

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

7:00 P.M.

JUNE 24, 2003

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

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**I. Public Hearings**

10) Petition of **Jean T. O'Brien Revocable Trust, owner**, for property located at **13 Fairview Drive** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 24' x 30' two story addition for garage space on the first floor and two bedrooms, a bath and playroom on the second floor with an 8' x 10' irregular shaped two story connector for a mudroom on the first floor and stairs to the second floor with a 15' front yard where 30' is the minimum required. Said property is shown on Assessor Plan 219 as Lot 22 and lies within the Single Residence B district. Case # 6-10

Attorney Bernard Pelech spoke on behalf of Ms. O'Brien. Ms. O'Brien and her late husband lived on Fairview Drive for many years and own this property as well as the land adjacent to it. Ms. O'Brien would like to have her son and her two grandchildren live with her. She currently has a two bedroom home and would like to add a two car garage with two bedrooms above it, with a bathroom and playroom. She is not attempting to add a second dwelling unit and they would be willing to stipulate to that. They will not be adding a kitchen. Fairview Drive, as opposed to Fairview Avenue, is like a little piece of the country in Portsmouth. The O'Brien property overlooks three very large open lots. One is owned by St. Catherine's Church, one is owned by Flowers by Leslie's and one is owned by the Willers. Fairview Drive deadends and terminates in the middle of her property so that the area where they are seeking a front yard setback, there really isn't a street in front of the home. This addition would be over 50' away from any of the surrounding residences. Ms. O'Brien spoke to all of her neighbors, except one, and they have no objection.

This is simply a proposal to add a two car garage with a three room addition above. It should be noted that the pond in the rear which is behind St. Catherine's Church is about 102' from the back corner of this addition. They had a choice to make – intrude on the inland wetlands buffer to be within 100' of the pond, or move it in closer to the front property line.

Attorney Pelech felt that the application was reasonable and that it met the five criteria. The ordinance requires a minimum of 30' for a front yard. No differentiation is made in the ordinance for situations where there is no street in front of the front yard. This situation is unique and presents a hardship. Secondly, there is no fair and substantial relationship between the intent of the ordinance as it applies to this property. Given the fact that there is no street in the area where she proposed to build the 2 car garage and addition, there is no fair and substantial relationship between the intent of the ordinance, which is to place structures a minimum distance from the street right-of-way. The area where she is proposing the addition, there is a common boundary line between land owned by Mr. & Mrs. Patch, who have no objection. There would be no public or private rights of others being effected. The paper street ends there and the property is owned by Mrs. O'Brien and the Patches. There is no public interest in any of the land at the end of Fairview Drive.

Attorney Pelech did not feel that the granting of the variance would result in any diminution of property values. The tax map shows that Mrs. O'Brien's property ends at the extreme end of Fairview Drive on the left hand side, surrounded by large parcels of open land. The area is not congested and not heavily traveled. The addition would be attractively constructed, in keeping with the remainder of the residence, and would be attractively landscaped. Mrs. O'Brien would rather be closer to the street than intrude on the wetland buffer.

Attorney Pelech felt that the granting of the requested variance would result in substantial justice being done. There was no benefit in denying the application and, conversely, there would be a great hardship on the owner if the variance were denied. Because of the unique location of the O'Brien property, the public could not be harmed by granting the variance. The public interest will be benefited by the enhanced value of the property. When the Board balances the hardship upon the owner against any benefit to the general public, it is clear that the hardship on the owner would outweigh the benefit to the general public were the variance to be denied.

They felt that the granting of the requested variance would not be contrary to the spirit and intent of the ordinance. The spirit and intent of the ordinance in creating front yard setbacks was to provide for ample space between structures and the public right of way, providing for the widening of right of ways or providing for installation of sidewalks or other public utilities. In the case of the O'Brien property, the street stops at the middle of her property in the area where she proposes this addition. There is no roadway in front of the property. The proposed addition would be at least 50' from any structure and 25' from the end of Fairview Drive.

Attorney Pelech felt that the granting of the requested variance would not be contrary to the public interest. There is no public interest to be protected by the requested variance. Because of the location of the property in relationship to the end of Fairview Drive, there is no public interest in requiring a 30' front yard setback. The public interest will be benefited by the enhanced value of her home. Her grandchildren presently attend Portsmouth schools and will continue to do so. It is not going to create any excessive demand for water, sewer, police or fire protection.

Attorney Pelech felt that the five criteria necessary to grant the variance had been met. The lot was truly unique as the public street servicing the lot terminates approximately half way down the lot. They have no problem with the Board attaching stipulations as this is a unique situation. Mrs. O'Brien's son is a single parent with two children and Mrs. O'Brien would like to have her family live with her. Attorney Pelech indicated that he drew the plans himself and apologized if they were inadequate. This should not reflect negatively upon Mrs. O'Brien.

Mr. Jousse asked about a property line that was shown on the plan. Attorney Pelech indicated that the lot line was adjusted in 1992 to make her lot 18,525 s.f. and that was the plan which they were using. The lot line should have been erased for the purposes of this hearing.

Vice-Chairman Horrigan asked about access to the main house from the addition. Attorney Pelech indicated that there is a connector that is accessible to the main part of the house, the garage and the second story. Attorney Pelech indicated that if they wanted a direct connector from the second story addition to the main house, they would be happy to do that.

Chairman Le Blanc asked about the 15' from the property line to the garage and whether there was enough turning room to move a vehicle into that garage without going on the neighbor's property? Attorney Pelech indicated that there was. From the end of Fairview Drive there is a driveway servicing both the Patchs and Mrs. O'Brien. It also acts as a turn around for people who drive down the street and get lost. That's also why she has a gate up.

Vice-Chairman Horrigan asked about the locked gate and Attorney Pelech indicated that belongs to the O'Briens and prevents people who are lost from going any further.

**DECISION OF THE BOARD**

Vice-Chairman Horrigan made a motion to grant the petition as presented and advertised, with the stipulation that the property remain a single family dwelling. Mr. Holloway seconded.

Vice-Chairman Horrigan addressed the issue of hardship. He agreed with the petitioner that the zoning restriction would interfere with the reasonable use of the property if they were to add to the property on this side of the house. They would run up against the front yard requirement and this is the end of a short, quiet street. There would be ample enough space to preserve the vegetation in front of the house in keeping with the rest of the neighborhood. It's hard to imagine how this would be an unreasonable use as the addition on this side of the house would afford them a very nice view, so this would be the most advantageous location for the addition. As far as the purpose of the zoning ordinance and the specific restrictions, he felt the zoning ordinance implicitly encourages improvements to residential properties. It was not intended that the front yard requirement on a deadend street, or a non-continuation of a street, would somehow eliminate any possibilities for making an addition on that side of the house. He did not see any public or private right issues with this particular addition. Therefore, Vice-Chairman Horrigan felt the application passed all of the hardship tests.

Going back to the public interest, it would not be contrary. Improving the house would improve the general housing stock of the city. He previously spoke to the spirit of the ordinance and felt it was hard to imagine that the ordinance was created to prevent this kind of renovation and improvement of the residence. Substantial justice was done by the granting of the variance as it would improve a family situation and allow them to continue to reside in this house with ample room for privacy. It would not diminish the values of surrounding properties and would more than likely increase the general values of the properties on this street.

Mr. Holloway agreed with Vice-Chairman Horrigan.

The motion to grant with the stipulation that the property remain a single family dwelling passed unanimously with a 7-0 vote.

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11) Petition of **Hayscales Realty Trust, owner, Dean for America, applicant**, for property located at **236 Union Street** wherein an Appeal from the Decision of the Code Official is requested concerning the requirement of a Special Exception as allowed in Article IV, Section 10-401(A)(1)(d) to change the use of 1,450 sf of space within an existing building in a residential district from the former use by Pro Portsmouth to a political campaign office. Case # 6-11

Notwithstanding the above, if the Appeal from the Decision of the Code Official is denied, a Special Exception as allowed in Article IV, Section 10-401(A)(1)(d) is requested to allow 1,450 sf of an existing building to be used as a political campaign office. Said property is shown on Assessor Plan 135 as Lot 22 and lies within the Apartment district. Case # 6-11

Chairman Le Blanc indicated that the Board would deal with the Administrative Appeal first.

Attorney Michael King addressed the Board on behalf of Dean for America. He felt the facts would be the same for the Administrative Appeal and the Special Exception. They are looking for temporary office space and this property was available to lease and appeared to meet their needs. They were advised by the Planning Department that this would be a significant change in use and a Special Exception would be required. It is the position of Dean for America that this is not a significant change. The prior use was by Pro Portsmouth, an advocacy group with 4-5 staff people as well as numerous volunteers, that used the entire building. Committee and Board meetings took place and the former Pro Portsmouth Executive Director advised Attorney King that the volunteers were in and out of the office constantly. Although parking was somewhat of a challenge, there

were no complaints to his knowledge. They ceased to use the property in the Fall of 2002 and the property was sold to the current owner.

Attorney King indicated that Dean for America is also an advocacy group. The use of the building would be subject to a portion thereof. It is contemplated that there would be 4 staff people. While much of the campaign activities would take place outside of the building, such as making contacts and canvassing and related activities out in the field, phone calls and mailings would be handled inside the building. They believe the use is substantially the same or less than the use of Pro Portsmouth and it is for a limited period of time. Therefore, he is asking for a reversal of the decision of the Code Official.

Mr. Parrott asked what the use of the adjacent properties were. Ms. Tillman indicated that the abutting properties on either side are residential. The property across the street is Dr. Bennett's which has a residential unit and his antique car/bicycle collection that received relief from this Board for limited sales in the mid-1990's. That is the only non-residential use in the immediate vicinity. Attorney King agreed with Ms. Tillman.

Mr. Parrott asked if Attorney King had spoken to the neighbors about this use? Attorney King indicated that they were all notified through the Planning Department but he had not spoken directly to any of the neighbors.

Vice-Chairman Horrigan asked about the notice of violation against the existing owner about vehicle repair and construction activities on the property. Attorney King was advised by the owner that all activities had ceased.

Chairman Le Blanc asked how big the building was. He indicated that the lot was about 5,000 s.f.. Attorney King was asking for about 1,500 s.f.. How much does that leave in the building? Attorney King indicated that the building was about 3,150 s.f. according to the tenant fit-up. They will be using the front side office space, which also runs out back.

Mr. Berg referred to the Planning Department memorandum that stated that Pro Portsmouth had only functioned on a sporadic basis and that this is a different use. Mr. Berg asked why that believe exists? Mr. Berg indicated that he was in the building when Pro Portsmouth was there so he knows the statement is wrong and that there were always at least 3-4 people working there and there was a misunderstanding going on. Attorney King agreed that there was a misunderstanding.

DECISION OF THE BOARD:

Mr. Berg made a Motion to overturn the decision of the Code Official. Mr. Marchewka seconded. Mr. Berg indicated that he was friendly with the Director of Pro Portsmouth and they often had lunch together and there were always 3-4 people present when he was there. Mr. Berg sees this use as a continuation of the exact same thing and it almost identical. The difference is that if the occupants of this office, being Dean of America, are doing their job they will be spending very little time at this space. Hopefully that would render some of the parking issue moot. In the worse case scenario the parking would be the same as was there before, which was within the 8 month allotted time to resume a use which has ceased. Therefore, he moved to overturn the decision.

Mr. Marchewka agreed. He felt the proposed use is the same as the past use. Because of that, he felt they should be allowed to continue to use the property as they had been allowed to previously. It is a specific time period and a temporary use.

Vice-Chairman Horrigan indicated that he would vote against the motion. He would prefer to deal with this request as a Special Exception. Regarding the Administrative Appeal, they are only talking about one half of the building and the other half is available for rent. That strikes him as an entirely different situation than when Pro Portsmouth was using the entire building. To say it is the same intensity is incorrect. This is a residential, apartment neighborhood. The Board knows from previous cases that parking is a very sensitive issue. The Board had a letter from an abutter on that issue. The only way the Board could deal with that was through the

Special Exception, keeping in mind the issues of hours of operation. He felt this was too open ended considering the surrounding neighborhood.

Mr. Parrott pointed out there was no time limit on the request before them and he felt this would be very disruptive in the residential zone.

Chairman Le Blanc indicated that he was on the Board when Pro Portsmouth moved into the former Regan Electric Company and their position, when they came before us, was that they would be there a couple of times per year, essentially Market Square Day and New Year's. It was presented to them that these were very sporadic uses of this building. The decision of the Code Official is entirely appropriate and the Board should uphold it and deny the motion. This is based on the fact that when the Board granted the permission to Pro Portsmouth to move in it was granted under the guise that they would be there a couple of times a year.

The motion to overturn the Code Official's decision was denied by a vote of 2-5, with Mr. Jousse, Vice-Chairman Horrigan, Mr. Holloway, Mr. Parrott and Chairman Le Blanc voting in the negative.

Chairman Le Blanc advised Attorney King that he could now address the Special Exception.

SPEAKING IN FAVOR OF THE PETITION:

Attorney King stated that he had addressed the criteria as set forth in the ordinance in his Memorandum that he submitted to the Board. He felt it was appropriate for a Special Exception and met all of the standards as set forth in the Zoning Ordinance. (Attorney King read through the list of standards). Attorney King requested that the Board grant their request for a Special Exception.

Mr. Jousse asked about the portion of the building that they would be occupying and whether it had the same address as the other half of the building. Attorney King indicated that both sides were 236 Union Street. Mr. Jousse indicated that if they grant the Special Exception it would be for the whole building. Attorney King confirmed that the application was for use of a portion of the property. Any action that is taken on this application will not have any effect on the rest of the property. Ms. Tillman indicated that, if granted, it would allow only 1,450 s.f. to be used for a political campaign office. Mr. King was correct that the Board will be seeing an application next month for other uses in the building. However, tonight he is only seeking 1,450 s.f. for a political office.

Mr. Berg asked if Attorney King would be willing to agree to the limitation that they only occupy the building until February, 2004? Attorney King indicated that their lease goes through January 31, 2004 and they would have no objections to that condition. Mr. Berg asked, if Dean should do really well, would they want to stay until the election? Attorney King indicated that they would put their resources somewhere else, like South Carolina, after the primary election.

Mr. Holloway asked what the hours of operation would be? Attorney King indicated they would be 9:00 am – 9:00 pm, 7 days a week.

Vice-Chairman Horrigan asked about the parking. Four spaces were indicated for this use yet it was mentioned that another use is going to apply to come into the building. Was there a way to allocate the parking? Ms. Tillman indicated that Dean for America was in first and the next person on site would have to request a variance.

Mr. Parrott had concerns about what the effect of an operation like this would have in a congested residential and an apartment district by its nature. The uses of a campaign headquarters would include press conferences, parties, receptions, rallies, which would bring a lot more than 4 cars. This would impinge upon the neighborhood where the parking is already a problem for many of the residents 365 days a year. He felt that was substantial enough of a problem to not support this petition.

Attorney King indicated that this would not be the site of any rally or political event as it was far too small.

Mr. Berg asked if they would stipulate to that? Attorney King indicated that they would be willing to stipulation that no political events would be held on the premises.

Chairman Le Blanc read a letter of opposition from Debra and Webster Kohlhasse of 187 Union Street.

Attorney King stated that they would be leasing the parking spaces along with the office space. He also stated that most of the buildings on Union Street have their own driveways and parking and he felt the Kohlhasse letter overstates the problem.

DECISION OF THE BOARD:

Mr. Berg made a motion to grant the Special Exception as presented and advertised, with the stipulation that the Special Exception terminate on January 31, 2004, that Dean for America have no more than 4 staff people working, that no political events be held on the premises, that they will not exceed, at any one time, the number of occupants allowed by the fire code; and that the hours of operation will not exceed 9:00 am to 9:00 pm, 7 days a week. Mr. Jousse seconded for discussion. Mr. Berg felt that Attorney King hit all of the points. He felt it was similar enough to the prior use that the Board shouldn't even be hearing it. He recognizes the Chairman's comment that Pro Portsmouth went in with the understanding that it would be there for interim use during the year, or sporadic use, but that didn't happen. However, Mr. Berg couldn't see penalizing this applicant because of that. What Pro Portsmouth did show was that they survived there and met the parking for their needs in an urban setting. He did not see any hazard to the public or adjacent property on account of potential fire explosion or release of toxic materials. Detriment to property values would be equal to or less than the prior use, which was already permitted. No traffic safety hazards or a substantial increase in the level of traffic congestion, there is no plan for this to be a frequently visited office and it is intended to be a camping and weight station for members of the campaign to operate out of. There would be no excessive demand on municipal services and no significant increase of storm water runoff onto adjacent property or streets.

Mr. Jousse had nothing to add to Mr. Berg's comments.

Chairman Le Blanc stated that he could not support the motion. He felt going from 9:00 a.m. to 9:00 p.m. is essentially going to change the characteristics of the neighborhood. When you have people working in a place after 5:00, he felt they were changing the characteristics of the area. He believed Dr. Bennett has restrictions on the hours of his operation and the Board would be allowing this business to go from 9:00 a.m. to 9:00 p.m. and he felt that did an injustice to the people who live in the area and to those who have bought homes in the area.

Mr. Marchewka stated that he would support the motion. He felt this use was a lot more benign than the Board is making it out to be and he felt a few people working until 9:00 pm at night on the phone is not going to intrude on the neighborhood to the extent that another type of business would have.

The motion to grant with four stipulations was granted with a vote of 4-3, with Mr. Holloway, Mr. Parrott and Chairman Le Blanc voting in the negative.



12) Petition of **David R. Lemieux and Lane W. Cheney, owners**, for property located at **43 Cornwall Street** wherein a Special Exception as allowed in Article II, Section 10-206(6) is requested to allow an existing building to be converted into six dwelling units. Said property is shown on Assessor Plan 138 as Lot 42 and lies within the Apartment district. Case # 6-12

SPEAKING IN FAVOR OF THE PETITION:

Bernard Pelech, Esq. spoke on behalf of Mr. Lemieux. They had been before the Board on previous occasions. They had previously attempted to demolish the existing Tire Loft building and put a 4-unit structure on the lot. This evening they were seeking a Special Exception to allow a conversion of the existing structure into 6 units. The major difference this time around was that they had the support of the majority of the neighborhood. The property is in an Apartment district and the surrounding uses are predominantly residential. This is a non-conforming use and is also a non-conforming structure as it does not have the appropriate side and rear yard setbacks. There is little green space on the lot at the present time. As the building was constructed prior to 1980, it may be converted by Special Exception provided there is 1,000 s.f. of lot area per dwelling unit. Although they have enough lot area for eight units they are only seeking six units. The off street parking requirements will be met, the area per dwelling unit will exceed the 500 s.f. requirement as all units will be over 800 s.f. The open space upon the lot will be increased by 20%. Therefore, the Applicant's proposal qualifies for a Special Exception.

Attorney Pelech indicated that they also met the six criteria required to grant the Special Exception. First, the proposal meets the standards as provided by the Ordinance for the particular use permitted by Special Exception, and he just went through them. The proposal does not create a hazard to the public or adjacent property on account of potential fire explosion or release of toxic materials. Currently, there is no fire prevention in the building at all. The use is more prone to fire explosion by its former use than what is being proposed. The building will have sprinklers and there will not be any hazardous materials on site. Allowing the applicant to convert the existing structure will not result in any detriment to property values in the vicinity or change the essential characteristics of the area. The essential characteristics of the area are residential. The former use of the site was not residential. They are hoping to bring the use into the character of the neighborhood so it won't be contrary to the characteristics. Furthermore, they are going to enhance the site. Currently there is no landscaping. They will put lawn and shrubbery in and will create 21% of open space where there currently isn't any. The improvements to the building will be substantial. The building is currently an eyesore. Between changing the characteristics of the building from a non-residential use to a residential use and by improving the structure itself, designating an entrance and egress where the area is currently unrestricted with un-buffered curb cuts along the entire length of Cornwall Street. Those are all positive factors that will have a positive effect on the values of the neighborhood. They will introduce at a later time a letter from a realtor indicating that he did not feel that this would result in any diminution of surrounding property values. The proposal is not going to generate any odor, smoke, gas, dust or pollutants, including noise, heat, vibration or unsightly outdoor storage of equipment. They will be putting residential uses in a residential neighborhood. Attorney Pelech indicated that there will not be the creation of a traffic safety hazard or a substantial increase in the level of traffic congestion. Attorney Pelech had a letter from Alan Watson, the former owner and occupant of the Tire Loft which estimated the count of vehicles that used the site on an average basis. He concluded that vehicle use by customers, customers taxi service, employees, tire deliveries, parts deliveries, multiple test drives and miscellaneous vehicles, would be around 75 vehicles. That's 150 trip ends. When you compare that with the Institute of Traffic Engineer trip generation manual for residential uses, the average apartment, depending on which study you read, experiences anywhere from 6-8 trip-ends per apartment per day. That would mean 36 – 48 trip-ends. The conservative study stated 10 trip ends per day which would total 60. Therefore they do not believe that they are going to create any substantial safety hazard or increase in the level of traffic congestion. Cornwall Street is one way and there would be a designated entrance and exit. The proposal would not create any excessive demand on municipal services. All units would be one or two units, which normally generate very few school age children and their best estimate would be maybe 3 children. It would not be a significant increase. The applicant's proposal would not create an increase in stormwater runoff but would actually be decreasing stormwater run off by about 9% because they are increasing the pervious surface on the lot by 21%. He presented a letter from Christian Smith of Beals Associates.

Attorney Pelech went through the packet that he had distributed to the Board. There was a letter from Alan Watson, previous owner, a letter from Christian Smith, of Beals Associates, regarding the increased pervious

area, and a letter from John McCormack who is one of the direct abutters who was previously represented by Attorney Ciandella. Mr. McCormack is in support of this proposal.

Attorney Pelech shared additional information which he had received that evening. There was a letter from Susie Stroud, who also was a direct abutter who spoke in opposition last time but now supports the petition. He also provided some rough computer drawings showing what the elevation of the structure were going to look like, floor plans and a letter from Scott Gove, of GMAC Real Estate, who felt the proposed plan would add to the value of surrounding properties.

Vice-Chairman Horrigan indicated that at the last two hearings they were given a fairly substantial analysis of why the building could not be renovated and he was wondering if Attorney Pelech could speak to that. Attorney Pelech indicated that one of their primary concerns had been that there was no way to gain access to the 2nd floor units without increasing the footprint of the building. Mr. Lemieux came up with the ingenious idea of how to build exterior stairs and wrap them around. They also plan to relocate one of the floors. They will be spending more money on this plan than the original plan and will now need six units to make it work financially.

Mike Rousseau, of 249 Islington Street, indicated that he was in favor of the petition and was very excited about having the old building renovated.

DECISION OF THE BOARD:

Vice-Chairman Horrigan made a motion to grant the Special Exception as presented and advertised. Mr. Parrott seconded. Vice-Chairman Horrigan commended the owner for preserving the building as it is a unique structure and in the long run he felt they everyone would be glad that he did preserve it. As far as the Special Exception, he went through the criteria. He did not believe there would be a hazard to the public on account of fire explosion or release of toxic materials since this is a residential unit it's not really even a relevant criteria. There would not be any detriment to the property values in the vicinity or change in the essential characteristic of the area, including residential neighborhoods. Clearly, that was the case here. It would basically be the same structure with modifications to make it safer and sounder. The parking access seems adequate. There would not be any issues with noise, glare, heat, vibration, etc. This would not increase traffic congestion as shown by the very interesting analysis by Mr. Watson who pointed out that the current traffic to this site was much heavier than what would occur with the six residential units. There would not be any excessive demand on municipal services. Finally, a fairly detailed analysis of the stormwater patterns was provided and there does not appear to be any problem connected with this structure. Therefore, all of the Special Exception criteria were met and it should be granted.

Mr. Parrott agreed with Vice-Chairman Horrigan and added that although the Board was advised by a consulting engineer that it was virtually impossible to rebuild the building, Mr. Parrott was very glad that it had been given a second look and the determination was made that it was salvageable.

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

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13) Petition of **Lawrence N. & Ruth S. Gray, owners**, for property located at **80 Currier's Cove** wherein a Variance from Article III, Section 10-301(A)(7) is requested to allow an 8' x 14' deck over an 8' x 14' deck and a 4' x 4' platform with steps to grade from the lower deck 67' from the edge of the salt water marsh/wetlands where 100' in the minimum setback to the edge of the salt water marsh/wetlands. Said property is shown on Assessor Plan 204 as Lot 14 and lies within the Single Residence A district. Case # 6-2



**SPEAKING IN FAVOR OF THE PETITION:**

Attorney Bernard Pelech spoke on behalf of Lawrence and Ruth Gray. He indicated that a similar proposal had been before the Board previously and had been denied. The proposal which was before the Board was substantially different from those previous proposals. The previous proposals contemplated an enclosed area or a deck with a roof above it which would create an impermeable surface. What was being proposed now were two decks, one above the other, both of which were permeable. The deck boards will have spaces between them so that the stormwater will run off of the decks. The proposal is further differentiated by the fact that there is no ground contact between the first floor deck and the ground. The deck will be supported by diagonal braces coming from the foundation of the house and will not be contacting the earth at any point. Previously the decks had been proposed to be constructed on sona-tubes that would be contacting the earth. Attorney Pelech presented color photographs to the Board, depicting the area in which the deck would be constructed. He felt the most telling of the photographs showed the area in which the two decks would be constructed, one on the first floor level and one on the second floor level, and the area which is below the decks. It showed that the area below the decks was occupied by two air conditioning units which were existing on the ground. Attorney Pelech indicated that the second photograph depicted the area between the decks and the abutter/Lesser residence and it was his understanding that Attorney Woodman was present on their behalf in opposition. The purpose of that photograph was to show that the decks would not be visible from the Lesser home. The third photograph again showed the area of the decks, it showed the air conditioning unit and it showed the rock wall which would be a portion of the steps up to the first level of the deck. Attorney Pelech felt that there was a substantial difference between the current application and the previous applications, the major difference being that the surfaces were permeable which would not impede stormwater runoff from the time it strikes the decks until the time it strikes the ground. He also indicated that the support structure for the decks was different. Even though the NH DES has granted approval for the steps, the Conservation Commission and predominantly Mr. Sturgis, opposed the last application and spoke in opposition. Attorney Pelech indicated that he was advised that Mr. Sturgis had no objection to this application primarily because the decks were a permeable surface. Attorney Pelech felt it met the tests forth in Fisher v. City of Dover in that there had been a material change of circumstances effecting the merits of the application as well as a substantial change in the application itself.

Attorney Pelech then addressed the criteria necessary to grant the variance. He indicated that variance was being sought from Article III, Section 10-301(A)(7). He felt that was a very innocuous part of the Ordinance which a lot of people overlook but it basically addressed dimensional requirements. Attorney Pelech indicated that it said that you cannot build a structure, and it just says structure, within 100' of salt water marsh, wetlands or lean high water line of Sagamore Creek. Attorney Pelech indicated that this was different from Article VI, the inland wetlands protection ordinance in that this deals only with salt water. He felt it was interesting to look at the two because they were and had the same stated purpose to protect the quality of the salt water marsh or the inland wetlands and both create a 100' buffer around them. He felt it was interesting to compare them because in Article VI, no relief is needed for permeable decks. In other words, if this were a fresh water wetland, they would not have to be before the Board. Secondly, in Article VI, someone can add up to 25% of a footprint to a dwelling that already exists in the buffer zone if the dwelling was there before the ordinance was passed. The Gray dwelling was there before the ordinance was passed and 2/3 of it is within 100' of wetlands. There were no exceptions, exclusions or exemptions in Article III as there are in Article VI. Attorney Pelech stated that Article VI recognized the fact that if someone were creating a permeable surface, i.e. a deck with no roof over it, then it was not really impeding the flow of stormwater into the ground. Article VI also recognized that some people do have homes that were built within the wetland buffer and need to expand them and it allows them a reasonable expansion which is exempt if the expansion is less than 25% of the existing structure. Unfortunately, they did not have that in Article III and Attorney Pelech was hopeful that we would have something like that during the next re-write of the ordinance.

The requesting variance would not be contrary to the public interest. As Attorney Pelech indicated, it should be noted that this request would not in any way involved dredging or filling of wetland nor would there be any contact with the ground below the permeable deck. The stairs will enter onto the stonewall. The uplands in

question about which the applicant was proposing to construct the two permeable decks, the same size, one above the other, was presently lawn area containing air conditioning equipment. The area below the decks has been disturbed and it is not a pristine buffer zone however it does have ground water recharge and filtering capabilities. The area in question is 67' from the end of tidal wetland. The earth below the deck would still serve to perform its previous functions. Because the proposed deck is 67' from the tidal wetland and it is surrounded by well developed landscaping and plantings, there is no concern with erosion and sedimentation control. Stormwater treatment will remain unaffected because of the permeability of the deck. Because the area was previously disturbed and because the decks will not be supported by a foundation, there would be no effect on the earth beneath it.

Special conditions exist with respect to the property which result in an unnecessary hardship. Attorney Pelech felt that this was a reasonable use. They were proposing unenclosed decks with no roofs. The zoning restriction as applied to this specific property interferes with this reasonable use. When the residence was constructed, 2/3 of the residence was within the buffer zone because the buffer zone did not exist at that time. Outdoor living space and decks are a very common accessory in today's society. Many portions of the existing home are much closer to the wetlands than the 67' distance for the proposed deck.

No fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific restriction as applied. Attorney Pelech stated that the enactment of Article III, Section 10-301(A)(7) was subsequent to the construction of the home in question. As such, much of the upland buffer was disturbed and developed by the time the ordinance was enacted. The inland wetlands ordinance also contains a 100' buffer, the purpose of which was to reduce sedimentation of wetlands and bodies of water, to aid in the control of non-point source pollution, to provide a vegetative cover for run-off and to provide for the protection of wildlife habitat. If these same purposes were applied to the 100' saltwater buffer, Attorney Pelech felt that the construction of the decks were not going to interfere or be contrary with those purposes. Attorney Pelech did not believe there was any habitat under the area where the deck was going to be constructed as there were two large air conditioning units located there. They believed that the filtration of ground stormwater run-off was not going to be effected due to the permeability of the deck, not any sedimentation or erosion.

Attorney Pelech did not feel that the granting of the variance would be contrary to the intent of the ordinance. They believed the decks would not negatively impact the wetland zone. Granting the variance would not injure the public or private rights of others. There were no access easements, no view easements, or rights of the public on or in close proximity to the applicants' property. The deck in question is not visible from any of the abutting residences during the summer months when the decks would be used. Attorney Pelech felt the variance was consistent with the spirit and intent of the ordinance. As previously submitted, Attorney Pelech could only surmise what the intent of the ordinance was as there was not a specific provision for stating the purpose of the ordinance as there is Article VI. Assuming that the purposes were the same, which Attorney Pelech felt they should be, they were not violating the spirit or intent of that purpose of the ordinance.

Attorney Pelech felt that substantial justice would be done if the variance were granted. In order for the Board to find that substantial justice had been done, they must find that the hardship upon Dr. & Mrs. Gray, if the variance were denied, outweighs any benefit to the general public. Attorney Pelech was unaware of a benefit to the general public in denying the requested variance. Because the upland area had been previously developed and disturbed, the public interest would not be effected by the proposed decks which would be located over the air conditioning system. Because the decks are permeable and do not contact the ground, the effect upon the wetlands and buffer would be the same. As there is no benefit to the public interest in denying the variance, the hardship upon the owners could not be outweighed by some perceived benefit to the general public.

Granting the requested variance would not diminish the values of surrounding properties. As was stated, the proposed decks were not visible from abutting properties in the summer months when the decks would be used. The decks and railings would be in keeping with the architecture of the Gray's home. There would not be any adverse effects on views, aesthetics, or property values of surrounding properties. Two of the three abutting property owners have stated support for the variance request.

Attorney Pelech felt that the five criteria necessary for the Board to grant the variance were met by the application.

Vice-Chairman Horrigan commented on Attorney's Pelech's argument regarding the inland wetland ordinance and how he drew that parallel to the salt water wetland protection. Vice-Chairman Horrigan felt that fresh water run-off into fresh water wetlands was a relatively benign event whereas some increase in fresh water run-off into the salt water wetlands was a matter of concern and he was concerned with how far Attorney Pelech was planning to take his argument. Attorney Pelech reiterated his argument regarding the intent of the ordinance. Vice-Chairman Horrigan stated that if they had written a perfect zoning ordinance then they wouldn't need the Board and it was their purpose to deliberate on the very kind of ambiguity that Attorney Pelech raised.

Attorney Pelech stated that there was background in State legislation governing the State's 100' buffer which is called the Shoreland Protection Act and it has the same purposes as Article VI. Dr. & Mrs. Gray have made the necessary application and had received the necessary approvals from the State of New Hampshire. As part of their approval, they stated that the proposed project was within a previously developed tidal buffer zone area. The approval was consistent with other approvals in previously developed upland tidal buffer zone areas. In a letter dated February 14<sup>th</sup> the Conservation Commission recommended denial of the proposed project however they provided no basis for the denial. The proposed project meets the criteria for an approveable project under DES Wetlands Code of Administration. The only thing that has changed since the DES granted their approval was that the Chairman of the Conservation Commission now has no problem with it.

Mr. Jousse asked why the applicants had sliders installed on the 1<sup>st</sup> and 2<sup>nd</sup> floor leading to nowhere. Dr. Gray stated that they built them because they had assumed that there would not be any problem having the deck and they had wanted a way to get to the back of the house. The sliders went into the house when they already had the State permit for having a much larger deck on the back of their house. Had they known there was going to be a problem they may have had to reconsider. The sliders have been nailed shut. As a safety measure, they would like to have stairs going down to the ground.

Chairman Le Blanc asked how big the air conditioner units were? Dr. Gray indicated that he did not know but that it looked like a pretty small area to him. Chairman Le Blanc asked how far away from the house they were? Dr. Gray indicated that the base was probably around 3' x 4' and they were probably 3' away from the house.

Dr. Gray spoke on behalf of his petition. He summarized why they were there and asked the Board to be fair in looking at their proposal. They started with this project, trying to get the appropriate approval, from day one. They went to the Conservation Commission and were turned down by a 3-4 vote. At that point, the reason given by Mr. Sturgis was that he was afraid, with them having a porch without having a solid foundation underneath, that they would be cold and would go back to the Conservation Commission to enclose it. In the meantime they got a State permit and the next step was to go to the Board of Adjustment for a variance. Mr. Sturgis showed up and voiced concerns that it would effect water run-off and they were turned down on a 3-4 vote. It has taken them a long time to re-visit this and see what they could do. He didn't understand how a couple of sono-tubes were going to impact the buffer zone. In the meantime there was a sono-tube further out in their yard which they have taken out and planted grass. After they came up with this plan, they filled out paperwork to go back before the Conservation Commission because they felt that was the appropriate step. When they went to the Conservation Commission last year, there were no abutters or anyone else opposed to the proposal. When they got the State permit, abutters and the City had 20 days to reply if they had opposition and no one objected to it. They were now aware that there were 2 people objecting to their plan. Dr. Gray indicated that the Powers were claiming that there might be harm to animals however the only animal that lives in his backyard is his dog. They were not effecting the water run-off. If they were truly that concerned about the environment, he couldn't understand why they didn't object to either the Conservation Commission or the State when the Lessers put in a dock that is over 100' in length, goes through the buffer zone and actually goes into the water. The Lessers don't play fair. The Lessers put two additions on their house, both of which are less than 100' from the tidal buffer zone and they did not get a permit from the State, they did not get a variance from the City, but rather just

intentionally mis-measured. The Grays are attempting to play by the rules, however, those who don't play by the rules are attempting to object to their petition.

**SPEAKING IN OPPOSITION TO THE PETITION:**

Attorney Ralph Woodman spoke on behalf of Marvin and Norma Lesser, who abut the Gray's property, and also Jim and Eva Powers, who abut the Lesser's property. Attorney Woodman respectfully suggested that the Board had two decisions to reach. The first was whether or not this petition was properly before the Board. Quoting from Fisher v. Dover, the New Hampshire Supreme Court had told us that subsequent petition cannot be heard if "a material change of circumstances effecting the merits of the application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor." Attorney Loughlin's book also addressed this subject. The standard is whether or not the proposal before the Board materially differs – not differs somewhat or differs a lot – but materially differs from what was before the Board in 2002. Attorney Woodman reminded the Board that the proposal in 2002 received two full hearings on two separate occasions. Denials were issued in both February and May. At that time, an 8' x 14' deck was requested. The current deck was not one but two 8' x 14' decks and a 4' x 4' platform. If there was a material difference, it was going in the wrong direction. The current proposed use was more onerous than what was proposed, heard twice and denied in 2002. The relief is requested for the exact same reason of 67'. The State's decision had come down and that was one of the reasons for the re-hearing in May of 2002. Dr. and Mrs. Gray had that decision in hand and that was included as part of their argument when their one 8' x 14' deck was denied in May. In the first denial, the Board stated "There was no proven hardship present. The Board concluded that the property could be used reasonably as it exists." In the second denial of May 2002, the letter from the Board of Adjustment included the following statement: "The Board found that the 100' buffer zone is important and should be protected." Attorney Woodman indicated that the 100' buffer is no less deserving of protection now than it was in May of 2002 and the fact that there is no proven hardship is no less true now than it was in 2002.

Attorney Woodman then addressed the variance. He distributed photographs. The first picture was taken prior to the construction and showed two decks and one enclosed porch on the property. The second picture showed the Gray's house from the Lessor's property and showed the house after the construction permitted by the June 2002 permit. The picture shows that there is a deck on the property. The third picture shows the Gray's property showing what the Lessor's would be able to see from their property. This picture also shows the putting green that the Grays have installed on their property.

Attorney Woodman referred to Attorney Loughlin's book on New Hampshire Land Use and Zoning which indicates that Simplex has not changed the special circumstances that cause the application of the ordinance to create an unnecessary hardship. Attorney Woodman did not believe there were any special circumstances. The Grays currently enjoy a deck on their property and they do not need three decks to be reasonable. If there are no special conditions, the applicants may not be entitled to variance relief. No special conditions warrant three decks on the property. The applicants must prove that the ordinance interferes with the reasonable use of their property. Attorney Woodman did not believe there were any special conditions to differentiate this property from other properties in the area. The ordinance is quite clear and it strongly discourages any development, including this proposal which is within 100' of Little Harbour. The ordinance is clear that it was the obvious intent that no development occur within 100' of Little Harbour and this obviously flies in the face of that. The Lessers feel that to add these two decks on their side of the building, both impacts, upon the saltwater wetland and impacts, as importantly to them, their views. They do not feel it is a reasonable use of the property and do not feel it is a reasonable request.

Mr. Berg asked for clarification regarding the 2002 application and the difference between the two proposals. Attorney Woodman described the differences. Mr. Berg asked how a permeable surface would effect the run off and Attorney Woodman felt that the surface was not permeable. If the deck is going to be constructed of some wooded or composite materials, he did not believe those materials were going to soak up the rain that were going to come on them. The rain would have to go somewhere and is going to be shunted off onto the saltwater wetlands.

Marvin Lesser, of 60 Currier's Cove, spoke in opposition. He stated that he was the next door abutter who would be most effected by the proposed addition. He felt it significantly effects them. The decks would provide inappropriate views directly into their bedroom windows. The variance would create a major nuisance to them. They were concerned about protecting the area, which they always thought would be protected by the law. He felt it was unfair and unreasonable.

Chairman Le Blanc asked how far his house was from the Gray's? Mr. Lesser guessed it was 100'. Chairman Le Blanc asked if there were trees between the two houses. Mr. Lesser indicated that there were trees and for 9-10 months out of the year it's a straight shot on the view, when the leaves are off the trees.

Mr. Berg asked if all decks that are 100' to 150' away from a bedroom window be denied? Mr. Lesser indicated that that was beyond his expertise and all he could speak to was this particular situation.

**SPEAKING TO, FOR AND AGAINST THE PETITION:**

Andy Kaplan, of 100 Currier's Cove, spoke to, for and against the petition. He is familiar with the Gray's efforts to complete an addition to their property as well as their current request to build a deck. He wanted to provide the Board with additional background information. He felt his experience while on an architectural review committee of Currier's Cove was noteworthy as it involved dealings with both the Grays and the Lessers. He believes that one could reasonably conclude that nothing that Dr. & Mrs. Gray would offer would be acceptable to the Lessers and that includes prior to their addition being put on, the Gray's offered to put up a screen of trees. When presented to the Lessers, it was unacceptable because the trees would be controlled by the Grays. The Grays then offered to plant the trees on the Lesser property which was still unacceptable. The Lessers did not want any kind of window on an addition that would face the Lessers house. Mr. Kaplan feels that an injustice is being done. He is not taking sides and if the names and the facts were reversed, he would be speaking on behalf of the Lessers. He does not feel this project would negatively impact their property, their neighborhood, the environment or the city.

**IN REBUTTAL:**

Attorney Pelech suggested that the Board table this matter so that the Board could meet at the Gray's home to give them an opportunity to look out the windows of the Gray's home and see what can be observed from that view. This is the first that they have heard about a violation of privacy. This more than meets the setback requirements and a right to privacy can only go so far.

Mr. Berg indicated that he did not feel it was necessary to view the property.

**DECISION OF THE BOARD:**

Mr. Berg made a motion to grant the petition as presented and advertised. Mr. Marchewka seconded. Mr. Berg felt there was a material difference in the current proposal and the previous proposal as the deck surface was permeable, there was no roof, there was a lack of ground construction and it was a much less wetland intense application and, in fact, was wetland friendly. He felt this was a materially different request. Mr. Berg felt the question of public interest was answered within the wetland act itself. The wetland regulations, whether it be fresh water or salt water, serves a certain purpose to protect them and the redesign of the Gray's deck and the lack of any construction on the ground is sensitive to that. Therefore it not only was not contrary to public interest but was actually in the public interest. The requested variance was consistent with the intent of the ordinance which Mr. Pelech spoke very eloquently to. Mr. Berg agreed that if there is no expression of what the intent of the ordinance is, they have to look either to the bigger picture, being the entire zoning ordinance itself, or the most similar ordinance. Although fresh water and salt water areas have very different eco-systems, the reasons to protect them are the same. Granting the variance would not diminish the values of surrounding properties as he would like nothing better than to have the nearest person who is looking in his window 100'

away. He was not minimizing the neighbor's concerns as they are used to one thing that is changing but nonetheless if this was an addition where someone was truly looking right into their window, it would be a different matter than part of the year from 100' to 150' away. The house pre-existed the wetland ordinances. They were not asking to expand the dwelling but rather are only asking to add an accessory use to the dwelling itself. If this were a new construction it would be very different. Regarding a fair and substantial relationship, if this particular ordinance had the same protections in it which the most similar ordinance to this one has, they might not be hearing the petition.

Mr. Marchewka felt that the Board could hear the petition and that this request was materially different from the previous request, which dealt with run-off from a roof and sono-tubes in the ground. He did not think the variance was contrary to the public interest nor did he feel it had any effect on the public interest. The special conditions which exist with respect to the property where literal enforcement of the zoning ordinance results in unnecessary hardship, the property does pre-date the wetlands setback and he felt the issue of run-off was really what the Board was dealing with. The fact that the deck was permeable took care of that issue, maybe not 100% because there may be some rain running off the side, but for the most part it is a permeable structure. There are no sono-tubes on the ground. He did not believe any fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific restriction on the property because it is permeable and the applicant is not effecting the permeable land surface beneath it. He did not believe the variance would injure the public or private rights of others. He felt it was consistent with the spirit of the ordinance which was to protect the wetlands and he felt the application addressed that. Substantial justice was done by allowing a reasonable use of the applicant's property. Concerning the question of how many decks can a person have – he didn't know how many were reasonable. The house is looking out over the water and presumably if someone had a house like that they would want a deck to look out over the water. He did not feel that was unreasonable. Mr. Marchewka did not believe that Mr. Lesser's property would be diminished by the fact that there are two 8' x 14' decks on the neighbor's property. The Lessors property is very substantial and valuable and would remain valuable.

Mr. Jousse stated that something was bothering him and he finally put his finger on it. He had previously gone to the property and after looking at the pictures he realized they are a lot different than what he recalls seeing. Back in February of 2002 he recalls an enclosed porch on the back area and that was before they denied the variance the first time. There also was no slider there at that time. Therefore the doors were installed after the variance was denied. He was also disturbed to note that a lot of the trees, or at least one large tree that was close to the house, was removed although that was not in their jurisdiction. Mr. Jousse did not feel that a hardship had been demonstrated and that is one of the prime criteria for granting the variance and he would not be supporting the petition.

Mr. Parrott stated that one of the rules that they must apply under the analysis for variances reads "the zoning restriction as applied to the specific property interferes with the property owners reasonable use of that property". Mr. Parrott indicated that this property happens to be built within the setback zone which was only passed by the City Council after great consideration of its value, and he personally felt it does have value to enforce it. Mr. Parrott read that to mean that if the variance were not granted, the Grays would not have a reasonable use of the property and he does not see where that is the case. They heard that there were other decks which were eliminated by being boxed in. He finds it hard to believe that two new decks are an absolute necessity so that the property owners may have reasonable use of their property. Regarding the issue of whether the new proposal is a substantial change is worthy of discussion. Dr. Gray indicated that he did not believe the sono-tubes themselves were a significant feature. Therefore, the elimination of them did not make the new proposal a substantial change on that feature. Whether the water hits an asphalt roof surface or whether water hits deck floors that may not be made out of treated wood or composite material is worthy of discussion. No matter how you cut it, the water hits some sort of artificial surface and then gets onto the ground and then spreads out as it proceeds down towards the wetland.

Mr. Marchewka addressed reasonable use. He did not believe they were voting on the fact that they currently have reasonable use of their property. They are voting on whether the deck is reasonable. Of course it is

reasonable for them to use the property as a house as they have for many years. With regard to the sono-tube being a significant feature, he was at the meeting when they voted last time and it was a significant part of that hearing and why the petition was denied

Vice-Chairman Horrigan indicated that he agreed that the new petition was significantly different from the previous petitions. He opposed the previous petitions in large part based upon the advice and counsel of the Conservation Commission, whose Chairman did testify before this Board. His concern was specifically the roof surface of the enclosed living space in the previous proposal and also there was a roof proposed for the deck itself. His concern was that the roof surface would create a significant volume and run-off and the disturbed property would have trouble absorbing and would run off into the salt water wetlands. Vice-Chairman had no other problem with the various other criteria for a variance. He felt that a deck with space between the planks and no roof significantly diminishes the run-off. He felt it was a reasonable proposal regarding water run-off. He did want to say for the record that, although he agreed with the Attorney's argument one would usefully take the inland wetland ordinance as the model for what was intended for this buffer zone around the shoreline, none the less, that leaves legitimate questions for proposals of this type. The wetlands ordinance is to provide vegetative cover for filtration of run-off and to provide for the protection of wildlife habitat but what they had was a sentence that said because the property was developed prior to the enactment of the ordinance, the area in question being developed as a lawn, has lost qualities which the buffer zone then seeks to protect. That holds the ordinance back on the buffer zone itself, which is designed to protect the wildlife habitat, among other things. He felt it was clear that the tidal buffer zone was intended to protect the tidal waters, not just the buffer zone itself. He does not care if the house was built before the enactment of the ordinance, there were still legitimate questions that the Board needs to deal with. It would be nice if they were spelled out, specifically in the zoning ordinance, but until that happens he presumes that this Board and the Conservation Commission were really the only two places where those two issues would be discussed, as well as the Planning Board. He did not want to prejudice the Grays case as he thought it was a reasonable use and given the design, there was no fair and substantial relationship between this part of the zoning ordinance and what they are proposing.

The motion to grant passed with a 4-3 vote, with Mr. Jousse, Mr. Holloway and Mr. Parrott voting in the negative.

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A motion to continue past 10:00 p.m. was made, seconded and passed unanimously.

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8) Petition of **Benoit R. and Andrea M. St. Jean, owners**, for property located at **54 Humphrey's Court** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow a 320 sf deck with a 6' right side yard where 10' is the minimum required. Said property is shown on Assessor Plan 101 as Lot 46 and lies within the General Residence B district. Case # 6. (This Petition was tabled at the June 17, 2003 meeting to the June 24, 2003 reconvened meeting.)

A motion was made to take this Petition off of the table, the motion was seconded and the motion passed unanimously.

**SPEAKING IN FAVOR OF THE PETITION:**

Ben St. Jean, the applicant, addressed the Board. They were looking to add a deck where no deck or patio currently exists. They felt this is something that is enjoyed by many of their neighbors and half of Portsmouth. He did not feel that the requested variance would be contrary to the public interest because the proposed deck will be low to the ground and will not be elevated in any way, the proposed deck will not dominate the yard, this will still fall well below the 30% coverage requirement, the deck will be tastefully done, in keeping with the overall design of the house, and the proposed deck is not in direct view of the street. Special Conditions exist as

this lot is similar to many other lots in the South End which are very small. The hardship for smaller lot owners are the difficulties of not having as many amenities as large lot owners enjoy. In this case, this will allow them better outdoor enjoyment. Decks are usual accessories to homes and they would to have the opportunity to enjoy one. Property owners on both sides of them as well as behind them all have decks and given the dynamics of the yard in terms of trees, fences and other structures that exist, the deck would not impede anyone in the area. The zoning ordinance and the restrictions there under would be compromised in form but not in function. Neighbors and other citizens would not be impeded in any way should a variance be granted. Due to the positioning to the yard as well as trees, it is clear that the proposed deck would not cause any undue changes to the neighborhood. The requested variance is consistent with the spirit of the ordinance in that they will not disrupt their immediate neighbors. How the house is situated on the property and how the proposed deck will be in relation to their neighbors, there will be no change in the neighbors enjoyment of their yards either. In terms of substantial justice being done by granting the variance, essentially a deck would be added for outdoor enjoyment which their neighbors currently have and the proposed deck would beautify the yard. The granting of the variance would not diminish the value of surrounding properties. The variance would have quite the opposite effect as it will be done with natural materials and keeping with the overall design of their home. It is his opinion that the deck will increase the value of their home as well as the value of surrounding properties.

**DECISION OF THE BOARD:**

Vice-Chairman Horrigan made a motion to grant the petition as presented and advertised. Mr. Berg seconded. Vice-Chairman Horrigan stated that decks are a basic part of houses so that owners can fully enjoy their residences. There is only one place on this property that they can put the deck, which is the rear of the house, which involves a violation which is less than the actual house. Therefore, the violation is actually less than what currently exists. The public interest is well served as decks are a basic ingredient of home life now. Concerning the hardship criteria, to literally interpret the zoning ordinance would interfere with a very reasonable use of this property, mainly a deck in a nice vegetative back yard. Regarding the second part of the hardship criteria, the zoning ordinance was never intended to deny the homeowner a use of a deck as that would be quite unreasonable. There does not appear to be any public or private rights being harmed. The abutters on both sides of the household would be most effected and they have both written letters of support. Substantial justice is being done by granting the variance because it allows the homeowner full enjoyment of his property. Granting the variance would not diminish the value of surrounding properties and, by the design of the deck, it appears that it may enhance property values.

Mr. Berg stated that this was an accessory use, not a change in use, it will enhance the property and it is no more non-conforming than any other attribute that they property has. Mr. Berg asked the applicant to think about what he has gone through because he would like to see a system where people don't have to ask for a variance and come before the Board but rather have this be more of an administrative function for homeowners to put on a deck. There are no dimensional problems other than the fact that the property is non-conforming in the first place and the proposed deck is even less non-conforming than the house itself so Mr. Berg does not feel that the applicant should have to come before the Board.

Ms. Tillman indicated that once a deck is granted there is nothing prohibiting the current or subsequent homeowner to enclose the deck into a screened porch, then a three season porch and then part of the house. Essentially the Board is looking at something that could become part of the principal structure unless you make stipulation that it shall not be enclosed.

Vice-Chairman Horrigan agreed that it would be nice to have a simpler procedure for decks and was agreeable to the stipulation that deck could not be enclosed

The motion to grant, with the stipulation, passed unanimously with a vote of 7-0.





**II. Old Business**

A. **917 Greenland Road** – Settlement Agreement relative to Rockingham County Superior Court Case #02-E-422 between Frances E. Wholey and City of Portsmouth and Heron Realty Trust and Sean Correll, relative to variances granted on August 20, 2002.

A motion to accept the Settlement Agreement was made and seconded. Said motion passed unanimously with a 7-0 vote.

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III. Adjournment

There being no further business to come before the Board, the Board acted unanimously to adjourn at 10:30 p.m. and meet at the next scheduled meeting on July 15, 2003 at 7:00 p.m. in the City Council Chambers.

Respectfully submitted,

Jane M. Shouse
Secretary

/jms