

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

**7:00 p.m.**

**CITY COUNCIL CHAMBERS**

**January 18, 2005**

**MEMBERS PRESENT:** Chairman Charles LeBlanc, Nate Holloway, Alain Jousse, Bob Marchewka, Arthur Parrott, David Witham, and Alternate Duncan MacCallum

**MEMBERS EXCUSED:** Vice-Chairman James Horrigan, Alternate Steven Berg

**ALSO PRESENT:** Lucy Tillman

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The regular meeting of the Portsmouth Board of Adjustment was called to order by Chairman Charles LeBlanc at 7:04 p.m.

Prior to considering the agenda, Chairman LeBlanc announced that the special meeting of the Board of Adjustment, scheduled for January 19, 2005 to consider the Children’s Museum, has been postponed.

**I. OLD BUSINESS**

A) Election of Officers – 2005.

Mr. Charles A. LeBlanc was nominated and elected to serve as Chairman of the Board of Adjustment for 2005. Mr. David Witham was nominated and elected to serve as Vice-Chairman.

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B) Petition of **Stephanie J. Lindenthal, owner**, for property located at **20 Pleasant Point Drive** wherein the following were requested: 1) a Variance from Article III, Section 10-301(A)(7) to allow a 4,039 sf footprint 1 ½ single family dwelling after the demolition of the existing single family dwelling 69.3’ from the mean high water line and the attached deck 61.1’ from the mean high water line where 100’ is the minimum required and, 2) a Variance from Article III, Section 10-302(A) to allow the left front corner of the proposed dwelling to have a 21.3’ front yard where 30’ is the minimum required. Said property is shown on Assessor Plan 207 as Lot 8 and lies within the Single Residence B district.

The applicant requested to have this tabled until a time uncertain because the City is doing a sewer study in the area.

The Board voted unanimously to table this petition to a time uncertain.

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C) Petition of **Eric Weinrieb, owner**, for property located at **1 Jackson Hill Street** wherein the following were requested for the construction of a 28’ x 32’ two story single family dwelling: 1)

Variance from Article III, Section 10-301(A)(2) to allow a freestanding second dwelling on the lot in a district where all dwelling units are required to be in one building, and 2) Variance from Article III, Section 10-302(A) to allow said building to have: a) a 14'± rear yard where 20' is the minimum required, and b) to have two dwelling units on a 11,650 sf lot where 15,000 sf would be required. Said property is shown on Assessor Plan 141 as Lot 30-2 and lies within the General Residence A and Historic A districts.

The petition was withdrawn by the applicant.

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D) Motion for Rehearing, by counsel for abutters, of the petition of **Lawrence and Ruth Gray, owners**, for property located at **80 Curriers Cove** wherein a Variance from Article III, Section 10-301(7)(a) was requested for retroactive approvals for the following where the minimum setback from salt water marsh wetlands / mean high water line is 100'. Item 1) Approval was sought for an existing second story deck with dimensions of 10' x 14' which differs from the plan submitted to the Board showing the second floor deck having dimensions of 8' x 14'. The second floor deck constructed by the Applicant's contractor has a curved front which results in the deck being 10' x 14', the maximum extent of the "bump out". The plan submitted shows this Item as being 74' from salt water marsh wetlands / mean high water line. Item 3) In June 2002 a building permit was issued to convert a screened porch and deck to living space. The screen porch converted to living space had a cropped corner to accommodate an existing tree. Subsequently the tree was removed and the cropped corner was extended and enclosed. The Application sought approval for the enclosure of the corner. The plan submitted shows this Item as being 81' from salt water marsh wetlands / mean high water line. Item 4) In 2003 the Applicant received approvals to construct an 8' x 14' deck with a 4' x 4' platform and steps to the ground. Due to the geographical features on the ground, the steps and platform were configured in a manner different from plans submitted. The Applicant sought approval of the platform and steps as they are presently configured in this Application. The plan submitted shows this Item as being 67' from salt water marsh wetlands / mean high water line. Item 5) During the renovation of the Applicants home, a new bow window was installed in the kitchen. The bow window makes no contact with the ground. The Applicants sought approval of this bow window. The plan submitted shows this Item as being 60' from salt water marsh wetlands / mean high water line. Said property is shown on Assessor Plan 204 as Lot 14 and lies within the Single Residence B district.

Mr. Jousse moved to deny the request for a rehearing, which was seconded by Mr. Holloway.

Mr. Jousse stated that the two reasons for granting a rehearing would be if there was an error on the application or if new information has been presented that was not available at the time of the hearing. Neither one of these two criteria have been met.

Mr. Holloway seconded for discussion.

While agreeing that no new evidence had been submitted, Mr. David Witham indicated he would not support the motion as he believes an error was made in granting three of the four requests with the main reasons for granting being that they had already obtained their permits and that it didn't make financial sense to tear something down. He didn't feel that financial implications should be the basis for granting or denying a variance and the way the permits were obtained left room for question.

Chairman LeBlanc stated that they've heard this case quite a bit. He agrees with Mr. Jousse that there is no new evidence and there is simply no reason to rehear this case.

The motion to deny the rehearing was passed by a vote of 5 to 1, with Mr. Witham voting against the motion.

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## II. PUBLIC HEARINGS

1) Petition of **Michael J. and Leanne Edwards, owners**, for property located at **64 Brackett Road** wherein a Variance from Article III, Section 10-302(A) was requested to allow the following: a) an irregular shaped 14' x 22' 1 ½ story attached garage with a 3.1' right side yard where 10' is the minimum required and a 17.2' front yard where 30' is the minimum required, b) a 16' x 38' irregular shaped 1 ½ story rear addition with an 8.6' right side yard where 10' is the minimum required, c) a 12' x 27' irregular shaped deck with an 18.7' rear yard where 30' is the minimum required, and, d) 33% building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 206 as Lot 22 and lies within the Single Residence B district.

### SPEAKING IN FAVOR OF THE PETITION

Mr. Jousse asked if the applicant or their representative could advise if the previous property line dispute had been resolved.

Attorney Bernard Pelech responded affirmatively for the applicant and submitted a letter from Mr. LaCroce attesting to the resolution of the lot line issue and offering the LaCroce's support for the petition. He mentioned that the Board had conducted a full public hearing at the last meeting but did not conclude testimony because of the boundary line issue and Mr. Parrott's request for a plan with some dimensions on it, which has now been submitted.

Atty. Pelech reiterated that ten abutters spoke in favor of the petition, that this is a dimensional variance, and that the petition meets all the requirements of the Boccia analysis. In addition, with respect to item a), the garage, he stated the applicants have considered relocating the garage, but that would also involve moving the driveway and seeking the same side yard variance; that most neighbors have a garage; and, that they are only requesting a one-car-wide, rather than a two-car, structure.

With regard to other Boccia points, Atty. Pelech stated that this is a growing family in a very small house. They would like to remain in the neighborhood and the hardship on the owner if the variance were denied outweighs any perceived benefit to the public. He stated this is not an overdevelopment of the lot and that there is a large, municipally owned area to the back that will probably never be developed.

After questions from Mr. Alain Jousse and Mr. LeBlanc, Atty. Pelech verified that the lot line remains as shown on the Ambit plan dated November 12, 2004 and that the only change has been an easement granted between the parties with the coverage remaining at 33%. In conclusion, Atty. Pelech requested that the Board consider each item of the application separately.

Speaking also in the favor of the petition was Mr. Gene LaCroce, the abutter whose letter was submitted to the Board by Atty. Pelech. Mr. LaCroce reiterated his support of the improvements as helping to increase the value of surrounding properties. He reinforced previous statements regarding the school property at the back, indicating it is unusable swamp so that the way that the Edwards'

property is configured will not impact the school. After Mr. Jousse's request for clarification, Mr. LaCroce confirmed that his lot is located to the left as you face the Edwards' property.

With no response to Chairman LeBlanc's call for any other speakers in favor, he asked for any speakers in opposition.

### **SPEAKING IN OPPOSITION TO THE PETITION**

Mr. Eugene Wilder stated that he was opposed to the petition, but there was some confusion as to what he did and did not oppose. First, as an abutter, he would like to see the Edwards' remain. He has lived there for 55 years, and it is a wonderful and friendly neighborhood and place to raise a family. He asked his son-in-law to read it for him.

Mr. Cleveland, son-in-law, stated that he was just reading for the record. In regard to the petition, the family has no problem with the variances being sought for the home expansion or the structure cover (items B, C and D). He does, however, object vigorously to the construction of the garage (item A), which will require a variance of the ten foot buffer. The structure would be only three feet from their common boundary line. The one and a half story structure would tower over their house, especially their bedroom, bathroom and living room, which would block out the morning light and full view of which they entitled. It would unavoidably diminish the value of their property and it is contrary to the public interest, and the spirit and intent of the ordinance. The garage is not necessary and does not impose a hardship on the petitioners. Attached to the letter is a photograph of the area in question. It is obvious that this small building lot cannot support the proposed garage. It will definitely detract from the value and appearance of Mr. Wilder's property. It is not something the petitioners need to increase their additional living space to their growing family. The absence of a garage is not a hardship. Hopefully this will clarify matters. Again, he does not object to the majority of what the Edwards family proposed with the petition, which will allow them to enlarge their living space. He does speak vigorously against a garage being built 3' from his property line, and overshadowing his property.

Mr. Wilder showed, on a cane, how close the garage would be built to his property line.

Chairman LeBlanc asked him how far his house was from his property line.

Mr. Wilder stated that his house would be roughly 10' to 12' from the property line.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

Mr. Michael Edwards, the petitioner, showed pictures of other homes in the neighborhood showing how close they are to other houses. They have been considering this project as their family has grown requiring more space. The elimination of the garage does cause a hardship to them because it eliminates a bedroom. Permanently, he would classify their house now as a 2.5 bedroom house. The third bedroom is smaller than some walk in closets and it is currently being used a nursery. The garage would both allow them to have a larger home and a garage which most larger homes in the neighborhood have. Adding this bedroom someplace else would require them to go out further into the back as they are too tight on the sides. He showed pictures of the houses in the neighborhood showing how close the houses are. They have tried to work with Mr. Wilder all along, realizing that his approval would be important. There was a point that he did object to as they were about to have the

survey done. He voiced his concerns so they stopped the project without further discussion. He then decided to allow them, so they picked up and continued the project. It was not until the day of the last hearing that they learned that he would be speaking in opposition at this meeting. This has created a bit of a new hardship. They have invested \$10,000 into this project, which had all been moved forward based on his approval. That being said, that is the situation. They would like to get the approval as the petition was submitted. He does not wish to bring harm to his neighbor or diminish his quality of life, and would like to note that he is part of the reason why they would like to remain in the neighborhood. He then handed out more pictures to the Board.

In response to questions from Chairman LeBlanc, Mr. Edwards stated there would be a bedroom above the garage which was currently a one and a half story structure. It would be an a-frame garage with no dormer. The addition would have dormers. He confirmed that the fence on the property line was one he constructed and maintains.

Mr. Jousse stated that in looking at the second floor plan, and he counted five bedrooms or five large spaces and asked the purpose of that particular smaller room?

Mr. Edwards stated that it would be used for an office area. The dimensions are 8' x 9', and it is currently being used as a bedroom.

Mr. Jousse asked if it could be used as a nursery.

Mr. Edwards stated that it would be as tight as the one that they have now.

With no one further rising, the public hearing was closed.

## **DECISION OF THE BOARD**

Mr. Holloway moved to take the petition off the table, which Mr. Marchewka seconded. The Board voted unanimously to remove the petition from the table.

There was some discussion of how to consider the various parts of the petition, with the decision made to consider each section separately.

Part a) an irregular shaped 14' x 22' one and one-half story attached garage with a 3.1' right side yard where 10' is the minimum required and a 17.2' front yard where 30' is the minimum required.

Mr. Arthur Parrott moved that this item of the petition be denied and Mr. MacCallum seconded.

In speaking to the motion, Mr. Parrott stated that the ordinance is crystal clear about maintaining light and air around homes and this variance would violate that requirement. He stated he had been out to the property twice and that even the 10' allowed in the ordinance is small enough. The lot is less than one-half of the required 15,000 s.f. in the area and, with a large addition to the right being only 3.1 feet from the lot line, Mr. Parrott felt this was a very poor use of the land.

In seconding, Mr. MacCallum stated that there had been no showing of hardship in this case that satisfies the legal requirements for the granting of a variance, that is, hardship associated with the land itself, not the personal circumstances of the applicant. The property is typical of the rest of properties

along the street and the fact that the rear of the property opens to open space owned by the city is irrelevant as the problem in this case is the space to the side. He added that he isn't swayed by the argument that this is a neighborhood in transition. If this is the case, the solution is to go to the City Council and get the zoning ordinance changed, not grant variances on a piece-by-piece basis.

Mr. MacCallum concurred with Mr. Parrott that this variance would be an over-intensification of the property, proposing to increase coverage by more than 50% which goes against the spirit of the ordinance. He added that a garage is not a necessity, nor adequate justification for increasing the coverage. His final point was that, as attested to by Mr. Wilder, the applicants cannot do what they want without walking on their neighbor's rights.

Chairman LeBlanc added that he would like to note that all the lots are the same except that the Edwards and LaCroce lots are 100' smaller than the rest of the street. He still thinks that the arguments are valid, and that is why he will support the motion.

Mr. Marchewka indicated his support also, primarily based on the abutter testimony that a building 3' from the property line would diminish his property value.

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

Part b) a 16' x 38' irregular shaped one and one-half story rear addition with an 8.6' right side yard where 10' is the minimum required;

A motion was made by Mr. MacCallum to deny part b), which was seconded by David Witham.

Mr. MacCallum stated that most of the reasons to deny part a) also address part b) and he would like to include those remarks in support of this motion.

In seconding, Mr. Witham stated that the variance request doesn't meet the Boccia standard and that there is another reasonably feasible way to accomplish what the applicants want to do and still protect the abutters. The space inside the house could be reconfigured to achieve their aims and not need a variance.

The motion to deny part b) of the petition passed by unanimous vote of 7 to 0.

Part c) a 12' x 27' irregular shaped deck with an 18.7' rear yard where 30' is the minimum required;

Part d) 33% building coverage where 20% is the maximum allowed.

Mr. Parrott made a motion to deny item c), the irregular shaped deck. Mr. Jousse suggested combining both c) and d). Mr. Parrott amended his motion to deny both items c) and d), which was seconded by Mr. Jousse.

Mr. Parrott stated that the proposed deck as presented is designed to attach to the proposed addition, which was denied and it does not make sense to approve a freestanding deck. In view of previous actions, part d) is also moot. He added that there was no hardship associated with the land that has been demonstrated for either part c) or d).

Mr. Jousse agreed with Mr. Parrott.

Mr. Marchewka indicated that he would rather see a design that goes further back to the rear property line where some case for hardship could be made in that the lot is small and the abutting lot to the rear is municipal land that won't be developed.

Mr. Witham reiterated his view that, concerning lot coverage, the project is too ambitious and intense. He added that in terms of meeting the criteria for public interest, this house as currently configured probably falls under the affordable housing category but, if the variances were granted, probably would not.

The motion to deny parts c) and d) of the petition passed by unanimous vote of 7 to 0.

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2) Petition of **Mark Ayotte, owner**, for property located at **9 Garden Street** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow a 20' x 29' two story addition with a bay window on the first floor after the demolition of the existing 20' x 29' one story portion of the building in the same location with: a) a 3'± right side yard where 10' is the minimum required, b) a 7'± front yard where 15' is the required, and c) a 10'± right side yard for the bay window where 10' is the minimum required. Said property is shown on Assessor Plan 174 as Lot 10 and lies within the General Residence A district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Mark Ayotte stated that he was the owner and would like to present an overview of the history of the property. On sheet 2, he shows lot A, which is the original configuration of the property that was taken in 1989. It is a 33 x 50' lot and on it was an original Frank Jones house. The whole area was covered by 33 x 50' lots in the past. In 1995, he purchased parcel B from the City of Portsmouth, and one of the stipulations with City Attorney Bob Sullivan was that he would not put another building on the property. His intentions at that point were to add an addition, shown on Sheet 3. Most recently, he was able to do a lot line revision with his neighbor, where he was able to gain additional land. He gained a large bit of property. The hardship for him now is that his house is crammed up into the upper corner of the property. The old existing building was built from scrap. The side walls bow and he has electrical issues. His intent is to fix this to meet code and for safety. He would also like to replace the roof. He feels that this is the most logical thing that he can do with the property. Other than the bay window, he would be staying in the same footprint of the property. In going up, the finished roof line would be 1.5' lower than the one on the new addition. He does not want to cause any loss of property value to himself or his neighbors, but he felt that this would be an improvement to the neighborhood.

Mr. Ayotte stated that the only thing he planned to do was take down the front wall, the right side wall and the back wall. The roof and the low ceilings would also come off. He would like to build upon the first floor foundation and the first floor deck.

With no one further rising, the public hearing was closed.

**DECISION OF THE BOARD**

Mr. Jousse made a motion to approve items a) and b) of the variance, which was seconded by Mr. Witham.

Mr. Jousse stated that these would not be contrary to the public interest, and that the applicant has shown that the structure in question is in dire need of repair. Since the applicant is going to rebuild on the existing footprint, it would be in no one's interest to force him to live by the side yard and front yard requirement as they are, since the house is there already. He will be replacing what is there with a better structure. The variance was needed for the applicant to continue with what he is planning to do and the benefit sought by the applicant cannot be achieved by any other method. It was consistent with the spirit of the ordinance and substantial justice would be done. The value of the surrounding properties had not been mentioned and he was not adequately qualified to comment on that.

Mr. Witham stated that he agreed with Mr. Jousse. The applicant was not seeking to encroach any further but was simply trying to replace subpar walls. There is no other reasonably feasible way of doing that, except by moving the building. Although there was an issue with the lot coverage before, the applicant has taken steps to rectify that. He noted that this request was different from the last. Although the last one was requesting an expansion, this one is going to remain within the same footprint as the existing structure, and will be rebuilding the same walls.

Mr. Marchewka stated that he would support the motion because the hardship here was not the lot, but the location of the existing structure on the lot that was put there prior to zoning. He doesn't see any reason to make the homeowner move the existing structure, when he is really just replacing things that need it there. The direct abutter supports the motion and the nearest home was a substantial distance away from this house, so they can grant this variance.

The motion to grant items a) and b) of the petition passed by unanimous vote of 7 to 0.

Mr. Marchewka moved to grant item c) of the petition, which was seconded by Mr. MacCallum.

Mr. Marchewka stated that he doesn't see how they can deny a window that really has no bearing on the project as a whole. If they just approve the house to be rebuilt, a new bay window in that situation will not matter. It will have no impact whatsoever on the abutters and he sees no reason to deny the request.

Mr. MacCallum stated that he agreed with Mr. Marchewka. The window may seem cramped until you consider the wall on that side is about 10" from the boundary line. It would make no sense to grant the first two requests of this variance and then deny the third. He concurs with Mr. Marchewka's views and supports the motion.

Mr. Parrott stated that in this case, as one looks at the house, the house on the right is sided to the right side of their lot. This means that there is adequate spacing between houses. This tight side yard doesn't cause any problems.

Chairman LeBlanc stated that he cannot support this motion because 10" from the property line is too much. The right side of the building is 3' from the property line, and that is even very close. To have a window come out that far is too much and he doesn't think that it meets the criteria for the minimum amount of relief being asked, and he cannot support it.



The motion to grant item c) of the petition failed to pass by a vote of 2 to 5, with Messrs. Holloway, Jousse, Holloway, LeBlanc, MacCallum and Witham voting against the motion.

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3) Petition of **Richard Fecteau, owner**, for property located at **120 Spaulding Turnpike** wherein a Variance from Article II, Section 10-206 is requested to allow the creation of a 23,608 sf outdoor vehicle display parking area on the residentially zoned portion of the property where such use is not allowed. Said property is shown on Assessor Plan 236 as Lot 33 and lies within the General Business and Single Residence B districts.

**SPEAKING TO THE PETITION**

Attorney Peter Loughlin spoke in favor of the petition. He remarked about saving time in his presentation and reverted to a letter he submitted prior to the meeting outlining the slight changes that had been made to the plans. The case Fisher v. Dover was referenced and Chairman LeBlanc asked the Board if any of the members felt that this case applied to the current application. The current request had changed from the prior request in that the parking first requested was to be on the hill and currently, was to drop the parking lot below grade. Chairman LeBlanc thought the current application before the Board was totally different then the previous request and the Board subsequently determined that the case did not apply.

Attorney Loughlin cited the Simplex case. He stated that on the one hand, there was a landowner who wanted to use a small portion of his property, which they felt was reasonable and the other side was the neighbors who felt the zoning ordinance prohibited what the landowner was seeking to do. He noted that the current petition or application before the Board was a good balance as sought in the Simplex case. He indicated that none of the land could be used for any other purpose for which it was zoned and therefore, was trying to allow Port City Nissan a modest increase in their display area as well as allow the neighbors to continue to enjoy the benefit of a substantial buffer on the applicant’s property and thus, achieve a balance between private property rights and the rights of the City to restrict private property in addition to the expansion needs for the applicant together with the permanent protection of the neighbors that would survive any future zoning changes, any further expansion of property rights or the change in needs of PSNH. They wanted to address and focus on the unnecessary hardship aspect primarily and noted that was the focus of the Board back in 1999. The property had been used for over 27 years as an automobile dealership and therefore, there was no unnecessary hardship. The decision was concurrent with other cases during that time.

He cited the Simplex case and he noted that the Court had cited the Grey Rocks case and in that, the Court said “the uncontraverted fact that the marina had been operating as viable commercial entity several years prior to the variance application, it is conclusive evidence that a hardship does not exist.” He stated again that the Board voted consistently with that ruling in 1999. He noted the statute in which the Board operates under, NH RSA 674:33, which states “Board of Adjustment is authorized to land bearing system in terms of the zoning ordinance, if owing to special conditions, the literal enforcement of the provisions of the ordinance will result in unnecessary hardship.” He noted the number of special conditions that made the subject property unique. Attorney Loughlin noted that the issue before the Board was whether there were special conditions about the particular property that made the literal enforcement of the ordinance result in unnecessary hardship as that term is now defined. In addition, it was a use variance that the applicant was seeking so therefore, the Simplex

case took precedent over Boccia, in that “an applicant for a variance may establish unnecessary hardship by proof that (1) a zoning restriction as applied to their property interferes with their reasonable use of the property considering the unique setting of the property in its environment.”

He posed two questions, (1) is this particular use a reasonable use given the circumstances and (2) are there special conditions on the property. He noted the current proposal before the Board recesses the parking into the ground, which would make it invisible to the neighboring properties. The proposal contained a retaining wall, which would prevent encroachment. The retaining wall would surround the proposed parking area with a concrete wall. This is a reasonable use considering the unique setting of the property. The proposal would have 23,000 sq. ft. of parking that would be invisible to the dealership’s neighboring properties. He posed the question of what would be a reasonable amount of separation and whether there was a fair and substantial relationship between the purposes of the zoning ordinance separating the uses and specific restrictions on the property. While citing Simplex, Attorney Loughlin answered the question in that it, the answer, would be no, that the current proposal was a reasonable use of the applicant’s property and that the granting of the variance would not injure any public or private rights of others.

Mr. Jousse asked Attorney Loughlin why the subject property could not be used for residential use.

Attorney Loughlin remarked it was because of the existing utility easements.

Chairman LeBlanc asked Attorney Loughlin to point out the utility easement and the City’s easement on the map.

Attorney Loughlin remarked that the utility easement was 300 ft wide and the City’s sewer easement was roughly 50 ft from the easterly boundary of the parcel.

Chairman LeBlanc referenced page 11 of the proposal and asked Attorney Loughlin if there was a 150 feet between the rear lot lines of Clover Lane and the proposed parking area.

Attorney Loughlin answered that was correct.

Chairman LeBlanc referenced page 9 and asked approximately how much of the proposed parking area would be porous.

Attorney Loughlin referenced a site plan and said that everything on the northerly side of the building up to and including the new section would be porous paving.

Chairman LeBlanc asked that in addition to the parking area, would they take some of the current impervious asphalt and change that into pervious.

Attorney Loughlin stated that was correct.

Mr. MacCallum asked about the two easements referred to and whether they were existing and if so, was Attorney Loughlin’s client aware of those encumbrments when he purchased that tract of land.

Attorney Loughlin remarked that he believed his client was aware of those encumbrments when he purchased that tract of land.

Mr. MacCallum asked Attorney Loughlin if he knew what the distance was between the eastern boundary of the proposed display area and the boundary line of the nearest residential property.

Attorney Loughlin remarked yes, that it was about 150 feet.

Mr. Peter Stanhope of the Stanhope Group, LLC spoke in support of the petition and performed research on the effect of the market value on the surrounding properties if the current proposal before the Board was passed. He defined what market value meant and he visited the subject neighborhood a number of times. He walked around the neighborhood at various times during the day to evaluate noise, lighting, etc. He compared the subject properties to other properties in southern New Hampshire with the same set-up. He focused on a number of dealerships situated within residential surroundings and noted a number of example properties. He also visited properties where they had erected sound barriers to see the impact it had on the surrounding properties and looked at how the market reacted to those particular properties (i.e. tax assessors assessments of the properties (if the assessments were lower) and real estate brokers; the appraisals made on surrounding properties). He stated that this was a before and after comparison. He noted that the state highway lighting was far brighter and illuminated than the surrounding commercial properties and that there was a ton of noise (i.e. aircraft noise, traffic noise). He stated that if the Board should grant the current petition that the buyer would be confronted with a 150 ft. buffer between their property and the dealership with half of the area of parking which would be recessed and out of visibility, together with a sound barrier. He stated that all of those measures were risk reduction factors that would come into play for any buyer. He checked the tax assessor's office to see if any of the assessments had been lowered and there was no such proof. He spoke to realtors about whether there were any changes in the market's reaction to these corresponding neighborhoods and there was not. He interviewed appraisers and looked at the appraisals made to similar properties to see if there were any adjustments made. Consistently, the appraisers had not increased their adjustment for the commercial activity nearby. He found that if the petition was granted there was no market evidence that would prove to result in any diminution in property values and he felt the sound barrier would have a stabilizing effect on the residential values.

### **SPEAKING IN OPPOSITION TO THE PETITION**

Mr. Christopher Boldt, Esq. spoke in opposition to the petition on behalf of a group of neighbors from Clover Lane. He noted their objection to the proposed because of an existing permanent injunction against this petition via a Court decision dated October 4, 1999. In essence, it stated "though shall not park upon the residentially zoned land." He stated that they argue that the case of Fisher v. Dover did apply and that the Board should not accept jurisdiction because there can not be a material change in the application because the status quo is the injunction. He felt that the current petition did not meet the five standards set forth in Simplex. He stated that the first standard was that a variance shall not be contrary to public interest and that because of the existing judgment and all of the money that both the City of Portsmouth and the neighborhood had spent as interveners, it would be contrary to public interest and it would result in the overturning of a Superior Court judgment. He noted that it would be commercial creeping into the residential zone and if allowed, it would have an impetus on others seeking the same. It is also would be contrary to public interest because there were other reasonable alternatives on the property that have not been addressed.

Mr. Karl Jensen of Rockingham Avenue spoke in opposition of the petition and noted that the current petition if approved would impede on his private property and the enjoyment of his property. He has

had to deal with the intercom/speaker as well as the lighting on a regular basis and that the noise factor was constant. He noted that the sound barrier would be nice but he was more concerned about the traffic increase.

Mr. Mike Macdonald of 86 Farm Lane spoke in opposition of the petition and he concurred with everything Mr. Jensen had said. He was worried about his five children taking bike rides with the increased traffic and test-drives. He noted Mr. Stanhope's testimony and that the applicant was aware of the easements in place on the subject property when he purchased it.

Ms. Kim Cherest of 187 Meadow Road spoke in opposition of the petition and stated that she spent a lot of money to pay for her small house and that this was the second time that she had to come before the Board to oppose the variance requests of the applicant. She had serious concerns about her property value and her quality of life being drastically changed due to the applicant's request.

Ms. Suzanne Ford of 88 Farm Lane spoke in opposition of the petition and she agreed with what was previously said. She asked why the applicant's newly acquired bridal shop area was not being used to the full extent that the applicant could use and why the applicant felt the need to encroach their properties again when they have frontage on Spaulding. She asked the Board to stay consistent with the Court's decision and to side with the residents.

Mr. Joe Calpum of 50 Clover Lane spoke in opposition of the petition and noted that he had lived there for over 20 years. He remarked that he had spent many times in these types of meetings trying to maintain the residential area behind his house. When he purchased the property he expected it to remain residential. He felt that the original intent of the subdivision was starting to fall by the wayside. His specific experiences were that he could hear the overhead speaker constantly.

Ms. Karen Pierce of Meadow Road spoke in opposition of the petition and her concern are the changes that were made to the property had created significant flooding in her basement due to the downstream.

Mr. Bob Ford of 88 Farm Lane spoke in opposition of the petition and wanted to repute Mr. Stanhope's testimony of "there wouldn't be a change or diminishing effect on surrounding property values". He made the statement that when he purchased his home he got it so cheap due to its location in relation to the surrounding dealerships and no one wanted to live in a neighborhood surrounded by so many dealerships. He proclaimed that the only reason he purchased it was because it was the perfect location for him and his wife in relation to their work and he could not turn it down due to such a low price. He noted that Seacoast VW moved to Greenland because they knew that they could not expand. He noted that he did his own count for a 31-day period and came up with a lot more cars than what was presented. He stated that this was a residential area and it needed to remain that way. He said that the Superior Court ruled no and asked why everyone was back for this again. He also asked what the point of a zoning ordinance is if it will not be enforced.

Mr. Joe Shanley of 959 Maplewood Avenue came down in support of the petition and stated that he was surprised at the reaction from the local residents. He felt the current petition was a wonderful compromise for everyone.

Mr. Marchewka asked how many cars could be parked on the 23,000 sq. feet.

Attorney Loughlin replied that he estimated about 110 to 140.

Chairman LeBlanc asked if there was anyone else who would like to speak to, for, or against the petition. Seeing no one rise, the public hearing was closed.

## **DECISION OF THE BOARD**

Chairman LeBlanc asked the Board whether the case Fisher v. Dover applied.

Chairman LeBlanc did not think it applied due to the material changes made to the petition from the previous 1999 application.

Mr. Marchewka made a motion to deny the request. Mr. Witham seconded.

Mr. Marchewka recognized the work that the applicant had done to expand the dealership but noted that there would be a hundred plus cars nearby the residential zone using the residential land to accommodate the cars. He felt that the granting of the variance would be contrary to public interest. He did not feel the variance was consistent with the spirit of the ordinance in that the land is zoned residential; just because there are easements on the land does not necessitate change in use. He noted the residents who spoke against the petition and thought that the addition of so many cars would diminish the values of surrounding properties due to congestion and noise. He felt that the applicant has reasonable use of the property regardless the setting of the property.

Mr. Witham noted that he was very concerned about how many dealerships have come forth stating that they need to “keep up with the times” and therefore need to expand. He felt that the applicant met the first criteria of Simplex, however, the other prongs of the Simplex test, he felt the applicant failed to meet.

Mr. Jousse supported the motion although the design was appealing to him. He stated that it would still be a business encroaching into a residential area. He felt that a residential area is a sacred area.

Mr. Parrott shared Mr. Jousse’s opinion on the quality of the design but from a more practical side, he felt when the lot is full of cars and a foot of snow comes, the cars would have to moved to some other location as the remainder of the lot is so full of cars that he figured the only other place to move those cars would be onto the residential streets. He felt that the removal of the snow would create a certain amount of noise since a job like that is typically done at night and he thought for those reasons alone, it would have a significant impact on the neighborhood which would be undesirable and unnecessary and that the neighbors would have no recourse if the petition was granted. Additionally, he felt that the whole petition if granted would cause unnecessary encroachment upon the residential zone.

Mr. MacCallum agreed with Mr. Marchewka, Mr. Witham, Mr. Jousse and Mr. Parrott. He agreed with Attorney Boldt’s argument that if the Board was to grant this petition, then the same would have to allow the Mazda dealership and other dealerships to do the same. He commented that the applicant purchased the property fully aware of the existing conditions and easements on the property and he felt for those reasons it undercut the applicant’s argument.

Chairman LeBlanc stated that he would not support the motion. He felt the applicant had barely made the case that the criteria of Simplex was well met and that the reasonable use of the property was being impeded by the ordinance and the solution or proposal would amply address the concerns of the

residents. He noted that back in 1999, he had posed the question of moving the PSNH pylons across the road onto the Pease property and that would open that area for further development, however, the current petition eliminated that possibility. For those reasons, he felt that the applicant had barely demonstrated that all of the criteria have been met and he would not support the motion.

Mr. Marchewka stated the area for development is zoned residential and not business.

With no further comment from the Board, Chairman LeBlanc called for a vote on the motion to deny.

The motion to deny the petition was passed by a 6-1 vote with Chairman LeBlanc voting against the motion.

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4) Petition of Robert Chaffee and Barbara Trimble, owners, for property located at 32 Miller Avenue wherein a Special Exception as allowed in Article II, Section 10-207(18) was requested to allow a Home Occupation II for Extended Family on the first floor by the resident owners of the Bed and Breakfast with 5 parking spaces in the area of the tennis court for this use in addition to the existing onsite parking. Said property is shown on Assessor Plan 136 as Lot 18 and lies within the Mixed Residential Office district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Bob Chaffee, owner, stated that he and his wife currently have a Home Occupation 1 Permit. They are applying for the required variance to get a Home Occupation 2 Permit. They need this because the permit details that off street parking is required.

Chairman LeBlanc stated that all they needed was a Special Exception, not a variance.

Mr. Chaffee stated that his sheet states that he needs a variance. He has provided them with a full site plan. They plan on building over a tennis court that now sits at their property, of which they have no use. Presently, the lot has access from Merrimack Street. They obtained a driveway permit from the DPW and the Traffic Advocacy Commission. There is enough room on the tennis court to provide all the spaces that they need.

Mr. Witham asked what he meant by the use of the lot. Were there going to be meetings once a week with three people present or will it be three times a day with eight people. What is the nature of the business?

Mr. Chaffee stated that his wife runs the company from the property and has a number of people working for her. Only one would be devoted to parking, and periodically potential clients would come to the property to have meetings with his wife. The meetings would be sporadic and all during the week. They would all be taking place in the approved space of the governor's house.

Mr. Witham asked if there would be weekly seminars.

Mr. Chaffee stated that that would not happen. It would be clients.

With no one further rising, the public hearing was closed.

**DECISION OF THE BOARD**

In response to a question from Mr. Marchewka, Ms. Tillman stated that they would vote only on the Home Occupation II for Extended Family, because that's what is specified in the clause.

Mr. Chaffee stated that the floor plan submitted shows the space allocated in the extended family.

Mr. Parrott stated that he really had no idea what he was voting on. He asked Ms. Tillman to put it into plain English for him.

Ms. Tillman stated that Home Occupation II is allowed by Special Exception. He was going to have clients come to the house, while his wife runs a Home Occupation. If there was no one coming to the building, for instance if there were was no office, then it would be considered a Home Occupation I, for which he has already received approval. Since clients will be coming to the home business, it is required to have the owners provide parking and screening for that parking. That is what makes it a Home Occupation II. Abutters have been notified and aware that a business is coming to the neighborhood.

Mr. Parrott asked what the largest number of people visiting the home would be.

Mr. Chaffee stated that probably four would be the largest.

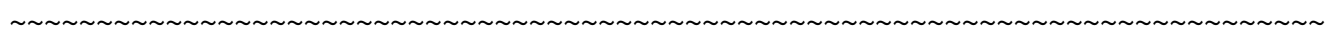
Ms. Tillman stated that they were provided ample parking for the businesses.

Mr. Witham made a motion to grant the Special Exception, which was seconded by Mr. Parrott.

Mr. Witham stated that a Home Occupation II can have a big impact on the neighborhood, but this Special Exception is just for this business, and as it is described, will have minimum impact. It was very low use in terms of the public. There shouldn't be any hazard to the public or detriment to any surrounding properties. There won't be any changes in the characteristic of the neighborhood or a creation of traffic hazards, or any strain on municipal services. This was well set up to handle the clients coming in. With the tennis courts already there, no additional stormwater runoff would be a problem.

Mr. Parrott stated that he agreed with everything that Mr. Witham said. He wanted to state that his second was based entirely on the assumption that the Special Exception is strictly related to the business described this evening.

A motion to grant the Special Exception passed by unanimous vote of 7 to 0.



**III. ADJOURNMENT**

The motion was made, seconded and passed to adjourn the meeting at 10:25 p.m.

Respectfully submitted,

Danielle Auger