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

7:00 p.m. **CITY COUNCIL CHAMBERS** **NOVEMBER 21, 2006**

MEMBERS PRESENT: Chairman Charles LeBlanc, Steven Berg, Alain Jousse, Duncan MacCallum, Robert Marchewka, Arthur Parrott, and Alternate Carol Eaton

EXCUSED: Vice Chairman David Witham, Alternate Henry Sanders

ALSO PRESENT: Lucy Tillman, Chief Planner

A) Approval of Minutes

- August 22, 2006
- October 17, 2006

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

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B) Abutter filed a Request for Rehearing for property located at **43 Pray Street**.

Chairman LeBlanc stepped down for this request. Mr. Marchewka assumed the Chair.

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

Mr. MacCallum stated that, although he was not present at the previous meeting, he had viewed the rebroadcast and agreed with some of the points made by Attorney Pelech. One of the issues was whether a variance was required for the 2-story addition on the left side of the property. During the discussion, Attorney Pelech cited the Granite State Minerals, case, stating that the Court had concluded that a variance was required for an upward expansion despite the fact that the property owner wasn't expanding the footprint. This was contradicted by Ms. Tillman who stated that the Planning Department's understanding had been that building upward on the same footprint did not require a variance.

Mr. MacCallum stated he had researched the case, which he briefly outlined, and believes that the Supreme Court had ruled that a variance was necessary for upward expansion on the same footprint and the Planning Department should not be issuing permits in those situations without requiring a variance. He stated that Ms. Tillman had pointed out that the language of the zoning
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ordinance had changed since the Granite State Minerals decision, but he felt the issue merited reconsideration as whether the language had changed and the impact, if any, had not been addressed in the initial hearing.

Mr. Berg stated that he agreed that the second floor expansion required a variance, but that was not a variance on which the Board had made a decision. While he was inclined to grant the appeal from the Administrative Decision, which concerns vertical expansion and would be heard later, he wasn't sure a rehearing should be granted.

Mr. MacCallum stated that, in his arguments against granting the variances, Attorney Pelech had referenced the Granite State Minerals case several times, noting that a variance was needed for the second story expansion. This issue had not been adequately considered at the previous meeting which constituted, in his opinion, a clear error in reasoning in arriving at the Board's decision, which was one of the criteria for granting a rehearing.

Ms. Tillman stated that the previous month's hearing had been for additions on the right hand side of the house, part of which were granted and part denied. At some point during the hearing, there was a question as to whether a variance should have been required for the second story at the back and this issue was covered by the appeal to be heard later. She read the description of the variance requests that had been considered as listed in the published Legal Notice, noting that this was Mr. Berg's point – what had been heard was what had been advertised.

Mr. MacCallum stated that Mr. Parrott had remarked at the previous meeting that, even though a variance may not be required for a portion of a project, it may be taken into consideration when considering others. The issue of building up bore on all the others.

Mr. Parrott stated that he had been concerned that there was not more discussion about the second story requiring a variance since Section 10-401(2)(c) states that "A building or structure nonconforming …shall not be added to or enlarged unless such addition or enlargement conforms to all the regulations of the district in which it is located." He disagreed with Attorney McEachern's Answer to the Request for Rehearing in which he had stated that a rehearing couldn't be granted because the challenge wasn't to a direct action taken by the Board. This may have been factually correct, but only because the Board had been told they did not have to deal with the second story. If it had also been before them for a variance, they might have looked at the others differently. He thought the second floor porch that was denied was adjacent, or attached, to the requested addition. He felt that inputting one story on top of the other could be considered an addition and/or enlargement and agreed that a rehearing was appropriate.

Mr. Jousse stated he agreed with Mr. Berg and Ms. Tillman and didn't see where an error on procedures or the law had been made on the actual requests made for this property. Although mentioned, the second story was not before them. The vertical expansion issue was going to be covered in the appeal to be heard later.

Ms. Eaton stated that she agreed with Mr. Parrott that, when considering the case before them, they were also considering other issues. She felt that, on a case-by-case basis, a vertical expansion could be considered against the spirit of the ordinance.

The motion to grant the rehearing was passed by a vote of 4 to 2.

Chairman LeBlanc resumed the Chair.

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C) Applicant Filed Request for Rehearing for property located at **80 Curriers Cove**.

Mr. Parrott stepped down for this request.

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

Mr. MacCallum stated he was thoroughly familiar with the property. He couldn't find a serious flaw in the reasoning used by the Board in applying Fisher v. Dover , noting that this petition amounted to the same that had been denied in 2002. He outlined what his position would have been on applying Fisher v. Dover if he had been in attendance and reviewed positions of several Board members. While he probably would have voted against applying Fisher v. Dover, he couldn't say that the Board members who voted to do so were wrong. The issue was whether the decision of the Board was clearly wrong and he concluded there was no clear error in reaching the result. Both sides had strong arguments and both sides were heard. There was no basis for having another hearing.

Chairman LeBlanc agreed, stating that there had been a reasonable discussion and decision and there had been no new information presented to justify a rehearing.

The motion to deny the request for rehearing was passed by a vote of 4 to 2, with Messrs. Berg and Jousse voting against the motion.

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II. PUBLIC HEARINGS

1) Petition of **Shaun J. and Catherine A. Ennis, owners**, for property located at **59 Oxford Avenue** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow a 6' x 33'6" porch with steps having a 4'± front yard where 30' is the minimum required. Said property is shown on Assessor Plan 258 as Lot 6 and lies within the Single Residence B district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Shaun Ennis stated that their new porch will enhance the feel of the neighborhood. Their front steps are in disrepair and a porch will solve that problem. He passed out photographs of the current front of their house and a facsimile of the porch.

SPEAKING IN OPPOSITON 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. Berg made a motion to grant the petition as presented and advertised, which was seconded by Mr. Jousse.

Mr. Berg stated that the existing steps are crumbling and the owner wants to repair that problem while improving the appearance of the house and bringing the porch into the neighborhood. He stated the petition should be granted for the following reasons:

- With an existing house built close to the front property line, a front porch cannot be built without infringing on the setback.
- Existing stairs which are deteriorating and unsafe will be replaced by an attractive structure which should add to property values.
- There will be no increase in living area or density.

Mr. Jousse echoed his comments.

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

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2) Appeal from an Administrative Decision by **Jeannette E. Hopkins abutter** concerning property located at **43 Pray Street owned by Anne Elizabeth and Alan Gregg Weston** wherein an appeal is requested concerning the decision that the owners do not need a Variance to add on to and enlarge the 1 story portion of the residence which violate the current side yard setback requirement. 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. Mr. Marchewka assumed the Chair.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin passed out some material to the Board.

Mr. MacCallum made a motion to table the petition to the next meeting, which was seconded by Mr. Parrott.

Mr. MacCallum stated he had not received the materials with enough time to study them. Since a rehearing had been granted for this property, they could entertain both issues on the same evening.

The motion to table the petition to the December meeting was passed by voice vote, with Mr. Jousse voting “nay.”

Attorney Alec McEachern asked to be heard and stated that he would like the petition to be heard for the record. He detailed why, procedurally, he would like the Board to take up the appeal that evening. It would affect preparation for next month’s hearing and, depending on the decision, he would have time to appropriately counsel his clients.

Acting Chairman Marchewka asked if the maker of the motion would agree.
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Mr. MacCallum stated that Attorney McEachern had made a legitimate point and he would like to poll the members.

Mr. Parrott asked if they should get guidance from the City Attorney because the discussion was getting beyond the substance of what they were to consider and getting bogged down in procedural matters touching on the law.

Acting Chairman Marchewka stated that the question back before the Board was whether to hear the petition that evening or the next week.

Mr. MacCallum stated his inclination was still to table. It was a matter of discretion whether they tabled or not. It wouldn't be wrong either way.

Mr. Berg stated he would like to hear it that evening as it clears things up procedurally.

Mr. Jousse stated that what they had agreed to rehear was the same application as a month ago, which had nothing to do with a second floor going onto the dwelling. If they made a decision on the appeal that evening, then they could either rehear the petition as presented a month ago, or hear a new variance with all of the previous requests plus the one covered by the appeal. It would be a lot cleaner.

Mr. MacCallum made a motion to remove the petition from the table, which was seconded by Mr. Berg. The motion was passed by voice vote, with Mr. Parrott voting "nay."

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin stated he was appearing at the request of Attorney Pelech who represented the individual requesting the appeal. The appeal had to do with the way the Planning Department had interpreted the ordinance. Miss Hopkins, whose home abutted the property, was concerned that the proposed addition would present a massive wall 16" from her home which would affect air and light and also some of the views from her back window. Reading the appropriate definitions from the ordinance, he noted that the Weston home is a non-conforming use and structure. He also cited Section 10-401(A)(2)(c), "A building or structure nonconforming as to Dimensional requirements shall not be added to or enlarged unless such addition or enlargement conforms to all the regulations of the district in which it is located." He concluded that the intent of the drafters of the ordinance was to not permit expansion of a non-conforming use. He also didn't think there could be doubt that the enlarging proposed by the owners was, in fact, an enlargement of a non-conforming structure.

Attorney Loughlin stated that this wording hasn't been interpreted by the New Hampshire Supreme Court. As Mr. MacCallum pointed out, Portsmouth's Ordinance was interpreted in the Granite State Minerals case. He looked at the wording in the 1982 Ordinance and the 1995 Ordinance and saw some minor changes, which didn't have the effect of overruling or changing the interpretation of the Granite State Minerals case. The bottom line was that the Court said that you can't go up and construct additional stories in the setbacks. He didn't agree with the Planning Department that this interpretation would generate a lot of cases. He noted that, if the petitions from that evening were all granted, not one would have the impact on the Hopkin's property that

the proposed vertical expansion would have. He stated he didn't know of any other towns allowing vertical expansion in a setback without a variance, noting that this type of expansion affects light and air, which is protected by the ordinance. As a matter of policy and legality, they request that this appeal be granted.

Mr. MacCallum asked that Ms. Tillman explain how the change in the zoning ordinance since the 1982 version potentially changes the impact of the court decision in Granite State Minerals.

Ms. Tillman stated that, as she recalled, in the 1982 Ordinance as quoted in the Granite State Minerals case it talked about non-conforming uses, which included buildings. In 1995, when the ordinance was rewritten, they broke apart non-conforming uses and non-conforming buildings. Section 401 addresses non-conforming uses and, separately, non-conforming structures and buildings. The Planning Department had been granting building permits, as long as all other criteria in the building code are met, for, say, a house with a non-conforming front yard where they are putting on a second story, going vertically and not increasing the footprint. Similarly, the Board makes stipulations about decks they grant being "free and open to the sky" because with vertical expansions, owners could take a deck and enclose it without a variance. A variance would only be needed if they took down a non-conforming deck and started from scratch. She cited a recent example on Ridges Court where the applicant was rebuilding a foundation

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Alec McEachern submitted a Memorandum in Support of Administrative Decision to the Board. He stated that the Westons had been told what was needed for variances and now it was being alleged that another variance was needed. In appealing the Code Officer's decision, Miss Hopkins is relying on the Granite State Minerals case which had been decided under the prior version of the ordinance which did not differentiate between non-conforming uses and structures. After the decision, the ordinance was amended to provide separate provisions for non-conforming uses and non-conforming structures. As indicated in the Planning Department memorandum, Section 401(A)(2)(c) has been consistently interpreted and enforced by the Planning Department to allow additions to existing structures which are non-conforming as to setbacks or lot coverage provided the addition does not increase the non-conforming nature of the footprint and all other zoning provisions are satisfied. The Planning Department's interpretation is consistent with the language of the ordinance which, in its second sentence, focuses on whether the non-conformity is being expanded. It is noted in the memorandum that the proposed addition would not increase the non-conformance and would conform to all the regulations of the district because it would not change the use of the property, the building footprint or setbacks or building coverage or require additional parking. On that basis, the Code Officer had determined that a variance was not required.

Under Littky v. Winchester School District, Attorney McEachern stated that the Department's longstanding consistent interpretation and enforcement of the cited section was entitled to substantial deference. To the extent there is doubt as to the meaning of this provision, it has been stated by a local author that, "Traditional interpretation of an ordinance of doubtful meaning by those responsible for its implementation, without any interference from the legislative body, is evidence that such construction conforms to the legislative intent. …if the 'administrative gloss' placed upon a particular clause of the zoning ordinance over a period of years is to be changed, the

local legislative body, and not the local zoning officials, must do it."

Attorney McEachern concluded that, based on the Planning Department's longstanding, consistent interpretation and enforcement of the cited section, which interpretation the City Council has not sought to change, the Board should uphold the Code Officer's decision. A ruling otherwise would require a variance for any addition over a nonconforming footprint, whether that nonconformity is based on a setback or lot coverage.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Loughlin stated that he disagreed that every time a footprint was expanded a variance would be needed. If you expand in the setback area, a variance would be needed. The quote that Attorney McEachern read said "traditional interpretation of an ordinance of doubtful meaning." He didn't see anything doubtful about this. In the case of Hanson v. Keene, the Court found that the Keene Planning Board had wrongly interpreted an open space requirement many times. The Court found there was nothing "doubtful" about it; they just got it wrong. Attorney Loughlin reiterated that there was nothing doubtful here; he didn't see how it could be written more clearly.

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

DECISION OF THE BOARD

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

Mr. MacCallum stated that, while he wished he had more time to review all the materials and the memorandum handed in that evening, the bottom line was that the New Hampshire Supreme Court had spoken in Granite State Minerals and he was inclined to adopt the Court's interpretation rather than the Code Officer's determination in light of the zoning ordinance itself. He leaned toward Mr. Loughlin's interpretation of the ordinance. There were also policy reasons why owners such as the Westons should seek a variance for an addition such as this, some of which were spelled out in Granite State Minerals and another articulated by Ms. Tillman in describing the large addition. This should come before the Board and the building permit, if issued, should be rescinded until such time as the Westons come before them for a variance.

In seconding, Mr. Parrott stated that the structure was clearly non-conforming as to dimensional requirements and adding a story is either an addition or enlargement, or both. The fact that this paragraph in the ordinance applies to it seems clear to him. The quote that Mr. McEachern provided to them was simply saying that, as a matter of common sense and making things work, if you have doubtful meaning, you have to put some interpretation on it and that, if whoever makes the rules doesn't change it, then that should stand. Mr. Parrott stated he didn't feel that applied in this case as the meaning of wording in our ordinance was not doubtful, but was pretty straightforward.

Mr. Marchewka stated that what he saw as doubtful was the interpretation by the Planning Department over the years. He asked Ms. Tillman for confirmation that the Planning Department has interpreted the cited section as not applying to vertical expansions.

Ms. Tillman stated they had been granting vertical additions that don't increase the setback or change the use of property, if that was the nonconformity. She stated, "correct" when he asked if that was how it had been interpreted since the section of the ordinance was written.

Mr. Marchewka stated that he read the other paragraph that Mr. McEachern had given them referencing doubtful meaning as saying that this interpretation we have used over the years should be continued unless clarified by the City Council. He noted they hadn't had time to study the presentation.

Mr. Berg noted for the record that Attorney McEachern had presented a memorandum prior to his comments and they had not had time to read it. While his comments may be a verbatim statement of the memorandum, the Board members have to base their decision on Attorney McEachern's spoken words, not the memorandum that was presented.

Mr. Berg stated that he was not going to address the owners' right to have a second floor as that could be decided separately. He wanted to speak to whether or not an error had been made and felt that the ordinance was very clear. If there was any question on Section 10-401(2)(c) which treats "adding or enlarging" being silent on the question of going up, he felt it was clarified in 10-401(2)(b). This section outlined how a nonconforming building which had been damaged by fire could be reconstructed or restored as long as it did not enlarge overall floor space, the height of the building or cause the building to become more nonconforming. He felt it was clear from that section that non-conformity does relate to how many floors there are, as opposed to simply the footprint.

With regard to Mr. Marchewka's point that this has been the interpretation over the years and it's up to the City Council to decide, Mr. Berg stated that the position was clearly written in the ordinance. He was concerned at the precedent that could be set by saying that, simply because the department has done something for a number of years, it had been codified into new law. He felt that the wording in the ordinance was what the City Council voted on in 1995 and they shouldn't have to vote on it again because the Planning Department had interpreted it differently. It was clear that Granite State Minerals does apply and the owners can't build up without a variance.

Mr. Jousse stated that, while he didn't like the interpretation of this part of the ordinance, he had to go along with it. This is in line with the requirement that changing any exterior part of a dwelling that is within the setbacks needs a variance.

The motion to grant the appeal was passed by a vote of 5 to 1, with Mr. Marchewka voting against the motion.

Chairman LeBlanc resumed the Chair.

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3) Petition of **Keith B. Prince and Jeremy T. Colby, owners**, for property located at **43 Rutland Street** wherein the following are requested to construct a 24' x 24' one story garage: 1) a Variance from Article III, Section 10-302(A) to allow a a 27' front yard where 30' is the minimum required and, 2) a Variance from Article IV, Section 10-402(B) to allow 6' left side yard where
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10’ is the minimum required. Said property is shown on Assessor Plan 233 as Lot 15 and lies within the Single Residence B district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Keith Prince, the owner, noted that the 6’ setback on the left side, in looking at the drawings he had submitted, is just the back corner of the garage. They are trying to keep the driveway in line with the house so the garage is somewhat at an angle. The 27’ front yard instead of the 30’ is so they don’t have to move the fence by the tree line. The trees can’t be seen on the sketch

In response to questions from Chairman LeBlanc and Ms. Eaton, Mr. Prince stated that the garage couldn’t be closer to the house or front as they wanted to keep in line with the existing driveway and there was no current garage

Mr. Parrott asked about the change in dimensions from 20’ x 20’ to 20’ x 24’ inked in on the plan and Mr. Prince stated they changed the dimensions when they realized the car would not fit into the garage.

Mr. Berg asked about the driveway’s composition and, upon Mr. Prince’s response that it was compacted dirt and crushed stone, asked why it could not be moved back.

Mr. Prince replied because of the tree line and fence and, in response to a question from Mr. Jousse, stated that the fence and the property behind it belonged to him. There were two section of the fence, one just a couple of feet behind the garage and then the entire back yard is fenced in, but between the fence and the garage there’s a stand of trees.

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. MacCallum made a motion to deny the petition, which was seconded by Mr. Parrott. Referencing the reasons outlined in the departmental memorandum, he stated there was nothing to stop the owners from moving the garage closer to the house or building a smaller garage. The only explanation that had been given was the location of the driveway. Even if the driveway were asphalt, it would not be sufficient grounds, but this was just compacted dirt and crushed stone. A garage is not a necessity and there was no strong reason why they could not comply with the ordinance.

Mr. Parrott added that sometimes compliance with the ordinance was difficult due to the orientation of the lot or considerable expense, which created a hardship. He didn’t feel there was a hardship in this instance; it was clearly a choice to do it in a certain way.

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

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4) Petition of **Adam C. Hegi and Cheri E. Haley, owners**, for property located at **50 Cottage Street** wherein a Variance from Article II, Section 10-206(11) is requested to allow two Home Occupation I businesses (Primal Media 182 sf existing and Guru Computer 299 sf proposed) within a dwelling unit and having a total of 481 sf where one business per dwelling is generally allowed and a maximum of 300 sf is allowed. Said property is shown on Assessor Plan 163 as Lot 29 and lies within the General Residence A district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Adam Hegi passed out a petition of support from the neighbors. He addressed the criteria for granting a variance, stating that the Home Occupation would not be contrary to the public interest as it would minimize the need to visit clients, reducing traffic and emissions. They would be in line with a growing trend of people working from home, which would allow them to keep a home here instead of having to move. Since they use computers to conduct their businesses, most of the neighbors were not aware that they had a home office. The space they were proposing to use as an office was separate and had its own entrance. While good for an office, it had limited other uses. He stated that the nature of their work was demanding and it was impossible to share a 300 s.f. office. Even if they put the two businesses under one name, they would still need the extra space. He described the neighboring properties, some of which were commercial, and stated that they would not be adversely affecting the neighborhood or property values.

In response to questions from Mr. Berg concerning the existing office, Mr. Hegi stated there was no direct access from the outside and no customers coming in; this was just a room in the house they happened to use as an office; they don't use it for non-work. He clarified that the existing home office was already registered and the office he was proposing to use was out back.

Mr. MacCallum asked Ms. Tillman if, under Home Occupation I, there was no restriction on the number of businesses as long as the 300 s.f. limit was not exceeded.

Ms. Tillman stated it had been general past practice to have one home occupation per dwelling unit and this was the first time they had a request for two. The second issue was that the combined square footage exceeds the total allowed.

Mr. MacCallum stated he believed that, as far as the language of the zoning ordinance was concerned, theoretically they could move in any number of home occupations as long as the square footage did not exceed 300 s.f.

Ms. Tillman stated that the Department would not be signing off on them. The object of Home Occupation I was to allow the homeowner to reasonably work within a dwelling as long as there was no impact on neighbors. In this instance, two Home Occupations were being requested.

Mr. MacCallum asked what the rationale was for the 300 s.f. limit.

Ms. Tillman responded that had been decided and approved by the City Council as a reasonable square footage. Most Home Occupation I uses are in smaller spaces.

There was a short discussion among Mr. MacCallum, Mr. Hegi and Ms. Haley about the need for 481 s.f. and how the space was used and furnished. Ms. Haley stated the two rooms were chosen as the best rooms and just happen to be of a certain size.

Mr. John Stephenson stated he was a resident on Miller Avenue and had no objections as there would be no signs, noise or chemicals. The situation will be confronted more frequently as more people work this way. He felt that granting the request would be in the public interest as, if the ordinance was interpreted too vigorously, it will make this type of activity more difficult and push people to other areas.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. MacCallum made a motion to deny the petition, which was seconded by Ms. Eaton.

Mr. MacCallum stated that, while he was impressed with the applicants, the issues went beyond them. They were allowed to have a Home Occupation I there, but the square footage had been set to limit activity in residential neighborhoods. He felt they could accomplish what they wish in 300 s.f. Additionally, he didn't see any hardship associated with the property or anything unique about it which would make it unreasonable for the property owners to comply with the ordinance.

He was concerned that the variance would run with the land and the same property with 481 s.f. of available use could be subject to abuse and would be a step in the direction of expanding the business character of residential neighborhoods. If there was a trend to home offices in residential districts, the solution is to go to City Council and request a change in the zoning ordinance.

Ms. Eaton agreed that it should be a City Council issue, stating that she was worried about setting a precedent of having two Home Occupations in a residential district which was trying to keep a residential feel.

Mr. Marchewka stated that he felt that the issue of one, two or more Home Occupations was being overblown. Realistically a person could have a home office in 50 s.f. and run five businesses. It was reasonable to allow two homeowners to work out of the home and where they operate shouldn't be an issue. The applicants were asking for a greater square footage but they were simply using two existing rooms, which were large. The space had other uses and, if the portion used for the offices was totaled, it would probably be within 300 s.f. or close to it. The bathroom should not be a part of the square footage.

Mr. Berg stated that he felt what they were doing was regulating what someone can do in the privacy of their home with no impact whatsoever on the neighborhood. When the ordinance was written, modern computers were not yet in place. With the couches in the rooms, the actual space used for business is less.

Mr. Parrott stated that he believes the City does have a legitimate interest in defining what businesses can be used. The City Council has chosen 300 s.f as a reasonable amount to devote to a home occupation, which is designed to preserve the residential character of a neighborhood, while still allowing folks the flexibility of working from home. He had a problem with increasing the space simply because the rooms are large. He would support two businesses, but keeping the space close to 300 s.f. in total so that when the house sells eventually and someone wants a different type of Home Occupation which might be more intrusive, there will be a limit.

Mr. Berg asked if the maker of the motion was open to splitting the decision into one dealing with two Home Occupations and a second dealing with the square footage.

Chairman LeBlanc commented that the businesses were for Home Occupation I, which meant no signage, or customers visiting, no impact on the area. The fact that they want 481 s.f. is simply a factor of the size of the rooms and keeping the building as constructed has a value. He felt they could configure the space to just allow for the 300 s.f. total, but that would bastardize the building. The hardship was the size of the building. It was in the spirit of the ordinance to allow people to spread out and work in a productive way. The protection against future use would be the Home Occupation I classification with its stipulations attached.

Mr. Jousse commented that that the applicant was not requesting to build special rooms, but was utilizing what they have.

Mr. MacCallum didn't agree that the size of the house was a hardship. In the spirit of compromise, with everyone else willing, he would split his motion into two parts. He stated he would vote to apply the 300 s.f. limit, but would go along with two businesses.

Chairman LeBlanc stated that they could, then, grant two occupations with 300 s.f. and leave it to the applicants to work with it.

Mr. MacCallum asked if Ms. Eaton would amend her second and she replied, "yes."

Mr. Marchewka suggested that a reasonable figure would be an increase of 10% over the 300 s.f., or 330 s.f.

Mr. MacCallum stated that he saw no justification for departing from the 300 s.f. figure.

Ms. Tillman noted that the motion on the floor was to deny the petition.

Mr. MacCallum stated he withdrew his motion and Ms. Eaton withdrew her second.

Mr. MacCallum made a motion to grant the request to allow two Home Occupation I uses on the same property, but the total amount of business use was not to exceed 300 s.f., which was seconded by Mr. Marchewka.

The motion to grant the request to allow two Home Occupation I uses on the same property with the stipulation that the total amount of business use would not exceed 300 s.f. was passed by a unanimous vote of 7-0.

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Attorney Loughlin requested that the petition regarding 3002 Lafayette Road be tabled until the next meeting of the Board.

Chairman LeBlanc asked if there was any objection to considering this petition out of order, with all responding, "nay."

6) Petition of **Mark B. and Chong Jou Kim, owners**, and **Mark B. Kim dba We Care Dry Cleaning, applicant**, for property located at **3002 Lafayette Road** wherein a Variance from Article IX, Section 10-908 is requested to allow: a) a 5' x 10' (50 sf) free-standing sign in a district where free-standing signs are not allowed and b) a 2' x 12' (24 sf) internally illuminated sign and 5' x 10' (50 sf) free-standing internally illuminated sign where only externally illuminated signs are allowed. Said property is shown on Assessor Plan 292 as Lot 13 and lies within the Mixed Residential Business district.

Mr. Parrott moved that the petition be tabled to the December 19, 2006 meeting, which was seconded by Mr. Marchewka and approved by unanimous voice vote.

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5) Petition of **Nathaniel E. and Francene M. Heard, owners**, for property located at **384 Lincoln Avenue** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 12' x 17'9" deck creating 25.9±% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 133 as Lot 2 and lies within the General Residence A district.

SPEAKING IN FAVOR OF THE PETITION

Ms. Fran Heard stated they wanted to take down the original deck and passed out some photographs showing how the porch is tucked in between the existing garage and the family room. They would want to put the stairs back so they can get down to yard. This was all within allowed setbacks.

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.

Mr. Marchewka stated that this was a reasonable request as the replacement deck would be unobtrusive and couldn't be seen from neighboring properties. The amount of relief requested was only .9%, very minimal.

Mr. Parrott stated he had nothing to add.

There was a brief discussion of adding a stipulation that the deck remain free and open to the sky, with the applicant indicating that the builder may want to cover part of the deck and Ms. Tillman indicating that any part not included in the .9% over lot coverage could be covered. Mr. Marchewka stated that the .9% was probably the stairs and did not add the stipulation to his 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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7) Petition of **Matthew D. Beebe and Barbara R. Jenny, owners**, for property located at **81 Lincoln Avenue** wherein the following are requested: 1) a Variance from Article IV, Section 10-402 to allow 12' x 21'8" x1 ½ story garage and attached 12'6" x 21' 1 story garage/studio with a 1.5'± left side yard and a 1'± rear yard where 10' is the minimum required, and 2) a Variance from Article III, Section 10-302(A) to allow 29.5±% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 113 as Lot 35 and lies within the General Residence A district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Matthew Beebe stated that they were looking to replace a structure which had significant damage to its undercarriage and was sagging badly. While it was taxed as a garage, it could not safely be used as a garage. They couldn't salvage it so they were asking to demolish the garage and put it back in kind in the same spot, with more of a coach house look.

Addressing the criteria, he stated that the hardship was that, with the size of the property, there was little of the existing structures that meet the setbacks. There was a little back yard and they were reluctant to move further into the property as they would lose the yard and open space. They had spoken to the neighbors who were in favor of rebuilding as the current garage is an eyesore. There were two driveways and a fence connnecting the garage to the house which also affected placement. He stated that rebuilding would enhance neighborhood property values.

Mr. Beebe stated that there were at least 6 garages in the area which were also right on the property line so this was in line with the neighborhood. He felt that an attractive, code compliant structure would be in the public interest by making properties more valuable and increasing taxes. Justice would be served by allowing them to replace in kind, as they could do if the building burned down.

Chairman LeBlanc asked about the bumpout on the garage studio and Mr. Beebe stated it was an architectural element on the side of the garage facing the back yard and didn't go down to the ground. In response to a question from Mr. Marchewka, Mr. Beebe stated they had adjusted the height a little as the current roof pitch was so shallow that it couldn't shed water.

SPEAKING IN OPPOSITION TO THE PETITION, OR
SPEAKING TO, FOR, OR AGAINST THE PETITION
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With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Jousse stated that the petition was not contrary to the public interest as the applicant just wants to tear down an unsafe garage and replace it with a garage and studio in the same location. There were special circumstances in the size of the lot and the existing structures and there was no better place to site the garage. Surrounding property values would not be affected.

Mr. MacCallum stated he had nothing to add.

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

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8) Petition of **Robert J. Chaffee and Barbara A. Trimble, owners**, and **Healing Environments**, **applicant,** for property located at 32 Miller Avenue wherein the following are requested: 1) a Variance from Article II, Section 10-207 to allow the building to be used as an office, library, group staff meetings, and to store and distribute publications for a private non-profit foundation, and 2) a Variance from Article XII, Section 10-1204 to allow 2 garage parking spaces and 6 open air parking spaces to be provided for 4,450 sf of office space (1 space per 250 sf of gross floor area) and a caretaker's master suite/apartment (1.5 per dwelling unit) for a total of 19 parking spaces required. Said property is shown on Assessor Plan 136 as Lot 18 and lies within the Mixed Residential Office district.

The petition was withdrawn at the applicant's request.

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9) Petition of **Pier II, LLC, owner**, for property located at **10 State Street** wherein a Variance from Article XII, Section 10-1201(A)(3)(A)(4) is requested to allow a vehicle to enter or leave a one-car garage by backing into a street where such use is not allowed. Said property is shown on Assessor Plan 105 as Lot 4 and lies within the Central Business A and Historic A districts.

The petition was withdrawn at the applicant's request.

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III. ADJOURNMENT.

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

Respectfully submitted,

Mary E. Koepenick, Secretary
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