

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

7:00 p.m.

CITY COUNCIL CHAMBERS

OCTOBER 17, 2006

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice Chairman David Witham, Steven Berg, Alain Jousse, Robert Marchewka, Arthur Parrott, Alternates Henry Sanders and Carol Eaton

EXCUSED: Duncan MacCallum

ALSO PRESENT: Lucy Tillman, Chief Planner

A) Approval of Minutes

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| - March 22, 2005 | - April 19, 2005 | - June 21, 2005 |
| - June 28, 2005 | - September 27, 2005 | - December 20, 2005 |
| - September 19, 2006 | - September 26, 2006 | |

It was moved, seconded and passed by unanimous voice vote to accept the Minutes as presented.

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B) Petition of **Michael De La Cruz, owner**, for property located at **63 Congress Street a/k/a 75 Congress Street Franklin Block** wherein a Variance from Article XII, Section 10-1201(A)(2) is requested to allow a 10' two accessway to a below grade parking garage where 24' is the minimum required. Said property is shown on Assessor Plan 117 as Lot 5 and lies within the Central Business B, Downtown Overlay and Historic A districts. *This item was tabled at the September 19, 2006 meeting.*

Mr. Witham made a motion to remove the petition from the table, which was seconded by Mr. Marchewka and approved by unanimous voice vote.

Chairman LeBlanc announced that the applicant had requested that the petition be tabled to a time indefinite.

Mr. Witham made a motion to table the petition to a time indefinite, which was seconded by Mr. Marchewka and approved by unanimous voice vote.

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C) Petition of **Abigail Khan-Cooper, owner**, for property located at **227 Park Street** wherein a Variance from Article II, Section 10-206 is requested to allow outdoor display and sales of artwork where such use is not allowed as a Home Occupation I or II. Said property is shown on Assessor Plan 149 as Lot 6 and lies within the General Residence A district. *This item was tabled at the September 19, 2006 meeting.*

Mr. Witham made a motion to remove the petition from the table, which was seconded by Mr. Marchewka.

Chairman LeBlanc announced that the applicant had withdrawn the petition.

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D) Petition of **Lawrence N. & Ruth S. Gray, owners**, for property located at **80 Currier's Cove** wherein a Variance from Article III, Section 10-301(A)(7) was requested to allow 190 sf enclosed living space (9.5' x 20') within 100' of the edge of the salt water marsh/wetlands. Said property is shown on Assessor Plan 204 as Lot 14 and lies within the Single Residence A district. This item was tabled at the September

Mr. Parrott stepped down for this petition

Attorney Bernard W. Pelech passed out copies of his position statement, with attachments, outlining why Fisher v. Dover did not apply in this case. He stated that, since February of 2002, several things had happened:

1. The Boccia v. The City of Portsmouth decision was made in May of 2004, which established new hardship criteria for area variances. The criteria were easier for the applicant to meet than the Simplex criteria, under which the February, 2002 application was denied. He stated that on a number of cases he had pending in Superior Court, he and the City Attorney had agreed that Boccia represented a change and that the cases should be remanded to the Board to be heard under the new standard. He stated that Attorney Loughlin, a local zoning expert, had given the opinion that, with cases decided by hardship under the Simplex standard, the Boccia decision was a material change in circumstances which would allow the Board of Adjustment to rehear the case.
2. On June 24, 2003, the Board granted a variance to construct two 8' x 14' decks adjacent to the addition constructed in June of 2003. The Board found the decks different from those that had been denied as the decks were now pervious and open to the sky. He stated the Board had also found that Fisher v. Dover did not apply and that the application was a material change.
3. In September 14, 2004, four variances were granted, which were for the areas highlighted in orange on his exhibit, copies of which he distributed to the Board. The area in green had been constructed in June of 2002 based on a building permit issued.

Attorney Pelech stated that what they were seeking approval for that evening was the small white rectangle between the purple and green areas on the plan. He also passed out copies of plans submitted by Attorney Woodman showing the existing conditions, demolition and proposed plans, noting that on the latter, he had outlined the areas which had been constructed. The white rectangular area, approximately 9.5' x 4' or 40 s.f. on the plan, had been covered in the applicants' previous request for an Equitable Waiver. It was the position of Attorney Woodman and the City that, although built, permission had not been received for the white area, as the building permit should only have covered the green area on the plan.

When Chairman LeBlanc asked if he was speaking to Fisher v. Dover, Attorney Pelech stated he was concluding it now.

Attorney Pelech stated that what they were talking that evening had been advertised as 190 s.f. The application indicated they were asking for the whole 20' x 9.5 foot rectangle, when in fact they were only asking for a variance to build what was already built, which was the white rectangle of about 40 s.f. The Board could grant something less than 190 s.f. He reiterated that there were two reasons why Fisher v. Dover should not apply to their request. One was that the Supreme Court had handed down the Boccia case which changed the standard by which the application was judged in 2002. Secondly, they were talking about 40 s.f. of structure needing a variance as opposed to 400 s.f. These represented a material change in circumstances.

Mr. Berg asked, if, in the interest of time, Attorney Woodman could be asked to speak now just to the two reasons Attorney Pelech outlined as to why Fisher v. Dover did not apply.

Attorney Ralph Woodman stated he represented Norma and Marvin Lesser and Eva and James Powers. On the first point, Fisher v. Dover does say the applicant must prove to this Board that the new application materially differs in nature and degree from the prior application. It says nothing about the law changing – only addresses the type of relief the applicant seeks. The Supreme Court never said that every time they change some aspect of the criteria for granting a variance, the same application could be submitted all over again.

Secondly, in 2002, the Board had denied the request before them because the existing deck was proposed to be expanded. Attorney Woodman stated that the key point is that it was constructed and by approximately 4 s.f. within 2 or 3 months after the Board denied that very relief. A building permit attached to his memorandum was then sought, and granted, to convert what was there. He stated that when Dr. Gray spoke at the last meeting, he said that they knew they had to get a variance. They knew, but went ahead and built anyway after the denial. Attorney Woodman stated that they didn't build based on the building permit as the building permit was to convert what was there.

One of the other components in 2002 were the decks attached to the living space and the applicants came to the Board and convinced you that the decks were substantially different, so the Board then granted the variance. As to whether or not this application has the same difference, we have not heard tonight.

What is at issue is that the 9.5' x 20' enclosed living space is exactly the same as what had been previously denied. He referred to his Exhibit P and Exhibit O in the packet prepared for the variance before the Board that evening. The plan, supporting that evening's request for a variance is, except for some handwriting, exactly the same as the site plan submitted in 2002. Under Fisher v. Dover, the application has to be materially different and it was not as far as the 9.5' x 20' deck is concerned. The request was for the same relief and the same plan and should be denied under Fisher v. Dover.

Chairman LeBlanc noted that the Board had had several cases returned to them after agreement with the City Attorney, because Boccia had been promulgated after their decision and this represented a material difference in the circumstances surrounding the applications.

Attorney Woodman stated that it was a different issue. In those cases, the law about what hardship meant changed because of the Boccia decision between the time the Board made their

decision and the time the final appeal was taken. That's why they were remanded. Boccia had nothing to do with the issue about Fisher v. Dover and its applicability here.

Attorney Pelech maintained that this was a different application. There is no dispute that the building permit that was issued was to convert into living space the area in green on his exhibit. That was not before the Board that evening, nor were the decks. All of them were applied for in 2002 and that application was denied because of the decks. All they were asking for that evening was the white area on the exhibit.

Chairman LeBlanc stated that Fisher v. Dover was before them.

Mr. Berg quoted from the OEP Handbook, January, 2006 edition regarding Fisher v. Dover, that "When a material change of circumstances affecting the merits of the applications has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition." He felt that Attorney Woodman only addressed the second part of that sentence. It was also up to the Board to decide whether a material change in circumstances had occurred. In the past, the Board had ruled that the interjection of Boccia in the hardship scenario was a material change in circumstances. The Supreme Court had not said Boccia constitutes a material change, but had also not said the opposite. He did not believe Fisher v. Dover applied.

Mr. Witham made a motion to invoke Fisher v. Dover.

Mr. Marchewka seconded for discussion.

Mr. Witham stated that he believes Fisher v. Dover does apply to this application. What they were asking for is exactly the same as what was denied in 2002. He didn't agree with Attorney Pelech you could pull out a little piece and say that was the only thing that was being requested. To him, what the applicant was actually asking for was exactly the same plan that was denied in 2002.

He had struggled with the material change in circumstances aspect. They don't have any case law so have to make their own decision. On the one hand was the argument that now they have the Boccia analysis and that's materially different so it had to be reheard. On the other, he felt that Attorney Woodman made a good point in stating that everybody could then come back who's ever been denied. Mr. Witham stated he did not feel that was the Court's intent in adding that prong to the criteria. While, as Attorney Pelech had noted, in 2003 the Board didn't apply Fisher v. Dover, it was because the decks were now permeable, which was a material difference.

He stated that there had been no material change in circumstances affecting the merits of the application. The application failed previously on the first, third, and fourth prongs of the criteria, with the main issue being wetlands protection. The merits stand as they were in 2002 and he didn't feel Boccia affects the merits of this application.

Mr. Marchewka stated that the plan was the same plan that was denied. He agreed with Mr. Witham, for the reasons stated, that Boccia had no effect on this.

Mr. Berg disagreed. In the denial letter issued 2002, it was stated in the center paragraph that

“The Board found that all the criteria had not been met to grant the request since there was no proven hardship presented. The Board concluded that the property can be used reasonably as it exists.” He felt this was exactly Boccia. If the denial was based on hardship, then Boccia meant a significant change.

Ms. Eaton stated she would support the motion as the issue was the shoreland and wetland protection. The fact that the property was near the protection zone was probably the intent of the vote. She didn’t agree the circumstances were different now.

Chairman LeBlanc stated that he was torn. The criteria that was used to come to their decisions has changed, which he felt was a material difference, although the rest of the circumstances were the same.

Mr. Witham stated that 80% of the discussion in 2002 was on wetlands protection. He acknowledged that in the letter of decision section cited by Mr Berg, it sounded like the issue related to Boccia was the main point, but it was actually wetlands protection.

Chairman LeBlanc stated that the letter of decision was more of a synopsis rather than actual minutes.

Mr. Jousse stated that he was looking at the April, 2001 plan, Appendix G. What he saw on the easel was substantially different from the plan. The part that is ambiguous was that white area outlined in the exhibit on the easel. In the plan, everything was squared off and on Appendix G, with the deck and double maple removed, it would create a jog which was not there. What is being asked for is not the same as what is on this set of plans.

Chairman LeBlanc stated that K-2 in Attorney Woodman’s packet was a picture of the back of the house. The second floor has a pair of french sliding doors on the side of the porch that had been constructed with the deck was attached directly to that. He didn’t see this as different.

Mr. Marchewka stated he thought that both plans added up to the same thing except one of them has a piece in the middle that doesn’t exist, or was not supposed to exist. He asked if they had approved whatever was built as one continuous construction or one with a hole in it.

There was a brief discussion of the various plans and exhibits among Messrs. Marchewka, LeBlanc and Witham.

Mr. Berg noted that the discussion was drifting from Fisher v Dover.

Chairman LeBlanc called for a vote.

The motion to invoke Fisher v. Dover, and not hear the petition, passed by a vote of 5 to 2, with Messrs. Berg and Jousse voting against the motion.

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II. PUBLIC HEARINGS

1) Petition of **Ralph M. Guerra Irrevocable Trust, Mary Lou Guerra Irrevocable Trust, Ralph Guerra and Mary L. Grego, owners**, for property located at **24 Taft Road** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow a 12' x 12' one story rear addition creating 23.8±% building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 268 as Lot 89 and lies within the Single Residence B district.

Mr. Parrott stepped down for this petition.

SPEAKING IN FAVOR OF THE PETITION

Mr. Ralph Guerra stated they would simply like to put a room on the back of their small kitchen. They had eliminated their in-ground swimming pool in anticipation of this addition. They hoped that would be in their favor and also the fact that the addition would be built on piers instead of a foundation. While the coverage would be 3.8% over, that only represented some 5 s.f.

In response to a question from Chairman LeBlanc, he stated that he believed the coverage currently was 22.3%.

Mr. Eric Court stated he was a direct abutter and had no problem with the application.

Mr. Marchewka asked how they had come up with a 12' x 12' size and Mr. Guerra stated it was a matter of economics. They were trying to match the porch.

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

With no one rising, the public hearing was closed.

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

The reasons he cited for granting the petition were as follows:

- With open space to the rear, the addition will allow light and air without negatively affecting the public.
- The best placement on the lot has been chosen for this standard size addition.
- The increase in building coverage on a small lot is minimal.
- The proposed improvements have received the support of neighbors and will not negatively affect property values.

Mr. Berg stated he agreed with the maker of the motion.

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

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2) Petition of **Richard T. and Jennifer J. Matthes, owners**, for property located at **69 Sunset Road** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow a 13'3" x 10' one story addition with steps and a 23' x 10' deck with steps creating 26.8%+ building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 153 as Lot 15 and lies within the Single Residence B district.

Ms. Eaton stepped down for this petition

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Richard Matthes stated they would like to expand their small kitchen to make it more efficient and safer for their growing family. The deck is also very old and needs an update. They have been considering various alternatives for two years. He noted that they were only seeking a 2% increase, 174 s.f. The petition was advertised as 26.8% building coverage but the building permit indicates 25.08%. This was perhaps because they had not known how to account for the fact that they were removing a deck to install the new one and did not account for the 210 s.f. being removed.

He covered the various criteria for granting a variance, stating they were not encroaching on any setbacks and the addition would not be visible from the street. He passed a letter of support from his neighbors to the Board. Their special conditions were that it was one of the smallest lots in their area and it was hard to make even a small expansion without going over the limits. They've hired architects and considered alternatives and moving the deck over to accommodate the kitchen is really the only way. The kitchen will actually block the view of the deck from the neighbors, so privacy will be improved. He felt values would be upgraded by the addition.

In response to a question from Mr. Marchewka, Mr. Matthes stated that the existing deck would be pulled further back from the neighbors.

Attorney Bernard W. Pelech stated that he was an abutter living at 175 Thaxter Road. He confirmed that the lot is small and felt the expansion was reasonable.

**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**

Chairman LeBlanc asked the applicant what the actual lot coverage was and Mr. Matthes responded that it was 24.19%. Chairman LeBlanc stated that the Board could grant less than was advertised.

Mr. Berg made a motion to grant the petition as advertised and as modified by the applicant with regard to lot coverage, which was seconded by Mr. Marchewka.

Mr. Berg stated that he would like to reference Mr. Marchewka's comments on the last petition. This was a small lot and anything done would require relief. This was a functional addition, which lined up with what existed there now. A neighbor had confirmed that it was a small house and lot and there was no other way to accomplish what the owners needed.

In seconding, Mr. Marchewka stated that there was open space to the rear so overcrowding was not an issue. The owners could have rebuilt the existing deck, but chose to pull it away from the lot line and the deck will now be shielded from view. He asked if the maker of the motion would agree to a stipulation that the deck remain open and clear to the sky.

After a brief discussion, Mr. Berg agreed to the stipulation.

The motion to grant the petition, as modified to 24.19% lot coverage and with the stipulation that the deck remain open and clear to the sky, was passed by unanimous vote of 7 to 0.

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3) Petition of **Mark C. and Julie Gagne, owners**, for property located at **1105 South Street** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow a 6’8” x 11’10” one story porch creating 27.1%± building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 150 as Lot 21 and lies within the General Residence A district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Mark Gagne passed out pictures of the property, which they had owned for nine years. They now needed a variance to construct a one-story porch, replacing brickwork in the front of the house which was badly deteriorating. The pictures don’t show the extent of the deterioration as he has done some repairs himself, but the cost to repair would exceed the cost of the porch. There would be no encroachment on surrounding properties. At the same time, they will correct the roofline, which should also help with ice runoff in the front.

**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. Berg.

Mr. Witham stated that the petition should be granted for the following reasons:

- This is a modest request which will allow the homeowner to finish off the front of the house without infringing on the side setbacks.
- An open porch will reduce the visual impact on a substandard size lot.
- The porch will provide protection to the main entry while allowing replacement of badly deteriorating brickwork.

Mr. Berg stated he agreed and had nothing to add.

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

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4) Petition of **Michael B. Travis, owner**, for property located at **66 Benson Street** wherein Variances from Article II, Section 10-206(2) and Article IV, Section 10-401(A)(1)(b) were requested to allow a duplex to be converted into a three unit building in a district that only allows single family dwellings on a lot, and 2) a Variance from Article III, Section 10-302(A) to allow three dwelling units on a 13,270 sf lot where 15,000 sf is the minimum lot area required for one



dwelling unit on a lot in the Single Residence B district. Said property is shown on Assessor Plan 233 as Lot 73 and lies within the Single Residence B district.

Chairman LeBlanc announced that the petition had been removed from the agenda by the Planning Department.

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5) Petition of **Temple of Israel, owner**, for property located at **200 State Street, 170 State Street and off Court Street** wherein a Variance from Article XII, Section 10-1201(A)(3)(a)(4) was requested to allow 13 existing non-conforming parking spaces to be located on site with vehicles backing into Court Street where backing out onto the street is not allowed. Said property is shown on Assessor Plan 107 as Lots 65, 66, and 75 (to be combined) and lies within the Central Business B, Downtown Overlay and Historic A districts.

SPEAKING IN FAVOR OF PETITION

Attorney Bernard W. Pelech stated that Temple Israel was proposing to add an elevator to an existing building between 170 and 200 State Street, add a new entryway on the Court Street side, and add a second floor to the rear of 200 State Street to provide more space. Because of these renovations, they need to seek approval to allow the 13 parking spaces which have existed for at least 15 years. He stated that parking is at a premium in that area and it would be a hardship to eliminate the spaces given the nature of the building, the proximity to Court and the fact that the spaces had existed for a number of years. No accidents had occurred as a result of their use. He felt the ordinance was unduly restrictive. They were not trying to create new spaces. These had existed and not interfered with any public rights or caused a diminution in value of surrounding properties.

Mr. Witham stated that, in looking at the site plan, it appeared that at least some of the spaces overlap onto City property near Court Street. He wondered if that presented any legal issues for the City if vehicles were hit, for example.

Attorney Pelech stated that, from the plan, it appeared that portions may be within the right-of-way. The project still had to be reviewed by the Planning Board, the Historic District Commission and Traffic and Safety and he felt any issues would be resolved there.

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

With no one rising, the public hearing was closed.

Mr. Parrott made a motion to grant the petition as presented and advertised, with the stipulation that the owner work with the City concerning a license for parking overlapping into the City right-of-way. The motion was seconded by Mr. Witham.

Mr. Parrott stated that if this were a new proposal, he might have a different view, but the parking has been there for some time and clearly has not caused any problem. There were no neighbors there to oppose the petition. Although this was a busy street, it was not the busiest and he suspected there was not heavy in and out traffic on a daily basis. The hardship was inherent in the land because the building and layout were what they were and a change would be inconvenient.

In seconding, Mr. Witham added that the slower speed along Court Street due to its tightness makes this a safe situation.

Mr. Berg added that the property was a place of public assembly and they would need as much parking as possible.

The motion to grant the petition as presented and advertised, with the stipulation that the owner work with the City concerning a license for parking overlapping into the City right-of-way, was passed by a unanimous vote of 7 to 0.

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6) Petition of **Gerald W. Sutherland Jr. and Debra Sutherland, owners**, for property located at **252 Holly Lane** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow a 12' x 12' two story addition with a 23'± front yard where 30' is the minimum required. Said property is shown on Assessor Plan 261 as Lot 46 and lies within the Single Residence B district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Gerald Sutherland stated they needed to build a 12' x 12' addition to accommodate a returning family member and the addition would also allow inside access to furnace room which currently is from the outside. He noted the house was currently very small and stated the neighbors were in support.

Ms. Debra Sutherland stated they were placing this in the front to square off the house and the addition would be no closer to the street than the existing house.

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

The reasons stated by Mr. Marchewka and Mr. Parrott for granting the petition were the following:

- The addition will be no more nonconforming than the house, which predates the requirements set by the current zoning ordinance.
- The addition will not affect the public interest as it simply extends the front line of the existing house.
- The way the house is configured on the lot, there is no other feasible location for the addition.
- Set in the middle of the lot, the addition will not infringe on the rights of neighbors or negatively impact property values.

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



7) Petition of **Ellen M Hepp Revocable Trust, owner, Ellen M, Hepp Trustee**, for property located at **28 Ridges Court** wherein the following were requested: 1) Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) to allow a 16' x 26' two story rear addition with a 5.8'± right side yard where 10' is the minimum required, and 2) Variances from Article IV, Section 10-402(B) and Article IV, Section 10-401(A)(2)(c) to allow the height of the existing garage to be raised to 11'6"± with a 2'± left side yard where 10' is the minimum required. Said property is shown on Assessor Plan 207 as Lot 67 and lies within the Single Residence B district.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Eaton stepped down for this petition.

Mr. Mark Hepp pointed out the house in orange on the blow-up on the easel and in the plan in the Board packet. He noted the property was unique in having such a long, narrow lot. They touch most of the abutters on their rear setback which allows more room between the houses. They were 8' from the front and 6' from the side setback. The house is in need of renovation and they would like to add two one-story structures, all within the setbacks with the existing porches. The back of the building was actually a one-story shed addition and they would like to put a second story on it. The size of the existing foundation would not be increased. The issue was that this part of the house was built on a dirt floor and was really soft so it's necessary to excavate, put in a concrete basement, fix the structure, and then add the second story. He stated that they had talked to the abutters and the neighbors closest to the property had signed a petition that they did not object.

He outlined the ways in which their petition met the criteria, including the existing building already infringing on the setbacks and that it was consistent with the neighborhood. He felt the upgrade would improve the neighborhood aesthetics and property values.

In response to a question from Chairman LeBlanc, Mr. Hepp stated that the reason for raising the roof on the garage was to create the same pitch as the house and improve the roofline. They were only adding about 12", not enough for a room.

Anne Whitney stated she was the architect for the project. Raising the roof on the garage would add a little more storage room, but the main reason was aesthetics and to match the existing structure. Regarding the addition, they were doing a vertical expansion. They needed to take the building down due to the poor construction of the foundation. She referred to page 3 of 3 of her plan, on which the shaded areas showed the impact of the vertical expansion within the setback. In this zone, it was not unusual to have existing properties within side or front setbacks. They were not increasing the setback; they were following the existing footprint of the one-story addition and improving the look.

Mr. Marchewka asked Ms. Tillman if the one variance was needed because they had to remove the foundation.

Ms. Tillman stated they would be removing a one-story structure and rebuilding in the same infringing side yard setback. They could go up where they are, but they felt the needed to redo the foundation.

Ms. Anna Gringle, a neighbor, stated she supported the petition.

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

Mr. Marchewka stated that most of the work was conforming, which is unusual in the South end. The nonconformity results from a decision to remove a section of the house for safety purposes and rebuild what is there with another story on top. If there were no issues with the foundation, a renovation would be allowed without coming before the Board. As far as the garage is concerned, this was just an aesthetic improvement.

He stated the following reasons for granting the variance:

- The vertical addition would be permitted without a variance if the foundation did not have to be rebuilt for safety reasons.
- Built in line with the existing wall of the house, there is no better location for the addition.
- The renovation to the garage is minor and will be an aesthetic improvement.

Mr. Berg, in seconding stated he agreed and had nothing to add.

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

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8) Petition of **Anne Elizabeth and Alan Gregg Weston, owners**, for property located at **43 Pray Street** wherein Variances from Article III, Section 10-303(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow: a) a 5' x 13' one story addition with a 3'± right side yard where 30' is the minimum required, b) a 5' diameter spiral stair with a 4'.6''± right side yard where 30' is the minimum required, c) a 5' x 15'10" first floor deck with stairs with a 5' right side yard where 30' is the minimum required and 10' rear yard where 20' is the minimum required, d) a 5' x 11' second floor deck with a 5' right side yard where 30' is the minimum required and a 10' rear yard where 20' is the minimum required; and e) 53.6±% building coverage where 30% is the minimum required. Said property is shown on Assessor Plan 102 as Lot 39 and lies within the Waterfront Business and Historic A districts.

Chairman LeBlanc stepped down for this petition. Vice-Chairman Witham assumed the chair.

Prior to opening the meeting for discussion, Vice-Chairman Witham stated he had done some math using the information in the packet and felt there was a decrease of 4 s.f. in lot coverage.

With this reduction, if they granted relief, it would be less than advertised so they could go forward. He just wanted it noted.

SPEAKING IN FAVOR OF THE PETITION

Mr. Roe Cole stated he was the contractor for the project and that there was a reduction of between 4 s.f. and 6 s.f. in lot coverage. The owner needed to expand an extremely small living space. They were removing a small shed, which was in the side setback and wanted to construct in its place a one-story addition in line with the porch. They would also enclose the bulkhead door to make it more of a standup entrance door. They had the lot surveyed and he passed out plans to the Board.

After the survey, they found out that the existing fences were on their property, which further reduced the setbacks that were given. The addition, with the shed on the right hand side will allow them to expand the kitchen space, which is greatly needed. There are no possible alternatives which would allow them to conform to the standards. The lot is nonconforming and the lot coverage already exceeds what is allowed. The existing footprint, some 16' wide by 13' deep is neither wide nor deep enough to accommodate a kitchen and dining room. He stated that granting the variance will not have a negative impact on surrounding properties and will actually offer some extra water views to the next door neighbor.

Mr. Sanders asked about neighborhood response. Mr. Cole stated that the neighbors were in support with the exception of Miss Hopkins. He felt it would be an upgrade for the neighborhood.

In response to questions from the Board, Mr. Cole stated that there was a 3.5' picket fence on the plan which he assumed was the space between the houses at the back. Without entering on the neighbor's property and viewing only from the street, he would estimate the space between the main bodies of the house to be at least a couple of feet.

Ms. Anne Weston stated that she hoped the Board had the opportunity to view the property and note that the entire porch is rotted. Their changes would improve the neighborhood because that part of the house looks derelict right now.

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Bernard Pelech stated he was appearing on behalf of Miss Jeannette Hopkins, the abutter to the left. Some of the plans submitted show a 3" setback to the property line at the rear of the Weston home. He estimated that the space between the two homes was 2' or less, Miss Hopkins estimating it to be 16". They were talking about setbacks of less than 3' on one side and maybe 3 ½' on the other. He stated that repairing the property and replacing the rotting porch and steps could be done without an expansion of this magnitude. There would not be adequate space for light and air or emergency access. While a hardship may exist, it was not in the public interest to allow eight variances. He stated that an eighth variance would be required because the left building was going from one story to two, a vertical expansion within the left setback which had not been advertised. This would mean an additional story and a half within 16" or a foot of the property line. Looking at the architect's renderings, the Board could see what Miss Hopkins referred to in her letter as the "wall".

Regarding the need for expansion, Attorney Pelech stated that there was currently an office which could be converted into a living room or a dining room. Two bathrooms with amenities are being added on the second floor which currently has two bedrooms. The variances are not needed for the applicant to use the property, but Miss Hopkins property value will diminish by continuation of a massive wall that close to the property line.

Miss Jeannette Hopkins stated she lives at 39 Pray Street and could only speak to her experience. They had bought the house in large part because of the gardens, which need light to grow. She didn't like to speak because she liked her neighbors, but felt she owed it to her house and any successors. With her decreasing mobility, she planned to move to the first floor and the back of the house would face a looming wall. She stated she wished the neighbors could meet their needs without creating a hardship for her.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Cole stated that he wasn't sure what Attorney Pelech was referring to when he stated they were expanding by a story and a half. What they were seeking that evening had nothing to do with the second floor and there was no variance for the second floor. They were seeking variances as submitted – removing the shed in the back and increasing the footprint of the house. They were actually opening up the back yard for Miss Hopkins.

Ms. Tillman stated that, in general, the second floor addition would not require a variance as it was not overhanging or intruding further into the setback. A straight, vertical expansion, one floor on top of the other without removing the first floor, would not need a variance. The second floor on the rear of the building was not in question. The variances on the side were required and application had been made for them.

Attorney Pelech stated that the second floor addition, now a two and a half story addition as opposed to a one and a half story addition was being expanded within the left yard setback and the rear yard setback. It's always been the position of the Court, as in the case of Granite State Minerals v. the City of Portsmouth that a vertical expansion within the setback does require a variance.

Ms. Weston stated it was not two and a half stories. It was a single story, going up one story.

DECISION OF THE BOARD

Vice-Chairman Witham stated they had five variance requests before them. He felt they didn't need to consider variance request e) since the applicant presented it as a 4 s.f. decrease in lot coverage and he had also come up with the same number.

Ms. Tillman stated that structures were going to be torn down and rebuilt so they were still going to need relief for building coverage.

Vice-Chairman Witham stated that e) would then still be needed. The 4 s.f. change in lot coverage wasn't going to change the percentage, so it was 41.9% of lot coverage.

Ms. Tillman stated she couldn't verify the percent as she didn't have all the figures, but she had worked it out several times with the contractor and it came out to 53.6%.

Mr. Berg stated that they were o.k. as long as what they would grant, whatever the actual number, didn't exceed the advertised 53.6%.

Vice-Chairman Witham stated that he just wanted it noted that there was roughly 12% difference in lot coverage between what had been presented and what had been advertised.

Ms. Eaton asked Ms. Tillman what had changed from what was there and what was proposed.

Ms. Tillman referred her to the first two sheets of the drawings. There was an area, colored green on her sheet on her site plan, where it says "to be removed or TBR". The shed and bulkhead will be removed and, if you look at the pictures of the shed and the bulkhead, you can get an idea of what they represent.

Mr. Cole indicated the shed was to the left in the picture, roughly 4' tall.

Ms. Tillman continued that those two structures would be removed and there would be a one-story addition there as shown on the next sheet. That will come closer to the side property line. The new addition, labeled #1 in blue on the second site plan is now 5' x 13', so that's an expansion. They're making it wider and extending it back over the area of the previous shed and bulkhead. The elevations show a spiral staircase coming down from the second floor deck. That will land on a new deck area, and then you have the deck over deck.

Ms. Eaton asked if that was where there was nothing now.

Ms. Tillman responded, "yes" and reiterated the relevant features on the plans.

Mr. Parrott asked the height of the addition at the back. It looked like two and a half stories and there were several features shown, at least one of which wouldn't be put in, he felt, if it was just a shallow attic.

Vice-Chairman Witham stated that the number of stories was not an issue. It was an allowable expansion even if the variances before them were denied.

Mr. Parrott disagreed, stating that the ordinance speaks of light and air and the addition certainly affected light and air.

Ms. Tillman stated that permits are issued every day for vertical expansions within the setback. This case would require Historic District Commission approval, but anywhere else, it would be allowed as long as the second floor was not expanded. This is why it was not advertised.

Mr. Marchewka noted that Attorney Pelech disagreed and Ms. Tillman stated she understood that.

Mr. Parrott stated he also disagreed.

Vice-Chairman Witham stated he felt they should apply light and air to the variance request before them, not the height of the second floor addition.

Mr. Parrott stated he was – that was exactly his point.

Mr. Berg made a motion to grant the five variance requests as presented and advertised.

Ms. Tillman asked if he could make a note that the building coverage was as adjusted to the dimensions presented.

Mr. Berg stated he was willing, but he thought she had gone through the advertised dimensions several times with the contractor.

Ms. Tillman stated she had, but there was a question on Mr. Witham's part so the discussion was to adjust the building coverage not to exceed 53.6%, but as adjusted to the dimensions on the plan.

Vice-Chairman Witham stated he would second the motion, but only to requests a), c) and e), taking out the second floor deck and the stairs.

Mr. Berg asked if he was then requesting him to remove the deck and the stairs that go to it from the motion, so that b) and d) would be considered separately.

Mr. Witham replied, "yes."

Ms. Eaton asked if the building lot coverage was really an increase because, otherwise, she could support the motion.

Mr. Berg stated it was not.

Mr. Berg stated that he would like to withdraw his first motion, as there was no second, and make a new motion to grant variance requests a), c) and e) as presented and advertised with the building coverage adjusted to the dimensions on the plan, not to exceed 53.6%.

Vice-Chairman Witham seconded the motion.

Mr. Berg stated he sympathized with the neighbor but, as explained to them by the Planning Department, the area concerning her was not one of the areas where relief was needed.

Looking at the three variance requests, he stated that the lot coverage was not increased over what was there now and there was actually a 4 s.f. reduction. This would result in less nonconformity which would be in the public interest and the spirit of the ordinance. Two additions would be erected in place of existing structures resulting in slight changes. The changes would make the property more functional for the owners and be consistent with the spirit of the ordinance because there would not be an increase over what was there now.

The special conditions would be the unusually narrow size lot. Enforcing the setbacks would obliterate the property. The proposed changes were in line with the existing property, which was nonconforming. The additions should not increase the density of the property. The only testimony

from a neighbor as to diminution in the value or use of their property was for the change which did not require the Board's review.

Vice-Chairman Witham seconded the motion for requests a), c) and e), which were modest and reasonable. With specific reference to e), the lot coverage was actually decreasing. With c), a rotting deck will be replaced with an uncovered deck. The other addition was for building over an existing shed and bulkhead area, which was a small area and would have minimal impact. He could not support b) and d) as they would impact light and air.

Mr. Marchewka stated that he agreed with Mr. Witham that what they were voting on here did not pertain to the two story addition, which was the issue for the neighbor. Requests a), c) and e) could be granted regardless of how light and air would be affected by the second story, which was not before them. He would support the motion.

Mr. Parrott stated that his concern was the lot coverage, which was way over, and the difference of opinion as to what it is. It was advertised as 53.6% and he asked what the department's opinion was.

Ms. Tillman stated it was as presented on the drawings. The existing square footage, less that removed, plus the additions, if granted, would be the building coverage as adjusted.

Mr. Parrott stated he didn't know what that figure was.

Vice-Chairman Witham stated it would be as presented; they may not get to an exact figure that evening.

Mr. Parrott asked if they were confident that it was less than requested and Ms. Tillman stated it was equal to, or less.

Mr. Marchewka stated that they were removing and rebuilding structures so there would be less coverage.

Ms. Tillman clarified that item a) was a 4' x 12' structure going to a 5' x 13' so this was an expansion, not a decrease.

There was further brief discussion of the lot coverage, concluding that, if the contractor were incorrect and it exceeded what was advertised, he would have to come back.

The motion to grant requests a), c) and e) with the stipulation that the building coverage will be as adjusted to the approved dimensions on the plan, not to exceed 53.6%, was passed by a vote of 5 to 2, with Messrs Marchewka and Parrott voting against the motion.

Mr. Marchewka made a motion to deny variance requests b) and d), which was seconded by Mr. Parrott.

Mr. Marchewka stated they were talking about light and area in a very crowded area. Allowing the porch and spiral staircase would add to the overcrowding. Although they had not heard from neighbors on this side, there was already a lot of building on a small, narrow lot.

In seconding, Mr. Parrott stated that, with the neighbor’s back yard only a few feet, there was a potential for intrusion on their privacy. Something that existed was not being taken away as the property did not have a second deck at present. He felt that light and air would be affected by this construction.

Mr. Berg stated he didn’t see how light and air would be affected because the deck was a permeable surface and didn’t extend as far out as the deck below which they had approved. There was no setback question. Since they hadn’t attached an open-to-the-sky requirement to their approval, could they put in a permeable surface like a trellis?

Ms. Tillman asked if he meant like an arbor and Mr. Berg stated, “yes.”

Ms. Tillman stated that, then, would be a structure.

The motion to deny variance requests b) and d) passed by a vote of 6 to 1, with Mr. Berg voting against the motion.

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**III. ADJOURNMENT.**

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

Respectfully submitted,

Mary E. Koepenick, Secretary