

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

7:00 p.m. CONFERENCE ROOM B, SEYBOLT BUILDING May 16, 2006

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice Chairman David Witham, Steven Berg, Robert Marchewka, Nate Holloway, Arthur Parrott, Alternate Duncan MacCallum

EXCUSED: Alain Jousse

ALSO PRESENT: Lucy Tillman, Chief Planner

Chairman LeBlanc called the meeting of the Board of Adjustment to order at 7:00 p.m.

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**I.        OLD BUSINESS**

A)        Approval of Minutes – January 24, 2006 & March 28, 2006

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The Board voted to approve the Minutes as presented.

B) Petition of **Jonathan R. Dennett, owner**, for property located at **50 Brewster Street** wherein a Variance from Article IV, Section 10-402(B) is requested to allow an air condition compressor with an 18'± right side yard where 10' is the minimum required. Said property is shown on Assessor Plan 138 as Lot 37 and lies within the Apartment district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Jonathan Dennett asked the Board to grant him the petition so that he could install an air conditioner compressor on his property. He would like to install central air in his home. He would like to put this in the corner of his property, with a 6' high solid pine fence on either side of the existing house and porch. This would block the sound that the compressor would make should there be any problem with neighbors.

Paul Lane, a neighbor, spoke in support of the petition. He states that a nearby neighbor has this installed as well, so there is a similar instance of in the area already.

Mr. LeBlanc asked if the air compressor to which he was referring made any noise.

Mr. Lane responded that he was not the closest neighbor to it, but that it did not bother him. They make very little noise.

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

DECISION OF THE BOARD

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

Mr. Witham stated that the request was for a 25” high unit that would be tucked into the corner of a 6’ fence. Being in the corner would help deaden the sound, which will protect the public from sound emissions. Given the special circumstances of the property, there is no better place to locate the unit, which operates most effectively next to the building. The location will also ensure that the light and air covered by the ordinance will be protected.

Mr. Parrott agreed with Mr. Witham.

A motion to grant the petition was passed by a vote of 6 to 1.

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**C) Motion for Rehearing on petition of Hill-Hanover Group, LLC, owners, for property located at 349 Hanover Street.**

Chairman LeBlanc stated that the Hill-Hanover Group sent a letter wishing to withdraw their petition for a rehearing.

A motion was made to take the petition off the table and to allow the requested withdrawal of the petition.

The motion passed unanimously. The petition was withdrawn.

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D) Motion for Rehearing on rehearing of petition of Raymond A. Ramsey, owner for property located off Kearsarge Way.

Mr. MacCallum and Mr. Berg stepped down for this petition. The Board had five members sitting.

Mr. Witham made a motion to deny the rehearing, which was seconded by Mr. Holloway.

Mr. Witham stated that there was no new information in the brief that Attorney Keane sent to the Board. The brief was confusing and contradicts itself, so he moved to deny the petition.

Mr. Holloway agreed with Mr. Witham stating he will support the motion.

Chairman LeBlanc stated that the issue of the 100 rooms was decided by the court. The only thing the Board was looking for when this was last presented was that an alternative be heard. The applicant showed several alternatives, and the financial implications of those. The Board upheld a decision of December 28, 2003.

Chairman called for a vote to deny a request for the rehearing.

A motion to deny the petition was passed by a vote of 5 to 0.

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E) Motion for Rehearing on petition of **Icon Realty, LLC, owners** for property located at **1303 Woodbury Avenue**.

Mr. MacCallum returned to the Board. Mr. Marchewka stepped down.

Mr. Witham stated that the Board should not consider the new design presented. Any new design should be different enough for a new petition. He wishes to deny the rehearing.

Chairman LeBlanc stated that if the Board decided to deny the rehearing then the issue would be closed.

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

Mr. MacCallum stated that he believed the Board was correct in denying the petition previously. He believes to grant the petition would be in poor judgment. The proposal was submitted as a package, and he believes that each part should be denied. He does not believe a rehearing should occur. He stated that he would consider a more reasonable proposal. There is too much interference with the zoning ordinances.

Mr. Holloway had nothing further to add.

Chairman LeBlanc called for a vote to deny the petition for rehearing.

A motion to deny the petition was passed by a vote of 5 to 0.

Mr. Berg and Mr. Marchewka returned to the Board.

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II. PUBLIC HEARINGS

1) Petition of **Steven J. and Suzanne V. Cook, owners**, for property located at **524 Islington Street** wherein the following were requested 1) a Variance from Article II, Section 10-207(14) to allow an existing four unit apartment building to be expanded to five dwelling units on the lot where the maximum allowed are four dwelling units, and 2) a Variance from Article IV, and Section 10-401(A)(1)(e) to allow the construction of a 10' x 40' two story addition in conjunction with the

aforementioned conversion. Said property is shown on Assessor Plan 156 as Lot 3 and lies within the Mixed Residential Business district. Case #5-1

SPEAKING IN FAVOR OF THE PETITION

Attorney Pelech, on behalf of the Cook's, stated that the building had special circumstances because of the size and proximity to the business zone and the apartment zone. Most of the neighboring apartment complexes have more than four units. Attorney Pelech does not understand the rationale limiting the number of units in the building to four units when other buildings have more. The ordinance says that you can only have up to four dwelling units, but it does not say why. This proposal meets the requirement for one dwelling area per unit, meets all the requirements for parking and meets all the setback requirements. He wanted to know why the district limits the unit number to four. The only way to increase the number of apartments is to be granted a special exception. The Lot in question is 2 to 3 times the size of the abutting lots. Attorney Pelech asked, if there is more than 1,500 sf. per dwelling unit, what difference does it make to have five units instead of four? The building has enough square footage to accommodate five units, and has enough parking to accommodate the tenants. He stated that the property had unique conditions and that the variance was a use variance, not a dimensional variance. This building meets all the requirements for zoning. Attorney Pelech stated that he does not believe that it will be contrary to the public interest. Providing affordable housing units is in the public interest, and will not increase the demand of municipal services. Zoning restrictions as they apply interfere with the landowner's reasonable use of the property. He does not believe there is any fair and substantial relationship between the general purpose of the zoning ordinance. He stated that he would like to know the purpose for the limit of only four units per building. The ordinance is designed to prevent overcrowding of the land, since this is a mixed residential/business zone. The master plan encourages uses such as this conversion because it is a maximization of opportunities to provide additional housing the area. It is not inconsistent with the spirit and intent of the ordinance, and will not result in any detriment to the general public safety. If the Board took into consideration the size of the neighboring lots and uses, they would see that this is a reasonable request.

Mr. Berg asked if this would be a permitted use if the building were in the apartment zone.

Attorney Pelech stated that it was allowed in the apartment zone by special exception.

Mr. Berg stated that if it were in the next zone over, then the Board would be hearing a special exception case.

Chairman LeBlanc asked how this would affect the property values of the surrounding properties in the area.

Attorney Pelech stated that it would not affect the other properties, because there is a buffer block. Surrounding the building are multi-family dwelling units. The addition would be to the rear of the building. It will not create a diminution in value of surrounding properties.

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

DECISION OF THE BOARD

Mr. MacCallum made a motion to deny the petition for the reasons stated by the Planning Department, which was seconded by Mr. Parrott.

Mr. MacCallum stated that the Planning Department provided the Board with a memorandum outlining the reasons why this should be denied. The zoning ordinance is in place to prevent overcrowding. The Planning Department stated that there is nothing about this particular property that makes it unique, or requires a need for an additional unit. This does not comply with the spirit of the ordinance. If you fail to meet even one of the criteria, the petition must be denied and this fails to meet two.

Mr. Parrott stated that he agrees that it is a use variance, and uses the Simplex test. This requires that there be a hardship on the owner, which Mr. Parrott did not see when the petition was presented. The building presently has the maximum units allotted in the zoning ordinance, and there is no special condition that would allow it to qualify for another unit. Mr. Parrott did not see a hardship to the owners. The maximum number of four units should stand. The petition should be denied.

Mr. Witham stated that he would also support the motion. He tried to clarify for Mr. Pelech the reasons why the zoning ordinance stated four units was the maximum number allotted. A number was chosen as the standard and should be adhered to. He did not find a hardship on the owners of the property. This may also impact traffic on Islington Street and the parking around the buildings.

Mr. Marchewka stated that he was not going to support the motion. He asked if the size of the lot was bigger, if the Board would be comfortable granting the variance and adding an additional unit. He thought that the building was in a unique setting, because it is conforming, which most of the neighboring houses and apartments are not. Adding another unit would be conforming to other aspects of the zoning ordinance, which makes a fifth unit a reasonable request. He will not support the motion.

Chairman LeBlanc stated that he will support the motion. He stated that just because there exists a large lot, that does not mean they must develop it to the hilt. The ordinance states that four units are the maximum, so unless the ordinance is changed, it should remain a four unit building.

Chairman LeBlanc called for a vote.

A motion to deny the petition was passed by a vote of 5 to 2.

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2) Petition of **Doaks, LLC, owner**, for property located at **100 Portsmouth Boulevard** wherein a Variance from Article II, Section 10-212(G)(5) was requested to allow natural vegetation and new plantings to be provided along 560' ± starting at Portsmouth Boulevard and following the

side of the parking lot and along the back of the hotel to the fence at the top of the slope where an 8' solid board fence is required. Said property is shown on Assessor Plan 213 as Lot 2 and lies within the Office Research / Mariner's Village district.

Mr. Berg stepped down from the hearing.

**SPEAKING IN FAVOR OF THE PETITION**

Mike Meyers, representing Doaks LLC, stated that a provision in an ordinance required the owners to construct an 8' fence roughly 1,900' along the property boundary. When the owners tried to construct the fence, they realized it was being used as a recreation area and playground. The owners realize the hardship that this would cause those who use the area, who have voiced concerns about putting a fence through their backyard area. After meeting with the residents, they came up with a plan to put plantings of red and white pines along the buffer zone. This would obstruct the view of the hotel.

Mr. Witham stated that the Board received a letter from Martin Torres, a neighbor, who was interested in keeping the fence. He asked if the owners had spoken to him.

Mr. Meyers responded that he had not. He spoke with the residents. He stated that the property owners provided a heavily buffered area for Mr. Torres.

Mr. Parrott asked if there was a plan to maintain the trees.

Mr. Meyers responded that the owners have an irrigation plan and will maintain the greenery throughout the duration.

Mr. Parrott asked what would happen if the owners left in the future.

Mr. Meyers stated that the whole area was accommodated with irrigation.

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

**DECISION OF THE BOARD**

Mr. Parrott made a motion to grant the petition, which was seconded by Mr. Berg.

Mr. Parrott stated that it was hard to tell what standards applied to this. He stated that the variance would not be contrary to the public interest as none of the abutters had spoken against the petition. Special conditions exist, and denial of the variance would result in a type of hardship for the owner. Literal enforcement of the prior agreement would result in taking down trees or building a fence through standing trees which would be illogical. Fencing off an area that is far greater than necessary would create a disadvantage to the adjacent homes. The proposal is reasonable and makes sense. If granted, this would deny some neighbors reasonable use of the property. No fair and substantial relationship exists, so Mr. Parrott sees no reason to enforce the previous agreement. He stated that this was a good example of substantial justice, since it allows an exception to a prior agreement that

benefits the public good. The value of surrounding properties would not be diminished, but rather enhanced by the additional buffer and greenery. He stated that it is a good balance and compromise.

Chairman LeBlanc asked if the maker and second of the motion would accept the stipulation recommended in the Planning Department memorandum, which would read as follows:

- All landscaping shown on this plan is to be maintained in a healthy state and replaced if it dies or is damaged. No landscaping shown on this plan shall be removed or altered without the prior approval of the Board of Adjustment. Failure to maintain the landscaping may result in revocation of the approval.

Mr. Parrott stated he would agree to adding the stipulation to the motion.

Mr. Berg stated he agreed with the addition and with everything that Mr. Parrott said. He added that anytime an objective can be accomplished with a landscaping or green buffer, instead of a fence, it should be granted. Tree buffers and greenery buffers should be encouraged.

Chairman LeBlanc called for a vote on the petition with the stipulation.

A motion to grant the petition with the stipulation was passed by a vote of 7 to 0.

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3) Petition of **Steven C. Webb and Karen Butz-Webb, owners**, of property located at **51 Gardner Street** and **Joseph D. and Joyce W. Ciancarelli, Trustees, owner** of property located at **45 Gardner Street** wherein a Variance from Article III, Section 10-302(A) was requested to allow a lot line revision between Lots 21 and 22 resulting in Lot 22 having the following: a) 1,346 sf of lot area where 5,000 sf is the minimum required, b) 34.15' of street frontage where 80' is the minimum required, c) a 1.1'± left side yard where 10' is the minimum required, d) 23%± open space where 25% is the minimum required; and, e) 54%+ building coverage where 30% is the maximum allowed. Said properties are shown on Assessor Plan 103 as Lots 21 & 22 and lie within the General Residence A and Historic A districts.

SPEAKING IN FAVOR OF THE PETITION

Attorney Tom Watson spoke on behalf of both the abutting homeowners. He stated that for several years, the area between the abutting homes was thought to belong to the Ciancarelli's and was used as a parking garden and patio. Recently, the property line was inquired about due to the sale of both the properties. A survey was conducted and it was found that 96 square foot triangular sliver of land thought to be the Ciancarelli's was in fact part of the Webb lot. The parties wish to resolve the conflict by transferring ownership of the Webb property to the Ciancarelli lot, since it already is being used by the Ciancarelli's. The owners have already appearing in front of the Planning Board, who granted preliminary approval subject to certain requirements. They are asking for five variances, and Attorney Watson asks the Board to recognize the historic use of the property. They ask that the Webb lot be reduced to 1,346 sf. from 1,542 sf. Even after the change of the amount of land, the Webb lot is still larger than the Ciancarelli lot. The sliver of land at its widest point is 5.35' and sits

on the street. For that reason, the owners are required to ask for a variance from the Board. They ask the Board to approve a variance that would reduce the land from 40' to 35'. They are also asking to reduce a 7' setback on the road to 0'. They are asking that the minimum lot size of the Webb's property to be reduced to 23%, due to the ordinance that states it must be 25%. The lot size of the Webb's property now is 28%. Although the number of variances requested seems large, the actual changes in dimension are minor. He stated that all the criteria under the Boccia analysis would be met here, and it is not contrary to the public interest. It is simply an adjustment recognizing an error. There will be no diminution of value of the surrounding properties, and substantial justice will be done since they are correcting a problem. It is consistent with the spirit of the ordinance. The Webb's cannot use the sliver of land, and they wish to allow the Ciancarelli's to own it.

Chairman LeBlanc asked if the lot line at the rear of the property was 0. He stated that according to the map there was a side yard setback.

Attorney Watson responded that the existing side line goes back toward the road. There is a 10" strip between the houses that is on the Webb lot. Both parties agreed that they did not want the property line to be on the edge of the building. A maintenance easement will transfer from the Ciancarelli lot to the Webb lot.

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

DECISION OF THE BOARD

Mr. MacCallum made a motion to grant the petition, which was seconded by Mr. Parrott.

Mr. MacCallum stated that the request for the petition was common sense and granting it would not change anything on the properties significantly. Both properties are presently nonconforming, so granting the petition would settle the affairs and concerns of the abutters. Adjusting the property line makes sense. All the variances that the homeowners currently seek are area variances, and they will not be contrary to the public interest. The unique dilemma of the properties makes it a classic case of area variance adjustment, as the properties infringe on the requirements of the zoning ordinance. This is the exact type of situation that variances are called for. There is no feasible alternative to this, and there is no benefit from denial of the petition. Substantial justice is done, and the petition should be granted.

Mr. Parrott agreed with Mr. MacCallum and added that this is a common sense way to correct an anomaly.

Chairman LeBlanc added that the addition of the maintenance easement helps the problem that exists when buildings are close together. He then called for a vote.

A motion to grant the petition was passed by a vote of 7 to 0.

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4) Petition of **Golter Lobster Sales LLC, owner**, for property located **off Sagamore Avenue known as 929 Sagamore Avenue** wherein a Variance from Article III, Section 10-301(A)(9) was requested to allow access to the lot off a private right of way to construct a 26' x 32' two story barn for water related uses where access is required from a public street or an approved private street and access is provided from an existing right of way. Said property is shown on Assessor Plan 223 as Lot 28 and lies within the Waterfront Business district.

**SPEAKING IN FAVOR OF THE PETITION**

Joseph Golter would like to construct a 26' by 32' building with a workshop. It has been used since the 1950's and the owner would like to continue the use. The property is accessible from a right of way, and is in current use by the property owner.

Chairman LeBlanc asked how wide the road that the owner would be using was.

Mr. Golter stated that it was 8' wide.

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

**DECISION OF THE BOARD**

Mr. Witham made a motion to grant the petition, which was seconded by Mr. Marchewka.

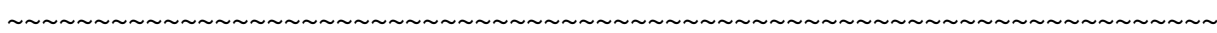
Mr. Witham stated that it was a difficult situation for the applicant. He wishes to expand his lobster business, and the barn is necessary for those expansion plans. Even though the city does occasionally adopt private right of ways as public right of ways, this is one situation where the city would not attempt to do that. It is a private right of way and always will be. It is one of the only ways for the owner to continue his business, and the waterfront district is considered one of the most vital districts in general in Portsmouth. This is in the public interest to grant the variance. The zoning restriction interferes with the reasonable use of the property, and it is reasonable to request the expansion. It would not injure any public or private rights of others, and is consistent with the spirit of the ordinance. There should be no diminution of any surrounding properties.

Mr. Marchewka stated that he agreed with Mr. Witham because he is continuing the use of a zoned waterfront business. He does have access to his lot as a waterfront business. Mr. Marchewka saw no reason to deny the request.

Mr. Berg stated that a main concern was that the lot did not have a road accessible to it. The preexisting lot is used as a dock, and would require using land that the owner does not possess in order to comply. In that respect, this variance is more of a waiver to allow the property to remain as it is.

Mr. LeBlanc called for the vote.

A motion to grant the petition was passed by a vote of 7 to 0.



5) Petition of **Elizabeth A. Pruyn, owner**, for property located at **41 Salter Street** wherein concurrence with previously granted Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(1)(c) was requested for 2'± right and 2'± left side yards based on the recently completed survey depicting the existing dwelling with a 0'± left side yard and a 4'± right side yard and where the previously approved plan had shown 2'± left side yard and a 2'± right side yard as both existing and proposed yards. The Board of Adjustment was being requested to advise whether the previously approved Variances should still be granted considering more accurate survey information. Said property is shown on Assessor Plan 102 as Lot 30 and lies within the Waterfront Business and Historic A districts.

Mr. Berg stepped down for this petition.

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

Attorney Emile Bussiere, on behalf of Elizabeth Pruyn, stated that the application was for an administrative appeal and is a special exception. The applicant would like to move her house back so that it sits 2' away from the neighboring houses on either side. Everything that she wished to do, she already had the variance for. The problem arose when she had the property surveyed which found the house sitting on the property line and 4' away from the other property. The owner wants the Board to know that the variance was previously granted. The owner made a decision to suspend a building permit that is in place right now.

Chairman LeBlanc stated that at a previous hearing, the property line was 2' from the left side of the building.

Attorney Bussiere stated that the plan in 2001 showed the property as located 2' from either side of the property line in 2001 when actually it was 0' on one side and 4' on the other. When this was discovered as an error, the owner decided to come back in front of the Board.

Mr. MacCallum asked if the property was exactly where it was depicted in the 2001 variance.

Attorney Bussiere stated that the previous plan was formulated without a survey. This is why the property was depicted as being 2' from either side of the property. After it was surveyed and found to be incorrect, they adjusted the plan to fit the dimensions of the property.

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

Charles Allard, neighbor, stated that he does not agree with the plan that Elizabeth Pruyn has created. The proposal would obstruct views that Mr. Allard does not want obstructed. He is opposed to the application. He also states that centering the house is not included in the proposal.

Chairman LeBlanc stated that there are iron pipes on either side of the lot that are shown in the plan.

Mr. Allard states that there are pipes in the front of the house that are not shown in the plan.

Chairman LeBlanc stated that the proposal was for the 2' on either side of the house.

Mr. Allard would like to receive plans from Ms. Pruyn so that he could know the exact renovations of the home, and be included in the process. This would allow him to be able to anticipate the renovations or changes being made to the home.

Chairman LeBlanc stated that there is no left side yard on the property line. The approval that the owner asks for is to move the house back 15' from the property line to have a 2' side yard on either side of the house.

Mr. Allard stated that, when the variances were granted, the property was listed as residential so the variances were granted to a different standard of the ordinance.

Ms. Patricia McCormack stated that she was concerned about the height of the building. She also stated that the property that the surveyor measured as 4' is actually 32". She would also like to see a plan of where the house is going to be located on the property, and the specific elevation of the new house because of the serious water problem presently.

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

### **DECISION OF THE BOARD**

Mr. Witham made a motion to grant the petition, which was seconded by Mr. Holloway.

Mr. Witham stated that the issue before them was previously granted. Although it was granted under different dimensions, it still complies with the same regulations. The result is the same as previously approved, even though the starting point has changed. The application should be approved, as it was previously.

Mr. Holloway agreed with Mr. Witham.

Mr. Parrott stated that the difference between the present application and the previous one was the inclusion of a survey that provided the exact dimensions of the property. The surveyed plan is more accurate, and shows the exact area of the renovations. It makes sense to center the house within the property lines.

Mr. Marchewka stated that the existing plan with the new survey is what the Board approved. He does not believe that the revised plan with the new survey should be denied.

Mr. MacCallum stated that the relief being requested is the same as that granted in 2001 and he was bound by that decision.

Chairman LeBlanc stated that the Board of Adjustment was being requested to advise whether the previously approved Variances should still be granted considering more accurate survey information. He then called for a vote.

A motion to grant the petition was passed by a vote of 6 to 0.

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Mr. Berg returned to the Board.

6) Petition of **A. Andrew Yager and Linda L. Hussey, owners**, for property located at **1707 Islington Street** wherein a Variance from Article III, Section 10-302(A) was requested to allow an irregular shaped 868± sf two story addition with a 4' ± left side yard where 10' is the minimum required. Said property is shown on Assessor Plan 241 as Lot 23 and lies within the Single Residence B district.

SPEAKING IN FAVOR OF THE PETITION

Andrew Yager, homeowner, stated that he requested relief for the proposed addition. Currently, the structure encroaches on another structure. The reason for the 5' 10" height is due to the garage wall. The owners would like to remain within the structural footprint of the house, and demolish the garage, shed and breezeway.

Mr. Marchewka asked if the construction would occur over the garage and breezeway.

Mr. Yager stated that the garage and the shed behind the garage would be demolished to make room for the new addition while staying inside the house footprint.

Chairman LeBlanc asked if he was also adding an addition to the right side of the building.

Mr. Yager responded that he was.

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

DECISION OF THE BOARD

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

Mr. Marchewka stated that the applicant is building within the footprint of the original house. The proposal states that the owner will demolish part of the house to make room for the new addition. It will not be contrary to the public interest, and it is virtually the same as what lies there on the property now. An area variance is needed for the application to use the property and rebuild the addition. The variance is consistent with the spirit of the ordinance because it allows the homeowner to improve his property and bring it to modern standards. Substantial justice is done by allowing this. The value of the surrounding properties would not be diminished by this addition. He stated that the petition should be granted.

Mr. Berg agreed with Mr. Marchewka and has nothing further to add.

Chairman LeBlanc noted that the property line to the left of the house is not parallel to it but at an angle. At the rear corner, the garage is 12' from the property line.

A motion to grant the petition was passed by a vote of 7 to 0.



III. ADJOURNMENT

A motion was made, seconded and passed to adjourn the meeting at 9:00 p.m.

Respectfully submitted,

Danielle Auger
Acting BOA Secretary