

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

7:00 P.M.

June 21, 2005

MEMBERS PRESENT: Chairman Charles LeBlanc, Nate Holloway, Alain Jousse, Bob Marchewka, Arthur Parrott, Alternate Steven Berg, and Alternate Duncan MacCallum

MEMBERS EXCUSED: Vice-Chairman David Witham,

ALSO PRESENT: David Holden, Lucy Tillman

1) **Petition of Myles Bratter, owner**, for property located at **159 McDonough Street** wherein a Variance from Article III, Section 10-302(A) is requested to allow a left side yard of 0' where 10' is required and building coverage of approximately 56.5% where a maximum of 35% is allowed. Notwithstanding the above, an Administrative Appeal is made seeking to overturn the Administrative Decision to deny the issuance of the applicant's building permit. Said property is shown on Assessor Plan 144 as Lot 46 and lies within the Apartment district.

SPEAKING IN FAVOR OF THE PETITION:

Mr. Alec McEachern identified himself as the attorney representing Mr. Bratter, the applicant. He stated that the applicant seeks to reconstruct a garage structure that had existed as a non-conforming use since the 1920's. The structure was non-conforming in that it has encroached approximately one foot onto the abutting lot where a 10' side setback is required. In addition, the lot in question has structure coverage of approximately 56.1% with the prior garage where 35% is the maximum allowed. This structure has been used through the years as a garage and, for the past 10-15 years, Mr. Bratter has used it as a workshop and storage area.

As additional background, Attorney McEachern outlined how the previous structure had been damaged. There are front and rear dwellings on the property and the tenants in the structure fronting on Cabot Street reported a smell of sewer gas and a basement filling with sewer water. Mr. Bratter was using a backhoe to locate the broken sewer line when, due to the wet conditions, the machine slipped and the rear part pushed into the garage and the roof came down, at which point the tenants came out as indicated in their statement. Mr. Bratter's contractor looked at the building determining that, due to severe rot, it could not be saved so most of the structure was removed with the exception of the wall which remains on the abutter's property.

Attorney McEachern added that one of the reasons the structure failed was due to the construction. The garage had a hip roof with air space between the structures. Whenever it rained, water would run off and collect in between the dwellings and the garage and, over time, that contributed to the garage's failure. In rebuilding, the applicant is proposing to connect the two dwellings on the property and

gable it in to prevent water collection. He is also proposing to end the encroachment and move the structure back onto the property line. It is Mr. Bratter's position that he has a vested property right in the pre-existing non-conforming structure that was on his property. It was damaged and destroyed, not intentionally, with a contributing factor being the rot in the structure.

Attorney McEachern then addressed the criteria for granting a variance, as follows:

- Granting the variance will not diminish surrounding property values. It is their position that he has a vested property interest which will allow him to reconstruct the structure as it had existed but Mr. Bratter is not seeking to do that. In addressing the variance criteria, Attorney McEachern stated it is going to be a comparison between what he (Mr. Bratter) could do as a matter of right and what he is proposing to do and for which he needs a variance. Rebuilding the structure to end the encroachment will not diminish the surrounding property values. It will, in fact, increase the value of the abutting property which is being encroached upon.
- Granting the variance will not be contrary to the public interest. The applicant submits the reduction in size and movement of this proposed building to end the encroachment will not be detrimental to the health, safety and welfare of the city's residents.
- With regard to hardship under the *Boccia* standard, an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property. The special condition of the property is that it has a pre-existing non-conforming structure which the applicant could rebuild without a variance. Rather than replicate the pre-existing structure and encroach further on the abutter, the applicant seeks to move it to end the encroachment and tie it into the existing dwelling units.
- The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue other than an area variance. The benefit in this case is the enjoyment of his protected property interest in the pre-existing non-conforming structure. But he also wants to change it so that it no longer encroaches and to protect it from further water damage which was caused by its design. These goals cannot be achieved by any method other than that requiring a variance.
- By granting the variance in this case, the Board will achieve substantial justice as the change in the size and location of the new building will decrease the non-conforming nature of the applicant's pre-existing non-conforming structure by ending the encroachment and reducing the lot coverage. By ending the encroachment, the applicant will reduce the lot coverage by approximately 20 feet. As spelled out in the variance application, the applicant wants to square off one corner of the building. The survey submitted with the application depicts the prior location of the damaged structure by indicating the concrete pad on which it was situated and also shows the footprint of the structure that Mr. Bratter proposes to build. In the northwest corner where there had been an irregular corner, Mr. Bratter is proposing to square that corner off. By eliminating the encroachment, there's a reduction of 20-21' and there's a 15-16 foot increase by squaring off the corner so there is a net decrease of approximately 5 s.f. which, statistically, is probably insignificant, but it does represent a reduction.

Chairman LeBlanc asked if the concrete pad was still on the other property and Attorney McEachern replied that it was, but it will be removed. He also indicated the wall of the prior structure still stands.

- Granting the variance will not be contrary to the spirit and intent of the ordinance by changing the size and location of the proposed building which will minimize the non-conforming nature of the pre-existing non-conforming use. Attorney McEachern added that it has come to his attention, in speaking with abutter, Mr. Hewitt, that he is of the opinion that the prior structure did not cover the concrete pad. Attorney McEachern wanted to point out that the City of Portsmouth's tax map and tax cards do show the structure going back to the dwelling unit. He stated that Mr. Bratter was there and would testify that there was a space of 2-3 inches between the prior structure and the line to the rear of this property and it's probably less than an inch between the garage structure and his, and the change in the structure that he's seeking is to allow that space to be eliminated and to tie in the garage structure to the two dwellings with a gabled roof on each end.

In conclusion, for all the foregoing reasons, Attorney McEachern stated that Mr. Bratter had submitted all the criteria had been satisfied to grant a variance.

Mr. Alain Jousse questioned whether the new structure would be a garage or something else, to which Attorney McEachern responded that the applicant intends to convert it into a kitchen. According to the Planning Department memo, he has a right to do that. In answer to another question from Mr. Jousse, he indicated it would be a one-story structure with a gable roof.

Mr. Jousse asked why there was a door between the tenants dwelling with the entrance on Cabot Street, and the one with the entrance on McDonough Street, which would have the kitchen. After conferring with the applicant, Attorney McEachern indicated that Mr. Bratter intends to move his 86 year-old mother-in-law into the back unit.

In response to further questions from the Board, Attorney McEachern stated that there will be no change in the number of dwellings on the property which will remain two. By moving the kitchen into this now garage structure, Mr. Bratter would remove the kitchen that is in his current home, the 159 McDonough Street residence. There would be a door to the Cabot Street dwelling due to the move-in of his mother-in-law.

Mr. Parrott mentioned a notation on the plan of an existing shed between the Cabot Street house and the railroad tracks and asked if it had anything to do with this property. Attorney McEachern indicated, "yes" and pointed out that there are numerous encroachments along that property line. After conferring with the applicant, he indicated that Mr. Bratter said it was a registered camper for which he has a license, not a shed. Mr. Parrott responded that what he was speaking of looked like a stick-built shed with an air conditioner and he was wondering if there was a third residence on or near the property.

Mr. Myles Bratter stepped forward and identified himself as the applicant. He indicated that about 15 to 18 years ago, he had the structure as a shed which sat between the two houses. It was lifted up and now has hitch on it and wheels under it. He went to the Department of Motor Vehicles and now has a license for it, but it is sitting there because it really can't be moved so it is used for storage. To Mr. Parrott's question as to whether it could be used as a dwelling, he stated, "no" - it had no electricity.

Mr. Parrott asked if it was on or off Mr. Bratter's lot, to which Mr. Bratter responded that it sits on the railroad property and they had given him permission to do so.

SPEAKING IN OPPOSITION TO THE PETITION:

Mr. Jim Hewitt identified himself as the owner of the property at 167-169 McDonough Street and stated that he is in favor of anything Myles did to improve the property but wants to encourage improvement in a way that is consistent with zoning laws. He felt there were inconsistencies between what had been presented and what were the facts and doesn't believe the garage is on his property. He stated that he had his property surveyed at least two or three times for refinancing and all the surveyors have come back and said there are no encroachments. The proposal has been presented as a rebuild, but he submitted that it was an expansion. There was at least 6-8 feet between the back of the old garage and the second property and he said he had pictures indicating that. He believed the concrete pad could be shown as the actual footprint of the old garage. Mr. Hewitt continued that it appeared that Mr. Bratter was turning two properties into one property and stated that the Board was already aware of the increase in the lot coverage percentage. He didn't see any hardship and felt that, if Mr. Bratter wanted to rebuild the garage the way it was on the concrete pad, by all means, but this is a much more intensive use which would impact his property. He wanted to assure the Board that the old garage did not extend back to within inches of his property.

When Mr. Duncan MacCallum asked if he had the pictures he referenced, Mr. Hewitt indicated that he did but not with him that evening.

Chairman LeBlanc asked how long ago the garage was intact and Mr. Hewitt replied up until this spring – until the accident. In response to a question from Mr. MacCallum, he indicated that what is being proposed is without a doubt an expansion – six to eight feet to the west, toward the railroad tracks. The old garage was a pad and six foot walls – certainly not as deep as being presented.

Mr. MacCallum asked if the Planning Department had an opinion as to whether this was actually an expansion and Mr. Holden urged him to direct that question to Attorney McEachern ultimately, but the way it's been presented to the department, the footprint is getting smaller, the encroachment is being eliminated. Yes, there is an attachment to the building, but with the building squaring off, it is smaller and he thought Attorney McEachern had indicated the foundation that was poured would actually have to be removed because it encroached on the property. He noted that there seem to be "dueling surveys" with both parties arguing that there is or is not an encroachment.

Chairman LeBlanc indicated that, if Mr. Bratter was correct, Mr. Hewitt was actually getting a little bit of property, to which Mr. Hewitt responded that that was correct, but the way it's been presented, it would help Mr. Bratter's case if it did move away from his property. He mentioned again that he had surveyed his property several times and there were no encroachments.

Chairman LeBlanc noted that the plan submitted to the Board does not have a surveyors mark on it, so he supposed that left the whole survey up to question, but he indicated his concern is that the foundation that's there looks fairly new. Mr. Hewitt indicated that the foundation was poured this spring. There was a pad there from the 20's. He noted that he hadn't seen the plans carefully but he thought there was a little light line on the plans that denotes the extent of the concrete pad. When

Chairman LeBlanc indicated there was not, Mr. MacCallum showed Mr. Hewitt his plan to see if he could indicate on it what he was referring to.

Mr. Hewitt wrote on the plan, indicating what he said was the old foundation and showed his marking to the Board, Mr. Bratter and Attorney McEachern.

Mr. Hewitt concluded by reiterating that he took issue with what had been presented, that this was an expansion and that he did not see any hardship. Again, he urged Myles to improve his property but in a way consistent with the zoning laws.

Mr. Parrott indicated that one of the plans they have in their packet was piecemeal and differs from the large plan that was provided and has different notations on it, so he has no idea which is accurate. He also asked Mr. Hewitt if there was any of the old frame wall of the old garage still standing. Mr. Hewitt said the wall of the old garage separating their two properties still stood but propped up. He stated that wall represents the depth of the old garage.

When Mr. Parrott reiterated that, as of two or three weeks ago, the old wall was still standing and in the same location, Mr. Hewitt said, "yes, as far as he knew." Mr. Parrott's other question was that Mr. Hewitt had mentioned a six to eight foot gap that was there previously, westerly toward the railroad tracks, but Mr. Parrott said the direction is generally north, northwest by this plan. He asked from which wall to which wall was the 6 to 8 foot gap?

Mr. Hewitt said Mr. Parrott was correct and as he now looked at the plan, the gap was in the northwest direction between the back of the old garage and the rental property on Cabot Street. Mr. Parrott said the back of the old garage would be toward Mr. Hewitt's property and Mr. Hewitt stated that when he said, "back," he meant the side that faces the railroad tracks (his "side" would be toward his property).

Chairman LeBlanc asked if Mr. Hewitt was claiming that it was a narrow garage that was accessed from a driveway on McDonough Street and Mr. Hewitt indicated that was correct.

Mr. Parrott asked, if he was standing on Cabot Street looking at the garage or connector building, where would he see the gap, or whatever he wanted to call it between the two houses, where would he see that gap. Mr. Hewitt indicated the gap would appear between what he is calling the back of the garage and the rental property which is closest to the railroad tracks.

There was some additional discussion on the perspectives of the gap and then Mr. Robert Marchewka ended by asking, gap or not, closed up or not, how the proposal would negatively affect Mr. Hewitt and he responded that it would be taller, longer and more prominent than the previous structure.

Mrs. Elizabeth Hewitt identified herself as living at 167-169 McDonough Street. She reiterated her and her husband's support of improvements and feeling that there seem to be discrepancies.

SPEAKING TO, FOR, OR AGAINST THE PETITION:

Attorney McEachern stated he would like to submit to the Board a copy of the City's tax map which clearly shows the garage structure being right up, touching "and I also..."

Chairman LeBlanc interjected that he also had a question about the extent of the garage. According to the plat the attorney had just shown them, the garage appears to come maybe two feet from the end of the rental property on Cabot Street. And he was now showing it coming up practically to the end of the "L" section coming off of that same property, which was a huge expansion. Attorney McEachern indicated he would have to be looking at the same plan as the Chairman to follow along. He was invited to come up so that he could be shown exactly what the Chairman meant. Chairman LeBlanc continued, stating that the garage comes maybe two to three, feet from the edge of the house and on the Attorney's plan, the current plan, the garage goes from the property line up to maybe two feet from the "L" that you see from Cabot Street, so he asked if there was an expansion of six to eight feet above what was on the plat plan than what was there before?

Attorney McEachern indicated he would like to have Mr. John Coughlin come and address the Board as he was the contractor that went on site and examined the structure and supervised its removal. The plan that was submitted in support of the application was prepared by Corey Coldwell. On there is the concrete pad and Mr. Bratter could tell you that the pad was put in when the garage was previously rebuilt at one time. He indicated he wasn't sure if the actual tax map, a copy of which he gave to the Board, is from a set of maps that they had in their law office but it does show that structure being there.

Chairman LeBlanc stated that that was not the issue he had, which was that it is doubling the size of what was there. He added they can grant, if we so choose, what's being advertised, but from what they had seen that evening, the size has doubled over what it was originally and he wouldn't feel comfortable voting until they had this ironed out very specifically.

Attorney McEachern indicated again that he would like to have Mr. Coughlin come up but before he did, wanted to make one comment about Mr. Hewitt's diagram. He stated that Mr. Hewitt indicated a portion where the garage previously did not exist. The existing wall of the structure, which still stands and is on the property line, is to the left of that space that Mr. Hewitt marked out. It's clearly there in that red area. He then called up Mr. Coughlin.

Mr. John Coughlin introduced himself, stating he wasn't sure what was wanted, but all he could remember was squeezing between the back house and the garage and he remembered his phone falling out into water that had built up there during all those rains in April. The proximity of those two buildings was very slight and the overhang gives another closer at the top of the eaves than at the footprint. He stated he didn't really understand what everyone was talking about as when he got there, it was all torn up and it was a mess, with walls falling and whatnot.

Attorney McEachern stepped forward again to indicate that while Mr. Coughlin was speaking, he had located a residential tax card for this property which he wanted to submit to the Board and which indicates a garage which is 20'x20'.

With no one rising in response to Chairman LeBlanc's request for anyone else speaking, the public hearing was closed.

DECISION OF THE BOARD:

Planning Director Holden took the plan Mr. Hewitt had marked and scaled it. While he was doing that, Chairman LeBlanc stated that they had the tax map which said the structure was 20'x20' and advised that it was being scaled out on the plan submitted.

Mr. Jousse referred to the Board packet, tab "E" and stated that adding the dimensions in his head, he comes up very close to 20'x20'.

Mr. Holden then stated that the plan he was examining scaled out at 20'x20'.

Mr. Jousse made a motion, seconded by Mr. Nate Holloway, that the variance be approved as presented and advertised. Mr. MacCallum raised the issue of the department-recommended stipulations and Chairman LeBlanc asked Mr. Jousse if he would like to attach these to the motion and Mr. Jousse stated he would like to do so.

Chairman LeBlanc then read out the stipulations from the departmental memo.

In making his motion, Mr. Jousse stated that the applicant was seeking to rebuild a structure damaged during some work on the property and he has the right to do so. After the surveyor found that it was believed to be encroaching on adjacent property, he proposed to rebuild without going onto adjacent property, an improvement over the existing condition.

Cited as the reasons under the analysis for granting the variance were the following:

- The variance will not be contrary to the public interest as this is an allowed use and the location of the structure has been the same for over sixty years.
- An area variance is needed to enable the applicant's proposed use of the property due to the special condition of needing to rebuild a non-conforming, damaged structure.
- The variance is consistent with the spirit of the ordinance, allowing the building of an improved structure which will no longer encroach onto adjacent property.
- Substantial justice will be done by allowing the applicant to fully enjoy his property.
- It will improve the abutting property to eliminate the encroachment and no concrete evidence has been presented that the value of surrounding properties will be diminished.

In seconding, Mr. Holloway said he had done so for discussion, but agreed with the comments of Mr. Jousse and the stipulations.

The Board voted unanimously to grant the variance with three stipulations:

- That the structure will be built as presented to this Board;
- That an as-built plan will be provided to the Inspections Department prior to the request for a Certificate of Occupancy; and,
- That this Certificate shall only be issued by the City when the two aforementioned conditions are satisfied.

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2) Petition of **Sheila Curtin Cail Revocable Trust 2002, Sheila C. Cail Trustee, owner**, for property located at **579 Sagamore Avenue Unit 122** wherein a Variance from Article III, Section 10-301(A)(7)(a) was requested to allow a 13' x 13' one story addition 97.3'± from mean high tide line (after the demolition of the existing 9' x 9' sunroom) where 100' from salt water marsh wetlands or mean high water line of Sagamore Creek is required. Said property is shown on Assessor Plan 223 as Lot 30 and lies within the Single Residence A district.

### **SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernie Pelech stated that they came before the Board in August of 2004, at which time their request to build within 92.3' of the mean high water mark was denied. That decision was appealed to the Superior Court and had not been dismissed contrary to the departmental memorandum. There was an agreement worked out with the City Attorney's office to continue to allow the applicant to file this application and a voluntary non-suit without prejudice is what actually occurred which allowed them to revise that appeal at any time should they wish to. He handed the Board more documents. They are back because the original dimensions were taken by Emanuel Engineering incorrectly at the highest observable tide line. That was the State of New Hampshire measuring point. The City of Portsmouth zoning ordinance requires the measurement from the mean high tide. When Emanuel Engineering was advised they had used the wrong determination of high tide, they re-measured and found a 5' difference so the application before the Board that evening was to be 97.3' from the mean high tide. He indicated a layout he had made on the floor which showed the amount of the building that would be within the 100' buffer.

He noted that from the time of the ordinance, the City had received approximately 25 requests of a similar nature and most had been granted. Two were denied, a billboard and the petition of Mrs. Cail. They were there to present a different proposal, and believe that they meet the Boccia standard. He stated that this was an area variance, and the use was allowed because it was simply an extension of the residence. They encroach by roughly 32".

Addressing the criteria, Attorney Pelech stated that a variance was needed to allow the proposed use of the land. The Cails are restricted by the condominium rules and this type of expansion has been approved by Tidewatch. The special conditions were that the structure was built and was in compliance, and the only way to expand would be by entering the buffer. The benefit sought by the Cail's could not be reasonably achieved by any other feasible method as they cannot move the creek. If they can build, this is where they have to build. The variance would be consistent with the spirit and intent of the ordinance. Where they are encroaching is a flagstone walkway, which technically was permeable but not significantly. Then there were 97' of lawn. Storm water, wild life or the ability of the lawn to filter storm water runoff would not be affected. If you look at the site, the amount of encroachment is not contrary to the ordinance.

He stated that substantial justice would be done because the hardship done to the Cails was not outweighed by any benefit to the general public. This was a minor encroachment into the 100' buffer, and did not diminish the values of the surrounding properties.

Chairman LeBlanc stated that there was a rock wall at the end of the road towards the property. How far in does that go?



Attorney Pelech stated that he has never followed it down. On this plan, it shows it going to the tide line; it doesn't show it going to Sagamore Creek, but that is the property line of Tidewatch on the left hand side.

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

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

Mr. Machewka made a motion to grant the petition as presented and advertised, which was seconded by Mr. MacCallum.

Mr. Marchewka stated that this is an area variance for less than 3' into a wetlands setback. The Board generally looks at whether or not the applicant could construct what they want to do in another manner that would be consistent with zoning. They could put an addition on there without the corner. The applicant was trying to expand their condominium unit in conformity with the Condominium Association rules. The encroachment here had little effect on the salt marsh or wetlands. The exterior was now a walkway, which might be permeable but not significantly. This variance would not be contrary to the public interest as they wouldn't know it was there. Special conditions exist such as the location on the 100' setback. To expand in that area was impossible without a variance. Substantial justice would be done by allowing the applicant to expand their property in a reasonable manner. The value of the surrounding properties will not be diminished.

Mr. MacCallum stated that he agreed with Mr. Marchewka. He remembered the hearing the previous August and agreed with the motion.

The motion to grant the petition as presented and advertised passed by unanimous vote of 7 to 0.

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3) Petition of **Mark Greenwood and Janet A. Greenwood , owners**, for property located at **475 Dennett Street** wherein a Variance from Article III, Section 10-302(A) was requested to allow a 5' x 11' front entry porch with: a) a 12'± front yard where 15' is required, and b) creating 25.4% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 160 as Lot 28 and lies within the General Residence A district.

Mr. Jousse stepped down for this petition.

SPEAKING IN FAVOR OF THE PETITION

Mr. Mark Greenwood stated that their request was only for a 5' roof over the front steps, which would put them 3' into the setback. This would be just less than 40' to the edge of the roadway that had recently been reconstructed. The setback would be to the width of the road right-of-way. He noted that

the neighborhood properties varied. Some had zero lot lines. This would be consistent with the neighborhood and an improvement to the property.

In response to questions from Mr. Berg, Chairman LeBlanc and Mr. Marchewka, Mr. Greenwood stated that the variance was only for the roof, not a structure; there would be two pillars holding it up on either side; the steps were already there; and the height to the top step might be around 18” but he hadn’t measured.

Chairman LeBlanc stated the roof is a structure and that was why they were there.

Mr. Berg asked what the yellow dots were on the tax map.

Mr. Greenwood stated that those signified other houses in the neighborhood that would require the same variance as he would. He was illustrating that he was consistent with the neighborhood. The arrow was his house. He noted the properties across the street have a zero lot line.

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

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

DECISION OF THE BOARD

Mr. Berg made a motion to grant the petition as presented and advertised, which was seconded by Mr. Marchewka.

Mr. Berg stated that the .4% building coverage was a technicality. The real issue was the setback. The location of the structure would be in conformity with the neighborhood. When Dennett Street was rebuilt, they took measures to control traffic. To all extents and purposes the proposal was well within what would be expected by the ordinance. The reason for setbacks relates to crowding and adequate green space and they were not violating the integrity of that. He didn’t see the variance as contrary to the public interest. This was not an addition, but a nicely designed front stoop. Looking at it, he had no concerns of it ever being enclosed. The steps were already there and already within the setback. There would be no impact on the value of surrounding properties. The desire to cover the front steps was architecturally and functionally reasonable. It was aesthetically attractive and protected against the elements. There was no other reasonably feasible method that would allow the homeowner to have a front porch that would be protected.

Mr. Marchewka stated that he agreed with Mr. Berg.

The motion to grant the petition passed by unanimous vote of 6 to 0.

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4) Petition of **David A. Perrault, owner, Nancy Grigor and Gale G. Brown Jr. applicants**, for property located at **300 Court Street** wherein a Variance from Article III, Section 10-303(A) was requested to allow: a) two previously approved dwelling units to be relocated within the building

having one unit on the 1<sup>st</sup> floor and basement and the second unit on the 2<sup>nd</sup> floor, b) an irregular shaped 154.5 sf 1<sup>st</sup> floor deck with a 9'± rear yard and a 2<sup>nd</sup> floor 46 sf irregular shaped balcony with a 13'± rear yard where 15' is the minimum required in each instance, and c) 42.5% building coverage where 40% is the maximum allowed. Said property is shown on Assessor Plan 108 as Lot 12 and lies within the Mixed Residential Office and Historic A districts.

### **SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech stated that he was there on behalf of the applicants. In 1999, Ms. Irvine purchased the building from the church, and constructed a second floor. They had a living space on the second floor, proposing to live there with an artists studio on the first floor. The Board granted a variance in 2001 to allow two living units, both on the second floor. In March of 2001, the Board granted a variance to allow a 24' x 10' two story porch on the second floor. They reduced the deck to a balcony. The applicants were proposing to relocate the dwelling units – one on the first floor and one on the second. The decks and balcony have been through a work session with the Historic District Commission, which had responded favorably.

He noted that the lot had special conditions, one of which was the size of the lot at 7,066 sf with a very large building. The Board had found a hardship when they allowed the two dwelling units. They were now there because they were relocating the dwelling units, one on each floor. The other variance they seek is for the rear yard setback and the lot coverage. There had been no objection from the abutters. This came to 39% of lot coverage without the decks in the rear.

Attorney Pelech stated the hardship would be in the special condition of a small lot and large building. With regard to the rear yard setback variance, they could see from the rear elevation that there was nothing in close proximity to the rear of the building, but the gardens of a historic home. The benefit sought could not be achieved by any other method without cutting back the building. The spirit of the ordinance would not be affected as there was still light and air to the rear. An objection to the porch interfering with weddings in the gardens was removed with a change in the plans. The requests were previously in one form or another granted by the Board.

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

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

### **DECISION OF THE BOARD**

Mr. Berg moved to grant the application as presented and advertised, which was seconded by Mr. Marchewka.

Mr. Berg stated that the first variance really requests more of the same. It was two units now and would be two units in the future. This was a large amount of in-home space that could be commercial but would be converted to truly living space. In light of the limited parking and narrow road, this more residential and less commercial use was a benefit. With regard to the setback and lot coverage issue, it is a market expectation to have decks. The proposal makes the back of the building look more attractive and less industrial.

This would be an improvement that would not be contrary to the public interest. The concern before was over the abutting yard, but this would be an attractive feature. Substantial justice would be done in allowing the beautification of the property used to more conventional expectations. There were unique circumstances in the small lot with a large building. Having been built as a church, it had massive volume on the inside which was unique.

It would be in the spirit of the ordinance as decks and two units are allowed in that district. There would be no perceivable impact on surrounding properties and this might actually improve values. He stated that substantial justice would be achieved by allowing a large building to be appropriately adapted.

Mr. Marchewka stated that he agreed with Mr. Berg. In terms of the interior units, the applicant's are just rearranging how they are configured. They aren't adding space or building an addition. As far as the decks go, the previous proposals were much larger and turned down by the HDC. These, however, are reasonable. They were replacing a part of the building, not just adding a deck.

The motion to grant the petition passed by unanimous vote of 7 to 0.

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5) Petition of **Patrick M. Seymour, owner**, for property located at **46 Mangrove Street** wherein a Variance from Article IV, Section 10-402(B) was requested to allow a 14' x 30' one story detached garage creating 28% building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 218 as Lot 8 and lies within the Single Residence B district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Joe Graham, on behalf of Patrick Seymour, stated that they propose a 14' x 30' garage that would create 28% lot coverage. The existing garage that the applicant has was part of the existing house before an addition. The door is 6.1' high by 8' wide. It is not large and Mr. Seymour has had to purchase a smaller vehicle in order to fit in the garage. They are proposing to enlarge the garage so he can park a full size vehicle.

Chairman LeBlanc asked if this would be in the rear of the property.

Mr. Graham stated that it would. He also brought pictures of the garage and the surroundings. He had cleared the driveway permit with the City, through Dave Desfosses. He is waiting on the outcome of this Board meeting.

Chairman LeBlanc asked if the garage was currently at the front of the house.

Mr. Graham stated that it was.

Mr. Berg asked if the driveways were going to be taken from the house.

Mr. Graham stated that the upper driveway was to be removed. That is what is expected of the owner in order to get the driveway permit.

Ms. Tillman asked if it was the Oak Street driveway that would be removed.

Mr. Graham stated that it was.

Chairman LeBlanc inquired about the Mangrove Street driveway.

Mr. Graham stated that that driveway would stay. There is a garage there that the owner uses for his motorcycle. The door on that garage is 6' x 8'.

Mr. Patrick Seymour, owner, stated that he has been living on the property for 16 years, and he is now starting to improve it. Aesthetically, this improvement will make the neighborhood will look better. He informed his neighbors, and they gave him verbal approval and encouragement. He has to park his truck and motorcycle in the same garage, and that causes him to scratch his truck. This addition would not degrade the property at all.

Chairman Leblanc asked if he was going to keep the garage underneath the house.

Mr. Seymour stated that he would probably keep his motorcycle in it.

Mr. Parrott asked him to describe the layout of the land grading in back of the house, parallel to Oak Street. Is it level?

Mr. Seymour stated that it was.

In response to additional questions, Mr. Seymour stated there was a leach field along the side of the house that abuts property on Kearsarge.

Mr. Berg asked if it was in the 11' area.

Mr. Seymour stated that it was.

Mr. Parrott asked if the City was aware of the location of both the tank and the leech field. Those clearances strike him as pretty tight.

Mr. Graham stated that he spoke to Mr. Desfosses that day and he mentioned that. He explained what they were dealing with, and there was no problem there.

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

DECISION OF THE BOARD

Mr. MacCallum moved that the variance application be denied, which was seconded by Mr. Parrott.

Mr. MacCallum stated that this is a small lot with a substantial house. There is no hardship associated with the property and a garage is not a necessity. Adding a garage of that size would build up the property too much. An 8% violation of a 20% building coverage limit is significant. This variance would contribute to piecemeal building. There is nothing unique in the property and this house is typical of the neighborhood. This would be contrary to the public interest because it would add to the trend of overdevelopment.

Mr. Parrott agreed with those comments, but noted that the garage is oversized for a one car garage. One of the principles they are supposed to follow is that the amount of overage requested is the minimum that can be achieved with the desired intent. This is well over that.

The motion to deny failed with by a vote of 3 to 4, with Messrs. Berg, Holloway, Jousse, and Marchewka voting against the motion.

Mr. Berg then moved to grant the petition as presented and advertised, which was seconded by Mr. Holloway.

Mr. Berg stated that he agreed that the garage is on the large side. The smallest the garage could be built would be 14' x 22', which is 2% over. He is not that troubled by the large size of the garage. Although Mr. MacCallum pointed out that he does not have a garage, they are benefits which can be seen in the marketplace. A home on a 5,700 sf lot without a garage would be penalized. The present garage is not adequate. The request for the garage is reasonable, and permitted by zoning, and complies with all the dimensional criteria, except for lot coverage. This is not contrary to the public interest as there was no threat of overbuilding. They will continue to see this in dense neighborhoods. There is no diminution to the value of surrounding properties. The applicant stated that his neighbors were on board, and this project has little to no impact. The spirit of the ordinance is met in that garages are permitted. This is a modest garage with a low pitched roof. Substantial justice will be done by continuing to improve the home. This is a small lot, and the benefit sought cannot be achieved by any other method that is feasibly reasonable.

Mr. Holloway stated that he has nothing to add.

The motion to grant the petition passed by a vote of 4 to 3, with Messrs. MacCallum and Parrott and Chairman LeBlanc voting against the motion.

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**I. OLD BUSINESS.**

A) Petition of **Brora, LLC, owner, and ProCon Construction, applicant**, for property located **off Dunlin Way aka Portsmouth Boulevard** wherein a Special Exception as allowed in Article II, Section 10-209(38) was requested to allow a portion of the vacant lot to be used for the temporary outdoor storage of raw or partially finished material, machinery, equipment and vehicles in conjunction with the construction of the Hilton Garden Inn and adjacent condo's off Hanover Street. Said property is shown on Assessor Plan 213 as Lot 11 and lies within the Office Research district.

Mr. Berg and Mr. Marchewka stepped down for this petition.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Paul Roy, of ProCon Construction, stated that, when they first accepted this project, they realized that it would be a tight site. They spoke with the City about using parts of land that is owned by ProCon. They are using the land for box storage and trailers. They do not have excavators or cranes or large materials. They plan on having everything out of there by April. The previous owners of the property were asked to use it as a snow storage area, which they allowed the City to use. This is a large construction project on a small site, downtown. This is prime tourist season, so they realize what effect this will have. They will not be putting out things for children to play on. They will also be rebuilding the road in front of the hotel. They are there asking for a special exception. They have met with the Planning Department and are trying to set trailers so that they won't be seen all the time.

**SPEAKING IN OPPOSITION TO THE PETITION**

Mr. Rich Mentine of 16 Dunlin Way stated that he lives 500' from the proposed site of the storage. He spoke to Paul previously, and he did alleviate some of his concerns. There is a major trash problem in that part, because people dump there. It is becoming an eyesore. This is a residential neighborhood adjacent to an area of the City that is zoned for office research. This is not an appropriate site to store construction materials. They will be building a new hotel up the street that will require large storage. That might be a better spot for the storage, not in a residential community. This is increasing the truck traffic on the street, which is a problem for children. In the summer, more kids will be on the streets, so that is an ongoing safety issue. He is worried about the precedent that this will set. If this is allowed now, will this company come back later and use the lot again? Once the precedent is set, they cannot say no in the future. They like their neighborhood, and would like to keep this as rational as possible. They do not need to create a hindrance in their neighborhood.

Ms. Kristen Ferragamo stated that she lived at 18 Dunlin Way, next door to the site. She wholeheartedly agreed with the previous speaker's comments. This is a residential area. Although it was mentioned that the area was zoned as an office research district, the closest office building is 200' from the residential area. The neighbors and the residents use the street for recreation. An increase in trucks will deter from the quiet of the street. People will not be able to enjoy the area. Currently, there are four containers on the site already, and they are not tucked away. It is a wide open corner and the storage crates are very visible. This just takes away from the quality of the neighborhood. This decreases the value of the home, if a homeowner was attempting to sell their home anytime during the construction.

Mr. MacCallum asked Ms. Tillman why they included machinery and large materials in their request if they were only planning on using storage crates.

Ms. Tillman stated that it was a precaution to cover all possible avenues. They have refined their request as Mr. Roy presented. She wanted to clarify the zone. This not a zone that is dealt with often. This area was a result of a negotiated bankruptcy. This has three components: apartments, office research and the Spinnaker Point Condominiums. This was approved as an overlay district. The apartment district is boarded by single family homes. What was anticipated was that Dunlin Way would be the office research portion. The owners came to the Planning Board and did all of their off-

site improvements. They are the ones that connected Commerce Way to Portsmouth Blvd. A lot of the road improvements were done in anticipation of this property being developed as office research as well as the lot for the hotel.

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

### **DECISION OF THE BOARD**

Mr. Parrott moved to deny the special exception, and Mr. MacCallum seconded for discussion.

Mr. Parrott stated that the folks that live in the area view it as residential area. They did not anticipate this sort of use, even though it is vacant land. He thinks that parking this type of vehicles there is a nuisance. The vehicles will attract kids, and detract from the neighborhood. This is not something that you would expect adjacent to a residential area.

Chairman LeBlanc stated that it was presented to them that they would not be parking vehicles there, only storage bins.

Mr. MacCallum stated that he seconded for discussion purposes and that he is unsure of how he feels. He would like to hear what the other Board members think.

Chairman LeBlanc asked if construction containers will be the only thing they will be using.

Mr. Roy stated that that was correct.

Chairman LeBlanc explained that they were being asked to approve something for a temporary basis. This is a finite amount of time, and there are no other disadvantages to the neighborhood that impinge on the use criteria needed for a special exception. He stated that the Board can grant this and should.

The motion to deny the petition failed by a vote of 2 to 3.

Mr. Holloway moved to grant the petition as presented, which was seconded by Mr. Jousse.

Mr. Holloway stated that in the discussion that has transpired, he has found that this is a solution. All the reasons for this have been given already.

Mr. Jousse stated that he didn't have much to add. There will be no services required from the City, and they will not be storing any explosive or hazardous material.

Ms. Tillman added that they might want to amend the petition to specify what machines can and cannot be kept there.

Chairman LeBlanc asked Mr. Holloway to amend his motion to include the stipulation that they are only granted permission for trailers or storage containers of materials on site. Also, the property must be restored to its original state after the construction.



Mr. Holloway agreed.

Ms. Tillman added that they should extend it to April 28, 2006.

Chairman LeBlanc added the stipulation that it would extend until the last working day of April.

Mr. MacCallum stated that the only storage of anything is going to be raw materials inside trailers. Is there any other form of storage of anything on the site?

Chairman LeBlanc stated that if that is what they stipulate, then that is what they must do.

Ms. Tillman stated that they would have 12 maximum storage containers.

Mr. MacCallum repeated the question. Is that part of the stipulation?

Chairman LeBlanc stated that it was. No more than 12 construction trailers can be on the site at one time.

Ms. Tillman listed the stipulations.

Mr. Parrott stated that he still thinks that it is a bad idea, but if they are going to pass it he would like to add some stipulations. He wants every crate on wheels with no engines operating. The idea is to protect the neighborhood from inappropriate activity. There should be some enforcement with the end stage such as \$100 per day for late removal.

Ms. Tillman stated that there is already a bond on the Hilton.

Chairman LeBlanc asked if that would apply to this construction as well.

Ms. Tillman stated that she didn't believe so. They can require a bond to ensure the removal, but this Board does not have the power to levy fines. Typically, a \$500 bond is what is done on temporary trailers so if the City needed them hauled away, that would be paid for. She proposed \$100 per trailer for removal.

Chairman LeBlanc stated that they would set it at \$1,500.

Mr. Parrott stated that his primary concern was that they are not behind a fence. They are not in a defined area and there is no means of controlling access to those areas. The City has no way of monitoring the area. It's asking for vandalism and will attract kids. This is a poor idea and an imposition on the neighborhood.

Chairman LeBlanc called for the vote on the petition to grant the petition with the added stipulations.

Lacking 4 positive votes, the motion to grant the petition failed by a vote of 3 to 2.

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B) Request for Rehearing on application of Wal-Mart Real Estate Business Trust for property located at **2460 Lafayette Road**

Mr. Jousse and Mr. Berg stepped down.

Mr. MacCallum made a motion to grant the rehearing, which was seconded by Mr. Holloway.

Chairman LeBlanc clarified that this request was due to the fact that the Board cannot determine what the signs for Wal-Mart say, but only the amount of square footage allowed.

Mr. Parrott stated that it was clear when they voted, that they were talking about the area represented by the signs. They did not rule according to the wording of the sign. He has never seen this Board try to tell an applicant what they can or cannot have on their sign in terms of wording or pictures. There is no doubt that Mr. Witham's motion was a way of getting at the area represented by those signs. The area that they represented should be deducted from the request. For those reasons, he cannot agree to a request for a rehearing. He also adds that there is nothing new added to the request for a rehearing.

Mr. MacCallum stated that it wouldn't bother him to have his motion denied, because he hates a surplus of signage just as much as everyone else. The rules state that the applicant must present something new in order to receive a rehearing or have something that they could not present. They can also request a rehearing if the decision was somehow wrong or in error. Attorney Pelech stated that City Attorney Bob Sullivan advised him to request a rehearing because the Board made a mistake on the items. This deserves a second look. The Board denied his request, and Attorney Pelech should not have taken this matter to another source. However, if that is the opinion that he is submitting, then they should look at it again. He has presented something new that was not presented at the last meeting.

Mr. Parrott asked Ms. Tillman how formal or informal Mr. Sullivan's opinion was.

Ms. Tillman stated that they do not add anything on the submissions in a request for a rehearing. She has heard that they cannot control content; they can only regulate the square footage. The letter of decision shows what can be there.

Chairman LeBlanc stated that Mr. Parrott was correct in assuming that the last decision was made in regard to square footage. They gave a guideline to show what they would like to see go away in order for the applicant to meet the restrictions.

Ms. Tillman showed him the letter of decision.

Chairman LeBlanc asked if that letter even reflected the content of the meeting.

Mr. Marchewka stated that he voted based on the square footage of signage, not based on what the signs said. If anything, Mr. Witham's comments were made to give guidance to the applicant as to how they could conform to something that this Board might allow. They were asking for 20% more over what was allowed.

Chairman LeBlanc stated that all the points listed were discussed and brought up at the meeting.

Mr. Marchewka stated that he didn't recall any evidence presented at the meeting explaining why they couldn't conform to the 300 sf limit.

Failing to receive 4 positive votes, the motion for a rehearing failed by a vote of 3 to 2, with Mr. Parrott and Chairman LeBlanc voting against the motion.

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**C) Request for Rehearing on application of 606 Realty Trust for property located at 606 Greenwood Road.**

Mr. MacCallum made a motion to deny the request for a rehearing, which was seconded by Mr. Parrott.

Mr. MacCallum stated that he cannot grant this request. The basis on which they denied the variance was the abutters' feelings toward the horses. The neighbors have a right to preserve the character of the neighborhood. He quoted the NH Supreme Court regarding proposed use. Zoning laws segregate land according to uses. He doesn't see how they could do anything but deny the variance. They also did listen to Mr. Berg's testimony, and some of the Board members agreed. Based on the analysis that they gave that night, the decision was clearly right. There is no reason to grant the request for rehearing.

Mr. Parrott stated that this hearing was one of the longest that he had ever sat through. The request for rehearing made untrue statements when it stated the Board failed to properly consider the matter and the Board ignored testimony. They had, in fact, looked, listened and weighed the matter very carefully which is evidenced by their discussion. This would result in a change in character of the neighborhood. He finds no new information to warrant a rehearing; therefore it would be inappropriate for the Board to grant a rehearing.

The motion to deny the request for rehearing was passed by a vote of 5 to 0.

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III. ADJOURNMENT

The motion was made, seconded and passed to adjourn the meeting at 10:20 p.m.

Respectfully submitted,

Danielle Auger
Acting BOA Secretary