

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

7:00 p.m.

CITY COUNCIL CHAMBERS

**July 18, 2006,
to be reconvened
July 25, 2006**

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice-Chairman David Witham, Steven Berg, Alain Jousse, Arthur Parrott, and Alternates Duncan MacCallum and Henry Sanders

MEMBERS EXCUSED: Bob Marchewka

ALSO PRESENT: Lucy Tillman, Chief Planner

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

I. OLD BUSINESS

- A) Approval of Minutes – March 21, 2006
- Approval of Minutes - April 18, 2006
- Approval of Minutes – April 25, 2006

It was moved, seconded and passed unanimously to accept the Minutes of April 18, 2006 and April 25, 2006 as amended. It was moved, seconded and passed to resubmit the Minutes of March 21, 2006 at the July 25, 2006 meeting with additional detail added under the decision sections.

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Chairman LeBlanc stated that he would like to take Item C of Old Business out of order and asked if there were any objections. None were raised.

C) Petition of **Fred Lowell and Al McElaney, owners** of property located at **62 Deer Street** wherein appeals pursuant to RSA 676:5 and 674:33(I)(a) were requested with regard to the Planning Board’s decision to recommend denial of a Driveway Permit Application. Said property is shown on Assessor Plan 118 as Lot 27 and lies within the Central Business B, Downtown Overlay and Historic A districts.

Chairman LeBlanc stated that the Board did not have the authority, and therefore declined, to hear this request. The Board indicated concurrence with this opinion by saying “aye”, with Mr. MacCallum saying “nay.”

B) Petition of **Lawrence N. and Ruth S. Gray, owners**, for property located at **80 Curriers Cove** wherein an Equitable Waiver of Dimensional Requirement per RSA 674:33-a was requested to allow the 2002 conversion of a screened porch to living space (Building Permit # 11359) where the Site Plan and construction drawings showed the screened porch of different sizes. The existing structure complies with the Building Permit and construction drawings, however those drawings and permits were based on an error with the dimensions of an existing deck not discovered by the owner until after the permits were issued and constructed. Said property is shown on Assessor Plan 204 as Lot 14 and lies within the Single Residence A district. This petition was tabled at the June 27, 2006 Board of Adjustment meeting.)

Mr. Parrott stepped down for this petition.

Mr. Berg moved to remove the petition from the table, which was seconded by Mr. Witham and approved by voice vote.

Mr. Berg asked, in light of the fact that this was tabled after applicant's counsel spoke, if it would be acceptable to incorporate by reference what counsel had already presented.

Chairman LeBlanc asked if there was any objection from the Board.

Attorney Pelech stated he had a procedural question. He didn't recall who had been there to hear the presentation.

Chairman LeBlanc stated that Vice Chairman Witham had not been there and noted that Mr. Marchewka was not there that evening. If Attorney Pelech wanted to go through the presentation, it was his privilege.

Attorney Pelech stated he would like to do so. He was appearing on behalf of the applicants with a request for an Equitable Waiver of Dimensional Requirements. To review, there was a building permit issued by the building inspector approximately four years ago to allow conversion of an existing deck. It was not until the past fall that it was discovered that the incorporation of the deck and screened porch into living space was not, as alleged by the abutters, as represented. What the abutters were saying and what the appeal for an equitable waiver was about is that the existing deck, which had been initially measured by Mrs. Gray in 2002 as a 15' x 9' irregularly shaped deck, was listed by D. D. Cook in May of 2002 as 9.5' x 20'. This was what his construction drawings showed and what was actually built.

Attorney Pelech listed the requirements for an equitable waiver as set forth in 674.33A and why he felt they had all been met, as had been detailed in his presentation to the Board at its June 27, 2006 meeting. He noted that it had been alleged that the Planning Department should have told the applicant that they needed a variance within the 100' tidal wetlands buffer set forth in the ordinance. They did not do so and the permit for the deck was issued. He noted that there had been previous issues with the Gray property, which had been built prior to the ordinance. He outlined the variances that had been previously requested and what had been previously granted by the Board. He reviewed the actions of Mrs. Gray and D. D. Cook and reiterated that, in this

instance, what had been built was what the plans showed. They were there to correct the mistake on the part of the Planning Department and the Grays.

Mr. MacCallum asked if there had been any physical changes to the deck since the Board of Adjustment hearing of December 14, 2004.

Mr. Gray stated there had been no change to anything on the house since that point.

Mr. Berg asked if he was correct in understanding that since this was built, they had approved two variances for structures even closer to the tidal edge than this?

Attorney Pelech stated that, in 2004, approval was granted for first and second story 8' x 14' decks that attached to the structure that was in question that evening. Both were closer to the mean high water tide. In December of 2005 another variance was granted when the squared off corner of this structure became an issue as a result of abutter's concerns. They filed an application for, he thought, three variances. Again, what had been built was in accordance with the construction drawings submitted by D. D. Cook and there were building permits issued, however, it was different from the site plan that had been submitted by Millette Sprague & Colwell at the time. As a result, they came before the Board in September of 2005 and the variances requested then were also granted. So, since this structure in question was constructed, the Board had granted variances to, first square off the corner and, then, to add 14' of deck to that structure.

Mr. Berg asked if both were closer to the wetlands and Attorney Pelech stated they were.

Mr. Berg stated that, if they were to follow this to an ultimate outcome and required the homeowner to tear down 3' to 5' of this structure, there would still be structures in the wetland buffer that were closer to the wetlands which had been approved since this was built.

Attorney Pelech stated he was correct.

Mr. Gray stated that the other variances were all closer.

Attorney Pelech noted that they had a letter of support to submit from the abutters at 100 and 90 Curriers Cove.

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

Attorney Ralph Woodman stated that he was representing Norma and Arthur Lesser and Eve and James Powers. The development of this property had been the subject of nine variance requests, each an invasion into the wetlands buffer. The majority had been granted but, especially important for the merits of that night's meeting were requests in February and May of 2002 which were not granted. The variances which had been granted were currently the subject of appeals to Superior Court and there was an express stipulation, to address Mr. Berg's point, that the decks were built at the risk of the applicant, with the understanding that, in the event that there is a court order contrary to their interest, the deck would come down.

Attorney Woodman indicated a display of photographs stating that they show the enclosed living space at issue. K-1 and K-2 were submitted by the applicants at the June 12, 2003 hearing to show

what the deck would look like. This was the enclosed living space on the home and the issue was, as in Exhibit A in his memorandum, that the City Attorney found after his investigation that approximately 5' on the end he indicated on the photograph was built with no permit. What he found interesting was that this was the area for which the variance requests were made in February and May of 2002. There was a request for a 9 and a half foot by 20 foot enclosure and this was expressly denied. Despite the denial, in the spring or summer this was built anyway.

Attorney Woodman stated the three main issues he saw were: 1) Was this enclosed living space built over the deck and/or porch that was there; 2) Did the building permit issued by the City of Portsmouth somehow give rights that they otherwise did not have; and, 3) Were the applicants mistaken in their January, 2002 permit application when they identified the deck that was then existing as 15' long by 9' wide, irregular because they know that, in the May, 2002 application by D. D. Cook, who was the builder, it was represented that at that time, the deck was 9 and a half feet wide by 20 feet long so there was obviously a mistake.

Stating he would like to address the last issue first, he referenced Attachment B in the folder as the January 31, 2002 building permit application filed with the City. Under the "Dimensions of Existing Buildings and Structures on This Lot" section, it shows "deck irregular 15' x 9' and this was signed by the owner. This deck could be seen in attachment I-2 and is irregular because there is a maple tree growing in the corner. He stated the question was if, as of January 2002, the homeowner was correct in representing a 15' x 9' deck. At that time, the homeowner submitted scaled drawings by engineers, (marked C, D and E in his exhibits). Attachment E showed the proposed 9 1/2' x 20 foot enclosure. Attachment C showed the existing features plan, which when scaled out, shows exactly that the deck is 15' long along the house, 8 foot on the water side and 9' wide. In addition to those plans, attachment F in the package is a site plan dated April 20, 2001. The full plan, drawn to scale, is important for two reasons. One is that, again this is April, 2001 drawn for the Grays by Millette Sprague & Colwell and, once again, this shows an irregular shaped deck that is at issue. Scaled out, it's 15' along the house, 8' on the water side, there's an indentation where the tree is and it's 9' wide. The reason that this becomes even more important is that it is a portion of this plan showing that deck that is attached to the letter that D.D. Cook writes and attaches to the May 30 building permit application.

Chairman LeBlanc asked if in this deck Attorney Goodman had been describing as 15' along the house and 8' along the water side, the 9' wide was where the 8' section along the water side was.

Attorney Woodman responded that it was and, scaled, it was roughly 5' wide on the end where the tree was. Attorney Woodman continued that they then had the plans done in 2002 that were submitted by the Grays to the City of Portsmouth at that time and showed that the deck was, in fact, 15' by 9' irregular. And, they had the April, 2001 plan, also scaled by the Gray's engineers that shows the same thing.

He then addressed the argument that the building permit application somehow gave rights to build, indicating that the application by D.D. Cook was Exhibit H in the packet. On the first page under "description of proposed work," it says "convert screen porch and deck to living space." On page three, it says "We would like to convert the existing screen porch...to finished living space." Also in Exhibit H is a letter, dated May, 2002, in which the builder says twice, "we wish to convert." Assuming that convert means change what is there to something else and not add 5' feet, what then is Exhibit J is the actual permit issued and the description says convert screen porch and deck

to living space. So, Attorney Woodman stated, the City of Portsmouth gave permission to convert what was there. In no way did the building permit give, or could give, permission to expand by 5'. He stated the reason everybody knew at the time they could not give permission was that, on May 21 of 2002, less than 10 days before the building permit was submitted, this Board denied the right to create a 9 ½' x 20 foot enclosed structure and denied right to add the two decks. Part of that denial, he stated, was the absolute denial to expand into wetlands with the enclosed living space. D.D. Cook in his letter said he understood there was a denial. Where the application is to convert and the building permit that is given is to convert, Attorney Woodman asked how the permit to convert can be argued as a permit to expand. As a final point, he stated that the Board was told that the enclosure was on same area as the then porch. In the event that the building permit application in January, 2002 is correct and Millette Sprague & Colwell are correct in their scaled drawings, it was a 15' x 9' irregular porch and you can't convert that into a 9 ½' x 20 foot living space. That is what the City Attorney found in his investigation.

Addressing the argument that it was just a mistake, he identified Exhibit I-1 as a photograph submitted by the Grays at the May 21, 2002 hearing. If this photograph were compared with the earlier photographs, the areas he indicated on the enlarged photograph would be shown as the the opening to the basement. He pointed out two windows in the basement as the same two windows in earlier photographs. What had happened was that the sliding doors had been constructed and plywood put in. He indicated what was the end of the 15' x 9' porch, adding that the entire opening to the basement could be seen in May of 2002. If, however, what he labeled "the after", it can be seen that what has been built and enclosed comes over almost all of that opening to the basement was exposed because the porch was only 15' long. If the new structure had been built where the porch was, that entire opening would be seen. He pointed out on the displayed "after" photographs the windows and openings corresponding to the previous photographs, stating it was not a simple error in measurement. They took, however it happened, what was there without a building permit and in the face of having just been denied the right to expand it, and expanded it knowingly. He stated it could be told from the photographs that it had been expanded.

Attorney Woodman stated he agreed with Attorney Pelech that there were four considerations to granting an Equitable Waiver, with the burden of proof on the applicant, but disagreed that they were present. This was a hardship caused entirely by the applicants.

The first requirement was that the violation was not noticed or discovered. He stated it had to be noticed or discovered in May of 2002. It can be seen that there was no error in measurement. It was an intentional expansion of that porch into the wetland.

The second requirement is that the violation was not an outcome of ignorance of law or ordinance or misrepresentation. As he stated in his memorandum, a misrepresentation is not necessarily an intentional falsehood. It's an error. They were not saying that when D. D. Cook put in the May, 2002 building permit application that the existing deck was 9-1/2' by 20', that he intentionally misrepresented it, but that it was a misrepresentation. Even after that misrepresentation was put on the building permit application, the request was to convert what was there and the building permit was issued to convert what was there. He and his clients believe that this was not a case for an Equitable Waiver and they requested the Board to not grant one.

Mr. Witham stated he saw two issues – the squaring off of the deck that got enclosed and then the expansion to the left. When D. D. Cook submitted his letter to the Building Inspector, it was almost like he asking the question, “can we do it?” In item 2 in his letter, he states, “we wish to cantilever the frame over this corner,” which Mr. Witham noted was the corner where the tree was. Then, on the site plan, D. D. Cook has written, “can we cantilever this corner?”

Attorney Woodman stated that he understood that the Building Inspector did not recall granting permission and D. D. Cook does not remember one way or the other. However, that corner is 5’ away from what was actually built because that corner would be where he indicated on the exhibit. What was built, Attorney Woodman stated was 5’ in this direction, again pointing out on the exhibit. He stated the corner was not the real issue there, although it would be later on in court because what was represented to the Board as the corner when they came for the four retroactive variances wasn’t the corner at all. The corner was 5’ away from where the retroactive variances were requested and granted.

Mr. Witham recalled that he had previously initiated discussions on saving the tree and it had been said it would be saved. Then, when they came back, the applicant said it had been cut down and they were then requesting to square it off. He struggled with how they could not know and asked if the discussion had come up in Attorney Woodman’s research – the squaring off issue.

Attorney Woodman stated, not yet. The tree was not shown on May, 2002 building permit application.

Mr. Witham asked if that was the full-size one he had provided and Attorney Woodman stated it was. It was also the one where D.D. Cook made the little copy which was attached to Exhibit H.

Mr. Witham stated that did not show any trees and Attorney Woodman stated he suspected the tree had been cut down by then.

Mr. MacCallum stated he had a question for the Planning Department. Their memorandum stated that, if denied, the applicants could come back for a variance. If they come back for a variance aren’t they going to be asking for relief the Board already granted in 2004? What would the Board be granting that the applicants don’t already have?

Ms. Tillman replied that it would be any relief that was deemed necessary that they haven’t been granted. She didn’t have specific dimensions.

Mr. MacCallum asked Attorney Woodman what had happened to change things since the hearing in December of 2004.

Attorney Woodman responded that the City of Portsmouth had determined that approximately 5’ of what was formerly a 15’ x 9’ irregular shaped deck was built into the wetlands without a permit. The Planning Department, the Building Department and the City Attorney did an investigation and it resulted in a letter that Attorney Sullivan wrote and which is Exhibit A. He gave the applicants, through their attorney, the option of taking whatever recourse they felt was appropriate and it resulted in this Request for an Equitable Waiver. Once again, what was shown to the Board in December of 2004 as to where the tree was and where it was filled in was not in the right spot – it was 5’ off.

Mr. MacCallum said he knew that, but they knew in December of 2004. The building had already been squared off at that time and the tree already cut down and he vividly remembered there was quite a bit of discussion at that time as to whether it was an innocent mistake or deliberate.

Attorney Woodman suggested that at that time at least he, and, he believed, the City of Portsmouth through Attorney Sullivan did not realize that this extra 5' had been built. Everyone assumed that the squared off area was at the end of the enclosed area, but they now knew the tree was growing 5' in.

Mr. MacCallum stated that his recollection was that the board was aware of that fact and the tree had already been cut down by the Grays in order to square off the building. They were coming to seek retroactive approval of what had already been done – the tree cut down and the corner of the building squared off.

Attorney Woodman maintained that it had been squared off but not in same spot. The tree was approximately at a point he indicated on the photograph and it was represented that what was being requested at that time was to square off at that point. We now know that point was expanded 5'.

Mr. MacCallum stated that his memory was, and the reason for his question as to whether there had been any physical change since 2004, was that they explored the issue of the tree being cut down, inadvertently or deliberately. The tree had been cut down and the building squared off and the Board was asked to ratify the squaring off.

Attorney Woodman stated the Board was asked to ratify the squaring off, not the building of the additional five'.

Mr. MacCallum stated he still had the pictures from a year and a half ago.

Attorney Woodman agreed those were the pictures, but nobody knew of the additional 5' back then. They were told that what was being requested was to approve the squaring off, not the additional 5'.

Chairman LeBlanc stated so, then, they were claiming that the deck, on the original plans they had there from May of 2002 – that little irregular shape was squared off and an additional 5' were added to the deck

Attorney Woodman stated, “yes” and that was what was shown through the plans and the photographs.

Mr. Witham stated that, when they saw the pictures the last time – the squaring off of the deck issue - they were all assuming that the corner of the back of the house was the squared off deck and now they're coming back and saying that it's the squared off plus an additional 5'.

In response to a question from Chairman LeBlanc, Attorney Woodman stated that the biggest part of the section with the palladian window at the top measured 9 and a half feet by twenty feet.

Mr. Berg asked Ms. Tillman if, should the Board deny the Equitable Waiver and establish that they must come back for a Variance, it wouldn't be subject to Fisher v. Dover as they had already heard the 9' x 20' issue.

Ms. Tillman stated she would defer to the Legal Department for that.

Chairman LeBlanc stated that nowhere in the September 24 issue that was decided in December was there anything about a 9' x 20' deck. Everything was 10' x 14', 8' x 14' and this was all compounded by the fact that they were worried about the distance from the mean high water as opposed to the other term used at that time by Attorney Pelech. There was nothing on that date about a 9' x 20' deck.

In response to a question from Mr. MacCallum, Attorney Woodman stated everybody was waiting for the result of the court proceeding.

Mr. MacCallum asked if there were any new actions since 2004 that violated the zoning ordinance.

Attorney Woodman stated not to his knowledge.

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

Mr. Lawrence Gray stated that the original time the petition was turned down, the Lessers were not there. The whole issue was because one person that headed the conservation committee was worried about runoff. They came back later with a new plan. They didn't have a post but they had it cantilevered over and it was made permeable. At that meeting, there was no discussion of cutting down any tree or any problem of squaring off the old deck. At that time, it was mentioned that there was no problem of them building over the old deck. He stated that Attorney Woodman was using terms wrong. This was not in a salt water marsh. This was in the 100' buffer zone. He stated that the deck that was built was 19' or 20', but 2 and a half of those feet go with the previous screened-in porch, which could be seen in the pictures. He maintained that it was only in September of this year, when they were told that this was going to be added to the list of complaints, that they became aware that there was anything going on. It appeared to him that, for whatever reason, D. D. Cook submitted plans for a structure that size, but they didn't extend it 5' as was being alleged. He stated that the Board could see on the pictures and plans that had been provided that the distance between the old deck and the new deck was measured at two and a half feet, which he measured himself. He realized they should have had a variance, but he thought that's what they had a year and a half or two years ago. He outlined his reasons for not understanding the objections to their actions, but stated he would like it to end.

In response to a question from Chairman LeBlanc, Mr. Gray stated that the old porch which was enclosed as part of the house – the part with the tree – was probably 15' and, from the plans, two and a half feet of either 19' or 20' was going further away from water. That was cut down in size and incorporated into the enclosure. It appeared to him that they did go two and a half feet closer to the water there, but he thought that was all covered in 2004.

Attorney Pelech stated he didn't want the Board to have the impression that what was built was done without a permit. He reiterated that in the packet he submitted was the permit to incorporate



a 9 and a half foot by 20 foot addition. The permit was granted and the construction drawings show 9 and a half feet by 20 feet. Mr. Clum had stated, when they did the investigation, that what is there was what was covered by the permit. The dimensions and location were the same. He stated he agreed with Mr. Gray that it was 2 ½', not 5' because the enclosure moved about only halfway into the 5' wide doorway in the photographs. If it were 5', it would have covered the doorway completely. The issue simply was the building permit was issued and was for what was built. It was signed by the Building Inspector. The Planning Department signed off on the application. There was nothing but a mistake that an Equitable Waiver would correct.

Chairman LeBlanc stated that he must be aware of the March 29, 2006 letter from Attorney Sullivan.

Attorney Pelech stated he had requested the letter, which didn't say that what they built didn't have a permit. The issue that Attorney Sullivan and he were trying to discover was whether there were any permits issued that allowed the Grays or their predecessors to make the existing deck, which was incorporated into the living space, bigger than the 15 feet that Mrs. Gray showed. There was no question that the June 1, 2002 building permit authorized what was built. What Attorney Sullivan was saying in the letter was that they could find nothing that would make the deck go from 15' x 9' irregular to the existing size of 9 and a half feet x 20 feet. Attorney Pelech stated that Attorney Sullivan did not dispute that the building permit issued by the Building Inspector, to build what was built, was issued, which was why they were there that evening. He claimed that what Attorney Sullivan was saying was they couldn't find any building permit that brought the existing deck from 9' x 15' up to 9 and a half feet x 20 feet.

Mr. Witham stated that obviously the Equitable Waiver had to do with an error in measurement or calculation. They had an understanding about the squaring off of the deck and someone was saying 5' and someone else was saying two and half feet. To the eye, he felt it was probably somewhere in the middle of those two. He asked if it was their position that the enlargement of whatever it was, 3' or 4', was an error in measurement or calculation?

Attorney Pelech stated partially. It was hard to determine because looking at the application, submitted in his and Attorney Woodman's packets, and as filed by Mrs. Gray, the conversion into living space was not only the existing nine and a half foot by twenty foot deck, but the existing thirteen and a half foot by eight foot screened porch, and those two structures combined to a roughly 33 and a half feet in length. He stated that what was out there was 33 and a half feet in length when you consider the 20 foot portion that is at issue that evening as the remainder of the screened porch. It was also a matter of where it was located on the face of the building.

Mr. Witham asked if two and a half feet or three feet were lost on the other end.

Attorney Pelech said he believed it was, but couldn't determine and it was hard to tell by the photograph when you get down to two and a half feet.

Mr. Witham stated that there may be a chance that what was built was what was approved, but it just was put on the back of the face in a different location.

Attorney Pelech stated that was correct. He had no question that what was built was what was approved and he felt that the Assistant Building Inspector has testified to that on site when they

were out measuring with Millette, Sprague and Colwell. Roger Clum was taking down measurements and checking them against the construction drawings. Attorney Pelech did not feel that was the issue. What was built out there was what was shown on the construction drawings. The issue is where it was and whether it would match up with the Millette, Sprague and Colwell drawings.

Attorney Woodman stated that he disagreed about what Roger Clum would say. He felt Roger would say, like the building permit says, to convert an existing screen porch and deck – convert and not add to. The screen porch was 15' x 9'. What was built was nine and a half feet by twenty feet. The building permit application asks for permission to convert, convert, convert. The one mistake or misrepresentation – the only time that nine and a half feet by twenty feet appears is when D.D. Cook represents what the existing deck was, which, less than ten days before, had been denied by the Board of Adjustment. He again referenced the photographs and asked again how the earlier deck which went only as far as the opening he indicated could be expanded to two thirds or  $\frac{3}{4}$  across that opening by a mistake. He felt that was intentionally and knowingly expanded what happens to be further into the wetlands buffer setback, where 10 days before the Board of Adjustment had denied the right to build.

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

#### DECISION OF THE BOARD

Mr. MacCallum made a motion to deny the Equitable Waiver of Dimensional Requirement, which was seconded by Mr. Henry Sanders.

Mr. MacCallum stated that the elements necessary to grant an equitable waiver had not been met. He noted for the benefit of the interested parties that, if the other members of the Board supported the denial and if the Grays came back with an application for a variance seeking the same relief, he would vote to grant despite the fact that the equitable waiver had been denied. He referred to his remarks of a year and a half ago as indicating his inclination to believe representations made on behalf of the Lessers and Powers. Despite that, he reluctantly voted in favor of the Gray's position because he had felt that the violations were such that it didn't make sense to tear down what was there.

He stated that the one chief element in this case was that there was supposed to be an innocent mistake and he believed that was far from the case. In addition to the statutes cited by Attorney Woodman he quoted from Attorney Peter Loughlin's book on zoning and land use ordinances. With respect to equitable waiver requirements, Attorney Loughlin had said in Section 22.03 that "a situation that has often created consternation for land owners and land use boards is an honest mistake in the siting of a building. Prior to 1996, when a subsequent survey disclosed that a building was mistakenly located so that it transgressed a few inches or feet into a setback area, the only way available is to seek a variance from the zoning Board of Adjustment. Although this was often granted because of a realization that there was no meaningful alternate available and no particular harm being done, in most cases there would be a serious question as to whether the requirements of the variance could be met. To address the problem of the honest mistake, the legislature has provided for an Equitable Waiver of Dimensional Requirements."

Mr. MacCallum stated that was what the applicants had applied for that evening and the element of a mistake was missing in this case. He didn't believe that when a permit was applied for ten days after the applicants were denied a permit, and they went forward and did what told they had been told they could not do, it was an innocent mistake. With the application of pure legal criteria, the equitable waiver has to be denied.

Mr. Sanders stated that he was a new member and not privy to the previous meetings but he had read the background thoroughly. He had too many questions and too much concern to do anything but deny the equitable waiver.

Mr. Jousse stated he would support the motion. Something didn't seem right several years ago, when this was presented and he felt it was this approximately two and a half feet. He remembered stating that it was presumptuous on someone's part to put sliders in a house before the deck was approved. He felt that, intentionally or not, they were misled. He spent years in construction and knew you don't put a wall 2 and a half or three feet arbitrarily into open space.

Mr. Witham stated he agreed with Mr. MacCallum. He had struggled with this and something never felt right to it, although he didn't know whether it was deceitful or an honest mistake. However, what was there before them was an equitable waiver. He couldn't see this as being an error in measurement or calculation. His hunch was they came before the Board for variances with a conceptual plan. Once they received certain variances and a building permit, the project evolved and things happened and changed. He mentioned the number of times they had to come back for variances for something that wasn't on the plan. Changes sometimes happen during construction but they usually happen when someone meets all the setbacks. This was a sensitive area because the setbacks have been on everybody's radar screen. To think that something would just kind of move was hard to imagine because it was under such a microscope. He didn't think it was an error. It was more what the homeowner would like and it got built that way.

The motion to deny the Equitable Waiver of Dimensional Requirements passed by a unanimous vote of 6 to 0.

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D) Request for One-Year Extension of Variance granted August 16, 2005 for property located at **69-73 Prospect Street.**

Mr. Berg stepped down for this request.

Mr. Parrott stated there was no reason not to grant the extension. He moved to grant the one year extension with the understanding that a second one would not be granted, which was seconded by Mr. Witham, who had no additional comments.

The motion to approve a One-Year Extension of Variance through August 15, 2007 passed by a vote of 5 to 1, with Mr. MacCallum voting against the motion.

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**II. PUBLIC HEARINGS**

1) Petition of **Sea Ray Realty LLC, owner**, for property located at **445 Route 1 By Pass** wherein a Variance from Article IV, Section 10-402(B) was requested to allow a 19' x 44' garage with a 10' rear yard and a 10' left side yard where 15.5' is the minimum required for both. Said property is shown on Assessor Plan 234 as Lot 3 and lies within the Office Research district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Steve Lorentzen stated that he was representing Seaway Realty Trust. He stated that the existing structure was non-conforming and was on the corner of Borthwick and Route One Bypass known as the Griffin Building. The garage was at the back and was in terrible repair. In the interest of protecting the surrounding area and wetlands and for safety reasons, they could do a much better job if they could raze the building and rebuild on the existing footprint.

In response to questions from Mr. Berg and Chairman LeBlanc, he stated it would be the exact footprint but would be taller, with a second story.

Mr. Parrott asked why, if they had the room, they didn't just comply with the ordinance requirements.

Mr. Lorentzen stated that if they moved the building further, it would infringe on wetland buffers.

When Mr. Parrott asked how they could further infringe when they are 100% in the buffer, Mr. Lorentzen stated they would be closer to the wetlands themselves.

Mr. Parrott asked about moving the garage closer to the building to comply with the 15 and a half foot requirement and Mr. Lorentzen stated it would restrict parking and the traffic flow.

Mr. Parrott stated that the plan didn't show parking.

Ms. Tillman pointed out spaces 17 through 20.

Mr. Parrott stated that what he was suggesting is that, with a little effort they could tilt it a little and comply, avoiding this whole process.

Mr. Lorentzen stated he had no objection and they could look at it, but his impression was that, if they rotated it clockwise, moving it closer to the office building, they would restrict traffic flow to parking spaces and/or move it closer to the delineated edge of wetlands.

Mr. Parrott stated that his impression was not the same as engineering it to be sure.

Mr. Lorentzen referenced an existing drawing by Verra Engineers.

In response to a question from Mr. Jousse, Mr. Lorentzen stated they were leaving the same foundation and adding a 10" curb. He added that was something that could not be done if they only repaired the building and this further protected the wetlands.

Mr. Berg asked if he was the contractor and he stated he was.

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

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

Mr. Witham moved to grant the petition as presented and advertised, which was seconded by Mr. Jousse.

Mr. Witham outlined the following reasons for granting the petition:

- There is no benefit to the public in requiring the removal of the existing foundation and relocation of the garage.
- The garage will be tucked into the rear corner, not interfering with established parking and travel aisles.
- It would not be reasonable to require an expensive new foundation to bring the garage into compliance with the ordinance.
- Features of the replacement structure will be more protective of the wetlands, benefiting the neighborhood.

Mr. Jousse stated he agreed with the statements made by Mr. Witham.

The motion to grant the petition was passed by a vote of 6 to 1, with Mr. Parrott voting against the motion.

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2) Petition of **Fredrick I. McMullen, owner, and Stephen Sargent d/b/a Tokyo Joe’s Studios, applicant**, for property located at **1262 Woodbury Avenue** wherein a Variance from Article II, Section 10-207 was requested to allow a martial arts school with a maximum of 20 students in a district where such use is not allowed. Said property is shown on Assessor Plan 237 as Lot 67 and lies within the Mixed Residential Business district.

Mr. Parrott stepped down for this petition.

SPEAKING IN FAVOR OF THE PETITION

Mr. Bob Montana stated he was speaking on behalf of Steve Sargent, the licensee for the martial arts school. He outlined a history of the business pointing out that they have presented no problems to surrounding properties.

Mr. Sanders asked, with as many as 20 students there, how they intended to handle parking.

Ms. Tillman responded that the parking requirement for a school is 1 for each 4 students and the apartment above is 1 and a half. They have determined that there is sufficient parking on site.

Mr. MacCallum stated his question was for the Planning Department. He wanted to know the rationale was for forbidding businesses of this type in the MRB district.

Ms. Tillman stated that at one time schools were not even allowed in the Business or Central Business Districts, but that was changed in 1995. This zone was meant to be a transition between business and abutting residential neighborhoods. While this use seemed to be a nice fit for the neighborhood, it was not specifically outlined in the ordinance so they have to seek variance. This is something to look at when the ordinance is rewritten.

In response to a question from Chairman LeBlanc, Mr. Montana stated it would be limited to 20 students at any one time.

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

Mr. Berg stated that Ms. Tillman’s comments in response to the question regarding zoning speaks to the intent of ordinance and granting this would be consistent with the spirit of ordinance if not the actual wording. As additional reasons for granting, he outlined the following:

- The use will be complimentary to others in the neighborhood.
- A hardship would be created by not permitting a use which meets the spirit of the ordinance but is not specifically named as an allowed use.
- There will be less traffic generated than with previous uses in the building.
- There will be no impact on the value of surrounding properties.

Mr. MacCallum added that, while technically it might be a stretch to see a hardship, it was difficult to distinguish between this use and permitted uses and it didn’t make sense not to grant the petition.

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

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3) Petition of **Mark R. Neubauer, owner**, for property located at **101 Marne Avenue** wherein a Variance from Article III, Sections 10-301(A) and 10-302(A) were requested to allow a 32’ x 40’ two story single family dwelling with a 6’ x 30’ front porch and accessory shed on a lot having less than 100’ of frontage and 6,794 sf of lot area where 100’ of frontage and 7,500 sf of lot area is the minimum required. Said property is shown on Assessor Plan 222 as Lot 44 and lies within the General Residence A district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Mark Neubauer stated he was the property owner and had lived there for 10 years. There was 780 s.f. of living space. The structure was in bad shape and extensive work was needed. No matter what they did they would still require variances. If not granted, they will be forced to sell.

He stated the lot had been subdivided prior to the 7,500 s.f. lot size requirement. They would like to demolish the 780 s.f. ranch and replace it with a 32' x 40' home. He stated that they would meet most of the requirements and submitted a petition signed by neighbors in support of the project and respectfully asked that the request be granted.

Mr. Jousse stated that it seemed like the rear property line was right behind the shed but the aerial photograph and drawing seem to give it another 15 feet or so.

Mr. Neubauer stated that the back right hand corner is correct. It angles and gives 10 more feet. The fence would be coming down with the shed. The shed would be replaced eventually.

Mr. Jousse stated he thought he was asking for the shed and Ms. Tillman confirmed that he was doing so.

**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. Witham made a motion to grant the petition as presented and advertised, which was seconded by Mr. Parrott.

Mr. Witham stated that, while there are a lot of red flags that come up while renovating a home, there should be no future conflict with what was granted because the applicant is purchasing a modular home. The two variances required were for street frontage and lot coverage. The plan meets many of the other requirements, but there is no way for him to increase his lot area without buying some land and he couldn't buy enough to get up to 7,500 s.f.. In terms of street frontage, this is the last house on a dead end street. The property already exists as a single family home, predating zoning, so there will be no change to the neighborhood or diminution in property values.

For all of these reasons, he felt that the criteria to grant a variance were met.

Mr. Parrott stated he agreed, adding that the change in depth of the house is from 28' to 40' and the proposed house would be no wider than the existing. Given the way the neighbors are situated, this should be no problem to them. The total impact would be minimal and would not result in overcrowding. With respect to lot size, this lot is 10% less than 7,500 s.f. and given the age of the subdivision, an acceptable deviation. He saw no adverse effect on anyone.

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



**III. ADJOURNMENT**

It was moved, seconded and passed to adjourn the meeting at 9:05 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary