Mr. Howard indicated that the size of the house had grown a bit but the part of the house that had grown met the setbacks.

Ms. Tillman added that the survey showed that the right of way to the lot to the rear where the old house had an angle on the first floor had gone away because the right of way was actually a little farther away.

Mr. Howard indicated that the survey showed that the lot was actually 8' wider and the additional land was where the right of way originally was.

Matt Worth, of 439 Hanover Street, spoke in favor of the Petition. He was glad to see the property developed. He remembered when the City went for their variance to replace the building on its exact location. His only concern was in the interest of the parking directly across the street. If there were a way to push the house back even farther to get to a 5' setback off of Brewster Street it would make it easier for emergency vehicles to get through.

Mr. Marchewka asked Ms. Tillman why they didn't move the house back 5' rather than 2'? Ms. Tillman indicated that they were never asked to move the house back 5' and there was a 0' setback previously granted by this Board. Mr. Howard indicated that the only reason he moved it back at all was because of the water issue. He needed to raise the building up and that required adding front steps.

Mr. Berg clarified that what they were being asked for tonight was less non-conforming than what was previously granted. Ms. Tillman confirmed that it was more conforming.

Jonathan Dennett, of 50 Brewster Street, spoke in favor of the Petition. He supported the improvements to that area.

DECISION OF THE BOARD

Mr. Marchewka made a motion to grant the Petition as presented and advertised. Mr. Jousse seconded. Mr. Marchewka felt that Mr. Howard was presenting a better plan than what had previously been approved. His understanding was that, if the applicant went ahead to build the house as approved, he wouldn't even be before the Board. Going through the analysis, he did not feel that the variance would be contrary to the public interest and, in fact, would benefit the public by moving the house 2' from the street. It also allowed him to raise the house and improve the water problems. There are no special conditions that exist such that literal enforcement of the ordinance would result in an unnecessary hardship. Otherwise, they wouldn't let him build it. However, he already had a variance for a less conforming home so there would be no point. No fair and substantial relationship existed between the general purpose of the zoning ordinance and the specific restrictions on the property. The home was

allowed in the district and the applicant was simply making it more conforming than it was. The variance would not injure the public or private rights of others and would actually improve them. It was in the spirit of the ordinance and conformed with respect to everything except the setbacks, which were now more conforming. Substantial justice was done by granting the variance both to the applicant and to the public. Granting the variance would not diminish the values of surrounding properties and, in fact, it should enhance the area. That area had gone through a lot of changes over the past five to ten years with a lot of people putting a lot of money and time into their properties and he felt this would help the entire neighborhood and it should be granted.

Mr. Jousse stated that he agreed with Mr. Marchewka. They were re-granting a variance that was less demanding than the one that was granted in 2000. The property has been a problem for quite a while for private residents as well as the City and it is nice to see that something constructive was being done with it.

The motion to grant passed unanimously with a 7-0 vote.

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2) Petition of **George W. Williams, Jr., owner**, for property located at **272 Highland Street** wherein the following are requested: 1) a Variance from Article III, Section 10-301(A)(2) to allow a second dwelling unit on a 9,807 sf lot (4,948 sf of lot area per dwelling unit) where 15,000 sf of lot area is required for two dwelling units (7,500 sf per dwelling unit), and, 2) a Variance from Article III, Section 10-302(A) to allow two dwelling units each in a separate building where all dwelling units are to be located in one building. Said property is shown on Assessor Plan 130 as Lot 35 and lies within the General Residence A district. Case # 4-2

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech spoke on behalf of George Williams and his wife, the applicants. Mr. Williams was unable to be present. The block that the property was located on consisted of 10 lots. The lot next to Mr. Williams, Lot #34, had three structures on it and six dwelling units. It had four units in one building and one unit in each of the other two buildings, one of which was behind the Williams' house. That unit was the reason that Mr. Williams did not want to move his garage forward and attach it to his house. As the Planning Department Memo stated, up to four dwelling units were allowed in this district and Mr. Williams had enough lot area for three dwelling units. If he were to convert his house, he could build up to three units because he has 9,800 s.f. of lot area where 3,000 s.f. of lot area per unit is required. Because he was proposing to put the dwelling unit over his garage, that was a different standard of 7,500 s.f. of lot area per dwelling unit. The second variance was because the garage is free standing.

Attorney Pelech stated that he felt the ordinance was confusing at times. He was looking at 10-206, trying to find some rationale as to why the second dwelling unit couldn't be free standing. That section says, "Unless otherwise allowed in the ordinance ....". He looked at 10-206, Table of Uses, and #4 said conversion of structures existing prior to January 1, 1980, which the Williams structure was, to accommodate not more than four families per lot, provided there are 3,000 s.f. of lot area per unit. Attorney Pelech felt they could make an argument that Mr. Williams could convert his garage under 10-206(4) up to two or three dwelling units. He felt that was good evidence for a number of the five criteria. He felt it was good evidence that what Mr. Williams was proposing was a reasonable use of the property, which was part one of the hardship test. He felt it was also good evidence for part two of the hardship test where there wasn't a fair and substantial relationship between the purpose of the ordinance as it applied to this particular lot. Attorney Pelech felt the Board had to find that the lot was

unique because it was an L shaped lot and tucked right into the crux of the L was the dwelling unit on Lot #34 which had a zero rear yard setback and maybe 1' right yard setback. Mr. William's garage was way in the back of his property, which was well landscaped. He would like to rebuild the garage and put a dwelling unit on top of it. The lot area per dwelling unit for two units on Mr. Williams lot would then be 4,948 s.f. If you average the lot area per dwelling on the rest of the nine lots on that block, it would be 4,145 s.f. So he would be almost 1,000 s.f. per dwelling unit over the average in that block. Attorney Pelech felt that was evidence of the reasonableness of the proposal as well as that the requirements of the zoning ordinance unnecessarily interfere with the use of the property given the use of the surrounding properties.

Attorney Pelech did not believe that the granting of the variance would result in any diminution of value to surrounding properties. He felt there would be more of a diminution of surrounding property values if Mr. Williams were to build a garage at the front of his lot and attach it to his house. He felt it would block light and air and create a wall along Highland Street that was not necessary or typical. Lots 38, 37 or 36 have their garages in the rear. Looking at the lots off of Lincoln Avenue, the homes are located close to the street and the garages are in the rear of the property. It would not be consistent with the character of the neighborhood to require him to move the garage to the front and have him attach it to his house. He felt that substantial justice would be done by granting the variance. When looking at the test for substantial justice, it was a balancing test. The Board member must weigh the hardship upon the owner if the variance is denied against the benefit to the general public. Attorney Pelech did not see any benefit to the general public in denying the variance. It would not be establishing any precedent. All they have to do it look at the lot next to Mr. Williams' lot which has 2,146 s.f. of lot area per dwelling unit with six units in three separate free standing buildings. Mr. Williams would have more than double that lot area. Attorney Pelech felt substantial justice would be done because the hardship on Mr. Williams if the variance was denied does outweigh any benefit to the general public.

Attorney Pelech did not feel that the spirit or intent of the ordinance would be violated by granting the variance. If he wanted to convert his home, the ordinance would allow for him to put up to three units in his home because he has 9,800 s.f. of lot area. He certainly has ample light and air, it was not an over-intensification in use, the lot was not going to be overcrowded, and it meets the setback requirements. The spirit and intent of the ordinance was not going to be violated.

Attorney Pelech stated that the fifth test was whether the variance would be contrary to the public interest. Attorney Pelech did not believe that it would be. It would be creating an additional housing unit in Portsmouth. It would increase the tax base in the City of Portsmouth as the second structure would be taxed as a two-story garage with a dwelling unit over it. Rather than being contrary to the public interest, it was going to benefit the public interest. He did not see any diminution of property values, all criteria of the hardship were met and it would not injure the public or private rights of others. Attorney Pelech indicated that if the Board looked at what he could do opposed to what he was proposing to do, it was less intensive and less destructive to the neighborhood and probably better for the neighborhood and public interest.

Mr. Marchewka asked if the single-family house would remain a single family house? Attorney Pelech confirmed that it would. Attorney Pelech pointed out that the neighborhood was pretty much a mixed use multi family neighborhood.

Chairman Le Blanc asked when Lot #34 was established with six dwelling units on it? Attorney Pelech did not know.

**SPEAKING IN OPPOSITION TO THE PETITION**

Lola Vogt, of 212 Miller Avenue, spoke in opposition. She lives in the little house behind Mr. Williams that doesn't seem to matter to him. She handed out documents to the Board, including a letter from Eileen Lindstrom, a realtor who stated that the value of her property would depreciate if the garage were expanded into a second story apartment. She stated that Mr. Williams needed 15,000 s.f. when he only had 9,807 s.f. and he could not build a second family dwelling on the property. To expand his garage and add a dwelling unit above it would only be 11' from her house. BOCA requires an S1 rating, which was included in her handouts. He wouldn't be allowed over 25% of windows in the back of the structure because of the BOCA requirements. Along with the setback requirement of 20' where he was proposing 11', there were fire safety issues and also ventilation issues. During the summer she has her living room window open year-round which faces the Williams garage. He currently has 2 cars and one motorcycle and if he develops the property there would be at least 4 cars and at least one motorcycle and the ventilation from the southwest would be blowing into her house. She would experience loss of light. Ms. Vogt showed exactly how long 11' was with a tape measure on the floor in front of the Board Members. Her property value would go down. She bought the property on good faith that the garage would remain a garage and not be turned into a dwelling. Dwellings are not that tight in the neighborhood and she would lose her privacy, noise would be increased and ventilation would be effected. Ms. Vogt stated that she was an architect and therefore was familiar with building but she also noted that she was familiar with the ordinances and believed that they should be adhered to.

Mr. Berg asked Ms. Tillman about Attorney Pelech's statement about the ability to build another unit attached to the house and how realistic that scenario was. Ms. Tillman indicated that he would still need a variance if they added on to the existing house. The only way someone would get the benefit of the 3,000 s.f. per dwelling unit would be on a conversion of an existing structure. Ms. Tillman disagreed with Attorney Pelech's analysis. She also disagreed with the statement that the dwellings could be in separate buildings. Article III says that dwelling units have to be in the same unit except in certain zones that exempt them but this was not one of those zones. Therefore, all units would have to be in one building.

Chairman Le Blanc asked Ms. Vogt where the realtor who wrote the letter practices? Ms. Vogt stated that she practices in North Hampton.

Allison Tucker of 212 Miller Avenue, Unit 4 Condo Unit, spoke in opposition. She supports Ms. Vogt in her concerns and issues about the value of properties going down because of the building being expanded. She also stated that there used to be 8 units in their building and there are now only 6.

Attorney Pelech spoke in rebuttal. He indicated that the setback requirement was not 20' but was only 10'. The fact that the garage was only going to be 11' from the abutter's property was not because Mr. Williams' building was too close to the property line but it was because Mr. Vogt's condo sits on the property line. Attorney Pelech stated that Mr. Williams complies with the zoning. Her arguments about light and air carry no weight because they were not requesting a setback variance or a height variance. The proximity of the garage to her unit was irrelevant. As far as the argument that this would impact her property values, the issue was whether the second dwelling unit was going to impact her property values, rather than the construction.

Ms. Vogt spoke in rebuttal. She indicated that Attorney Pelech was speaking in riddles. She indicated that her property was not a garage but was a house. BOCA dictates that a garage has to be 15' away from the back of her house. The fact that they want to put a residence above it requires it has to be 20' back from the back of her house.

## **DECISION OF THE BOARD**

Mr. Witham made a motion to address the variance requests separately and to grant the first variance regarding Article III 10-301(a)(2) as presented and advertised. Mr. Holloway seconded.

Mr. Witham stated that he supported the first variance request based on what was going on in the neighborhood and the way the units are in that neighborhood. It seemed that the number of dwelling units in that area was well above the average. He felt that the lot could support two units. He did not feel it was contrary to the public interest to allow a second unit to be on the lot. He felt that it would be a reasonable use of the property to have a second unit based on the size of the lot. No public or private rights of others would be injured by allowing a second unit, considering the density of the area. He believed it was in the spirit of the ordinance to allow a house of this size to support two units. It obviously had been done in many of the other houses on that block and he didn't feel that a second unit would diminish the value of the surrounding properties based on the fact that there are only a handful of single family units in that block.

Mr. Holloway seconded for discussion and had not yet made up his mind whether he supported the motion or not.

Mr. Marchewka stated that he could put a second dwelling unit in his house without a variance and Ms. Tillman confirmed that he could convert the existing dwelling to up to three units, 3,000 s.f. of lot area per dwelling unit within the existing dwelling provided he had adequate parking. Parking for a 1-2 family can park one behind the other and back out onto the street. When you get to a third dwelling unit, the parking has to have 24' travel ways, arranged so that cars come in and back around and leave in a forward direction, so it would be a slightly different parking arrangement and they have not seen a plan for that nor are they being requested to act on any such plan.

Mr. Marchewka stated that it appeared that he almost didn't need to have the first variance. Ms. Tillman clarified that they did not have a request before the Board to put an addition onto the existing single family dwelling for a second dwelling unit. That would be a different request. Mr. Marchewka stated that he didn't need an addition if he just wanted to turn it into a duplex and he would be able to do that. Ms. Tillman stated that would be if he used the existing building. However, if he wanted to take and leave the single family dwelling the way it was and put an addition onto it for an additional dwelling unit, the lot area would be the same type of request where you would be required to have 15,000 s.f. So, if he expands the building he would need the variance, however, if he converted his existing building into two units he wouldn't need a variance.

Mr. Parrott stated that the requirement is 15,000 s.f. if there are going to be two separate dwelling units and the lot area is under 10,000 s.f., which is a small lot, therefore the variance request was a third less than the requirement. It seemed that that was a very substantial variance that was being requested and he didn't see the hardship. He also had a problem with the reasoning with respect to discussion about what could be done. With due respect to that discussion, it was beside the point because they were not being asked to convert the existing house. That discussion was only intended to mislead the Board.

He stated that he would have trouble supporting the request as it was a large variance request from what the ordinance required.

Chairman Le Blanc indicated that he did not support the motion because there was too much relief being asked for per dwelling unit for the present application that was before the Board. It would increase the density beyond what was envisioned for this area according to the ordinance. If other buildings in that area have more units in them than is allowed by law, it was not for the Board to allow a greater density and intensification of the lot. He would not support the motion.

Mr. Witham stated that he had been swayed and he now read the variance differently based on the comments of the Board. He was looking at what the lot could hold in terms of dwelling units as opposed to splitting it for the two units. Therefore, he would not be supporting his own motion.

Mr. Berg indicated that he would be supporting the motion and added that even though the request was not before them to put an additional unit in the existing structure, he felt they had to look at what could be done by right versus what was being requested. The variance was a request for something that was otherwise less intense and could be done. The owner could put three apartments in the house but putting an apartment in a detached structure unit was less intrusive than turning the property into three units

Chairman Le Blanc disagreed with Mr. Berg. He felt that if you looked at the size of the house, it would be an awfully small dwelling unit if there were three units inside. There were practical considerations to think about.

Chairman Le Blanc felt they had to take the application as a whole and he was proposing to put another dwelling unit in the garage and expand the garage. When you look at the totality of that, he didn't feel it could be allowed.

Mr. Jousse stated that Mr. Witham elected to vote on the two issues separately and so they had to be discussed separately in his opinion. The applicant had the right to put two dwelling units on the property and that is what the Board was voting on.

Mr. Parrott stated that Attorney Pelech indicated that he was not trying to set any type of precedent however that is an opinion that Mr. Parrott did not agree with. He felt that this would set a strong precedent for all of the folks who have a detached garage in this zone and in similar zones in the city in terms of creating some opportunities. That was another reason why he felt the Board should be very careful about granting the variance.

The motion to grant failed so the variance was **denied** with a vote of 3-4, with Mr. Marchewka, Mr. Witham, Mr. Parrott and Chairman Le Blanc voting in the negative.

Chairman Le Blanc stated that the second variance was before them.

Mr. Witham made a motion to deny the petition as presented and advertised. Mr. Parrott seconded.

Mr. Witham stated that this variance was where he had the greatest problem. There was some discussion on precedent and he felt this was the fourth apartment over a garage that he had seen before this Board in two years. There was one in particular that comes to his mind on Cabot Street which was a carriage house that someone had gotten approval to renovate and put an apartment above the small

little carriage house. The property was sold and the developer came back and said he wanted to rebuild it and came back with a 1/1/2 story structure. Mr. Witham went back later and found that it was even bigger than what had been presented to this Board. Mr. Witham had some neighbors come back to him asking how that had even gotten passed because it wasn't a garage anymore but had turned into a house in a back yard that totally dominated the scale of the backyard and prohibited people from the use of their backyard. The developer had a great economic gain because he sold the condominium for close to \$300,000 that used to be a little apartment over a garage. Therefore, he has a great concern about garages becoming apartments for an economic gain. It works against maintaining the integrity of the neighborhoods where the backyard is supposedly used for outdoor activities and apartments in garages are something that produce noise, light, smells, etc. and that was inappropriate for the neighborhood.

Addressing the five points, Mr. Witham felt it was contrary to public interest to allow this dwelling unit to be in a separate building as was proposed. He did not feel that the interest of the public was served because it was their right to enjoy their backyards and this worked against that. There was a difference between a house and garage and how they are used. He felt the property owner had a reasonable use of the property the way it was and in using the garage as it was. He felt the variance would injure the public and private rights of others as some of the neighbors had attested to. He felt it was not consistent with the spirit of the ordinance to allow this variance. The ordinance was set to protect the rights of neighbors and by allowing dwelling units in an existing structure you don't really change the density or character of the neighborhood but allowing this type of development works against what zoning is trying to accomplish in the first place. Mr. Witham stated that Attorney Pelech argued that this didn't have to do with scale, size or setbacks but on the other hand it would probably never be increased to this size if there weren't economics behind it to support such a large structure. Mr. Witham felt that, as the abutter attested to, it would diminish surrounding property values.

Mr. Parrott's main concern was with respect to the application for a variance to such a small lot. An abutter had an opinion regarding the value of surrounding properties from a qualified realtor and the applicant could have presented some expert testimony on that point however chose not to do so. Mr. Parrott did not feel that substantial justice was done as this property and the surrounding properties have been in their present configuration for some time so this variance would not relieve any problem but rather would intensify the population in the area. With respect to the test that says the variance is consistent with the spirit of the ordinance, the spirit of the ordinance in this case was quite clear where it says all dwelling units will be located in one building. Furthermore, in this particular case, that probably could be done with some construction of the existing single family residence. Mr. Parrott did not see any hardship and did not feel it would be in the public interest as defined by folks who live in that particular area, which again was a settled area with small lots, and it would not be enhanced by increasing the number of units on that particular lot.

Mr. Marchewka felt the burden was on the applicant to convince the Board that all of the criteria were positive for a variance and he felt that the variance would injure the private and public rights of others. The Board puts a lot of weight on the opinion of neighbors as it is their neighborhood and where they live. The neighbors in this case have put forward a very compelling case that they would be injured and that potentially their properties would be devalued by a dwelling unit being there, regardless of the scale. Having a garage next to someone is very different than having residence next to someone. Because of the argument of some of the neighbors, he felt they could not grant the variance.

Chairman Le Blanc stated that he felt that Mr. Williams' lot was somewhat different than the other lots in the area, however, that did not mean that they could grant the variance. Chairman Le Blanc

reminded the Board that all they have to prove was one reason among the five that didn't comply and they can deny the variance. He would allow the applicant that this was a unique lot in that area although the lot next door to it was also L shaped but it was probably one half as big. Therefore, he would support the motion to deny.

The motion to deny passed with a 6-1 vote, with Mr. Berg voting in the negative.

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3) Petition of **John W. and Nancy B. Anderson, owner**, for property located at **16 Brackett Road** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(2)(c) are requested to allow an irregular shaped 650 sf one story addition with a roof deck having a 2.2' right side yard where 10' is the minimum required. Said property is shown on Assessor Plan 206 as Lot 26 and lies within the Single Residence B district. Case # 4-3

SPEAKING IN FAVOR OF THE PETITION

Lisa DeStefano, architect for the Applicants, addressed the Petition. Ms. DeStefano displayed a photo of the tax map, showing the lots, shapes and structures of the neighborhood. What was interesting was that most of the lots were fairly irregular in shape. One of the challenges for this property was that they were angled back on the right side of the property line because of the extension of the paper road. That was the side where she had a challenge putting an addition onto the rear of the property or the side going towards the rear. The majority of the area had buildings that were either on property lines or over the current setbacks. Additionally, what was unique about the property was the end of the pavement road becomes a pedestrian way where the children walk back to the schoolyard. That was not right alongside the Anderson property but rather was along the other side of Haven Road. Ms. DeStefano reviewed the site plan that was submitted by Ambit Engineers as to why the building had the footprint that was shown. Many buildings that were built in that time have many small rooms. The addition to the rear of this building is a living area and a kitchen area, taking advantage of the views and the property that was in back of the building. They proposed the addition non flush with the face of the existing building on the right hand side but set in 1'. Construction techniques and aesthetics on the interior would want one room to flow openly into the other and would want the addition flush on the outside of the building however they set it in 1' as they knew they would have a setback problem. The building footprint in the rear keeps jogging over and away from the property line at an irregular shaped angle. Realizing that if they continued out parallel to the face of the building they would run into problems because of the angle. When designing the mass of the addition, she normally would have put a roof structure on it but in order to keep the mass down on the addition they did not. By putting a small roof and putting an upper deck on, that cut the mass down. To prove that point, they had photographs showing the existing view looking down Haven Road and a photograph with the addition superimposed showing the addition.

Chairman Le Blanc asked if the property in back was owned by the City. Ms. DeStefano confirmed that it was. He asked if Haven Road dead-ended at the end of the pavement. She also confirmed that it did.

Mr. Witham asked what trees would come down? Mr. DeStefano showed a tree in the photograph that would have to be taken down. They were planning to add another tree that was deeper in from the property line, which would add more sunlight to the addition.

Mr. Jousse indicated that the existing tree has a split in it and it probably won't survive much longer on its own. There were two trunks and there was a separation between the two trunks and a heavy storm would cause a lot of damage.

Attorney Bernard Pelech addressed the Board on behalf of the Andersons. He touched on the five points that are necessary to grant a variance. The first was that there would be no diminution in property values. He had two letters from neighbors who were in support of the Anderson's addition. Mr. Bacon, who lives on the other side of the Andersons had spoke with them and had indicated that he had no objection also. Attorney Pelech felt that the addition would be an aesthetic enhancement of the area and he did not see any diminution of values in surrounding properties, as the abutters attested to. Attorney Pelech felt this was a unique piece of property, creating a hardship. Any expansion to the house would have to be in the rear and a variance would be required no matter where it was placed. As the house presently has a 2' sideyard setback on the left side. Lot #26 has some inherent difficulties given the fact that Haven Road deadends approximately in the middle of the lot, the lot cuts back from it's 83' of frontage to a point where there is probably less than 70' feet of frontage. That pitch point makes it very difficult to put any addition on without having to seek a variance from this Board. There was no fair and substantial relationship between the purpose and intent of the ordinance only because Haven Road was a deadend street. There was approximately 17 acres of Little Harbour playground behind it. If Haven Road had continued and there were abutting properties to the rear, things would be different. As there was nothing there and Haven Road would not be extended, he felt there wasn't a fair and substantial relationship between the purpose of the ordinance and its compliance with this particular piece of land. There was adequate light and air and it did not infringe upon any abutting properties. The third part of the hardship test was whether any private or public rights were being interfered with and Attorney Pelech did not feel that there were any. Attorney Pelech felt that the hardship on the owner resulting in a denial would not outweigh any benefit to the general public. The relief that was being requested appeared to be considerable however given the unique setting of the lot, he felt it was not going to benefit the public to deny the requested variance. He did not feel it was contrary to the spirit and intent of the ordinance. The purpose of the setback is to provide adequate light and air, access by Emergency vehicles, overcrowding and the granting of this variance would not block any of those.

In conclusion, Attorney Pelech felt that all five criteria had been met and he felt the variance could be granted by the Board.

DECISION OF THE BOARD

Mr. Marchewka made a motion to grant the petition as presented and advertised. Mr. Holloway seconded.

Mr. Marchewka stated that this was an irregular lot and he didn't think that was a reason for a variance however the setback that they were asking for was basically from a road that was a sidewalk. No abutters were affected and because of that the request was very minimal. The variance would not be contrary to public interest as it didn't effect any of the public. The restrictions applied to this specific property interfered with the property owners reasonable use of the property and he felt this was a reasonable request for an expansion of the home. The setback was from a road that wasn't really there as Haven Road stops. There was a considerable amount of green space between the road and the addition. There was no fair and substantial relationship between the zoning ordinance and the specific restriction on the property, requiring the applicant to strictly adhere to the zoning. Mr. Marchewka felt it would not serve any real purpose but, rather, would create an odd looking addition and the public

would not be served by pushing the addition back an additional 8'. The variance would not injure the private or public rights of others and, in fact, wouldn't have any effect on the private or public rights of others. He felt it was in the spirit of the ordinance, as Attorney Pelech pointed out. There was a great deal of open space and a huge field behind the house that was part of Little Harbour School. Substantial justice would be done by granting the variance and there was no injustice. There would be no diminution to surrounding properties as he felt it would increase the values of surrounding properties. For all of those reasons, he felt the variance should be granted.

Mr. Holloway agreed with everything that Mr. Marchewka stated. The shape of the lot prevents the building of the addition without a variance.

Mr. Witham indicated that he would support the motion. Normally he wouldn't because of the importance of side setbacks but in this situation it was abutting city property that was used primarily as open space. He felt that was part of the unique setting of the property that made this allowable.

The motion to grant as presented and advertised passed unanimously with a 7-0 vote.

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4) Petition of **Susan B. Parnham, owner** for property located at **1220 Islington Street** on remand from Superior Court Order Docket No. 01-E-0568 for reconsideration of all factors to be addressed in a variance request under **Complex Technologies** Town of Newington, 145 NH 727 (2001) wherein a Variance from Article III **Stabling Requested** (b) including 10,280± sf non-conforming lot with a single family residence to be subdivided into two non-conforming lots with: a) one lot having 5,000± sf of area and the other lot having 5,280± sf of area where 15,000 sf of lot area is required for each lot, b) continuous street frontage of 50' for each lot where 100' for each lot is the minimum required, c) to allow a 2' rear yard for the existing 10' x 16' garage where 10' is the minimum required; and d) to allow 23% building coverage for the existing dwelling and accessory building where 20% is the maximum allowed. Said property is shown on Assessor Plan 233 as Lot 6 and lies within the Single Residence B district. Case #4-4

A motion to table at the request of the applicant was made and seconded. Motion to table passed unanimously by a 7-0 vote.

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5) Petition of **Robert Byrnes and Patricia Tobey, owners**, for property located at **41 Salter Street** wherein it is requested that the Board of Adjustment approve the delineation between the driveways thus satisfying the Board's previous stipulation. Said property is shown on Assessor Plan 102 as Lot 30 and lies within the Waterfront Business and Historic A districts. Case # 4-5

Robert Byrnes, of 41 Salter Street, addressed the Board. Mr. Byrnes thanked the Board for all of their help over the two year process. He spoke on two points. He wanted to call attention to the fact that what they were addressing that evening was the delineation between the driveway between 53 Salter Street and his property. He indicated that they had been through a long process and they were not deciding whether the application should be approved, disapproved or required further discussion. That had already been decided and tonight they were addressing the stipulation that was part of the original BOA approval. The HDC denied the approval of the application and the delineation. The BOA overturned that ruling and granted approval which was then supported by the Superior Court. That

puts the jurisdiction back before the BOA to have the delineation decided, rather than going back to the HDC. He submitted a diagram showing the proposed delineation of the driveway. He had discussions with Marsha MacCormack regarding this matter. The diagram shows a white picket fence that would mark the delineation and the agreement with Marsha was that the fence will align with the edge of the house. Marsha was in agreement with this delineation, the white picket fence or shrubbery that would give the same delineation that the white picket fence would give. He thanked the Board for their assistance.

Chairman Le Blanc asked how long the fence was from the road in towards the house. Mr. Byrnes indicated that the fence was 8' long from the road and 4' parallel from the road.

Mr. Jousse asked if the proposed fence was not in line with the fence in the rear of the house but rather was in line with the corner of the house? Mr. Byrnes confirmed that.

Mr. Parrott asked if it wouldn't be better to specify the difference from the property line as opposed to a fence that could go away in a heart beat? Mr. Byrnes indicated that they were not trying to define the property line as that was a little unclear. Rather they were defining the delineation to where the property ends and Ms. MacCormack's driveway begins. This was originally at Ms. MacCormack's request. She had some concerns about how it was going to look and what form that delineation would take. Mr. Parrott indicated that he was confused over exactly why this was before the Board. Chairman Le Blanc clarified that the issue that night was simply to have a delineation in the front of the house, where the cars were going to be parked, and any property that was going to be next to it.

Ms. Tillman indicated that the fence was how they agreed to delineate Ms. MacCormack's property from Mr. Byrnes property. Originally the Board made a stipulation that the HDC do it but now this request was back before the BOA, after a series of court decisions. It was at Ms. MacCormack's request and she has approved this plan so the Board was being asked to approve it. It was not defining a property line but was simply making sure that they keep their cars in front of their house and don't interfere with hers. It was more of a visual request.

Chairman Le Blanc indicated that they were being asked to give approval of what the applicant was proposing to meet the request of the neighbor.

Mr. Marchewka tried to clarify the issue by stating that the house was currently the delineation however when the house is moved back there wouldn't be any delineation. Therefore, that was why the fence was going to be aligned with the house, to delineate the driveway where the house used to be.

Mr. Jousse asked if they would still have access to their back yard through the little door that was there now? Mr. Byrnes confirmed that they would.

SPEAKING IN OPPOSITION TO THE PETITION

Charles Allard, of 35 Salter Street, spoke in opposition. Mr. Allard felt that he had been the ignored neighbor. His house sits 2' from the dotted line shown on Mr. Byrnes plans, although he questions that boundary line. Mr. Allard indicated that there would be no buffer on his side of the property. He distributed pictures of the two properties. Mr. Allard indicated that he received his abutter notice in the mail regarding this public hearing. Mr. Allard thought the Board should look at the zoning ordinance and see how the effect of this proposal would violate parts of it. He felt that the impact of this was going to be on him as opposed to being on Marsha MacCormack. There was only one

driveway on the other side of the property. The applicants' driveway was sitting right on the property line, at his front door, with no fence, with no buffer zone, in his alleyway, 2' off of his front door. This was also on a street that doesn't have any parking. Mr. Allard stated that the only issue that the Board was looking at was the proposal and the delineation between the driveway. There was no scale and the property lines are incredibly unreliable. He felt the parking that they were creating with this plan was intrusive and violated a number of zoning ordinances that are not before the Board this evening.

Mr. Allard stated that he was the party who appealed this matter to the Superior Court. The information that he submitted to them was not properly before the Court mainly because a building permit had not been issued yet. That was why Mr. Byrnes was before the BOA – to get the stipulation approved that was included in their original variance approval. Mr. Allard wanted the Board to know how this would effect him.

Mr. Parrott asked if there was any barrier or marker between his property and 41 Salter Street. Mr. Allard stated that the house, which sits approximately 2 ½ feet back from the street, is the marker. There is a tree that will be taken down to pave the driveway. The only barrier is the fence that is in the rear. Mr. Allard felt that the Byrnes house sits right on the property line, rather than how it was depicted on the plan that they submitted.

Mr. Berg was confused over which side of the property they were delineating and why Mr. Allard's property wasn't an issue? Chairman Le Blanc indicated that it was simply because when the Board gave approval to move the house back, they added the stipulation that there will be a delineation between the MacCormack property and 41 Salter Street. They said nothing about the other side of the property. It was never asked of the Board to do that.

Mr. Allard stated that he did not appear before the BOA meeting when this was originally decided and, instead, waited until the HDC meeting to plead his case. He felt that the notice states "the delineation between the driveways" and that should mean Marsha MacCormack's driveway and his alleyway. They have not delineated one of those driveways, which would be his property.

Marsha MacCormack, of 53 Salter Street, spoke and indicated that this matter was a very upsetting issue. She has never been comfortable with the proposal and the applicant's desire to create this parking area. She agreed with Mr. Allard and hoped that they would go to the HDC and really take a look at this. There were a lot of things that she wished could have happened but didn't. The Byrnes were doing what they were required to do by getting the delineation that this Board requested, that she also requested, and it was a very challenging proposal.

Mr. Witham indicated that he would like to move forward with this and he understood that they were being asked to approve the delineation for 41 Salter however Mr. Allard brought up a point of what about me and Mr. Witham was starting to ask himself the same question. Mr. Witham asked if it was written anywhere that the delineation was only between MacCormack's property. Did it specifically say MacCormack's or did it say driveways meaning both sides.

Chairman Le Blanc indicated that driveways meant between the MacCormack's and 41 Salter Street.

Mr. Marchewka stated that the reason for the delineation was because the house would be moved back. Previously the house delineated where the driveway was on the MacCormack property, which was why she wanted the fence where the house sits. It would stand to reason that if you move the house back, on the other side if the pavements was lined up with the house you would have a clear

delineation of where the house used to be on that side. Mr. Marchewka asked if there was any reason why the Board couldn't align the pavers with the house?

Mr. Byrnes stated that he doesn't have a problem aligning the driveway to the property line. He thought the real question and what it comes down to and where the confusion comes in is where is the boundary? In the older neighborhoods it very hard to determine that. His property would obviously have to be surveyed when it comes to moving the house as he was sure that there will be concern on both sides of it regarding where it may encroach on abutting properties. Aligning the driveway to his property line seemed reasonable. He was willing to be reasonable. He would like to have the property surveyed and have the driveway lined up to the true boundary.

Mr. Allard spoke again about the lack of buffer or fence delineating his property. Mr. Allard suggested that the Board add another stipulation.

DECISION OF THE BOARD

Mr. Witham made a motion to grant the stipulation as proposed with the stipulation that the left side of the property be delineated the same as the right side, with an 8' section of fence along the property line, perpendicular to Salter Street without the 4' section along Salter Street. Mr. Parrott seconded.

Mr. Witham stated that he couldn't find anything stating that they only needed to satisfy the MacCormack's. He felt that both sides should be afforded the same delineation. If they park along the property line they will be walking over the abutting property when they get out of the car so a fence would force the situation where they would have to park far enough away from the property line to get out of their car. Without the fence in the wintertime there would be no delineation. The way he reads the stipulation, when it says driveways, he felt that both sides needed to be delineated and the fence would clearly delineate both sides and address some of the issues that Mr. Allard has with people coming onto his property.

Mr. Parrott stated that this was a neighborhood where a couple of feet was significant so he felt it was important to treat everyone's concerns. He didn't understand what significance a fence has if it wasn't on the property line and properly installed because no matter how you look at it everyone is going to consider a fence the property line, especially where the houses are so close together. Therefore, you get to the point where the survey is the key element. The survey should establish where the property lines are and the fences can be properly installed with respect to the property lines and that would also define where the pavers are because you can't put an improvement on someone else's lot. He also agreed with Mr. Allard, raising the question of why one side of the property should be treated with a special concern and not the other. Mr. Parrott agreed with Mr. Witham that a fence should be established on both sides of the property.

Mr. Berg understands that they are present to vote on whether the proposal for the fence on the right is acceptable. The letter from Mrs. MacCormack does not voice her support or acceptance of that plan and therefore he would ask his fellow board members whether they actually heard her say that she supported the delineation when she spoke? Therefore, he's not sure that this proposal is acceptable with the person that it is intended to protect.

Chairman Le Blanc indicated that the question was whether it was acceptable to the Board. Mr. Berg reiterated Mr. Marchewka's comment that the Board listens to abutters and their opinions.

The motion to accept the delineation on the right hand of 41 Salter Street as presented and advertised, with the stipulation that the left side of the property be delineated the same as the right side, with an 8' section of fence along the property line, perpendicular to Salter Street without the 4' section along Salter Street, passed unanimously with a 7-0 vote.

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**IV. Adjournment**

The Board voted to enforce the "10:00 rule" and voted to adjourn at 10:15 p.m. and re-convene the following Tuesday, April 22, 2003 at 7:00 p.m. in the City Council Chambers.

Respectfully submitted,

Jane M. Shouse  
Secretary

/jms