

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

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

**October 28, 2008, Reconvened
From October 21, 2008**

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice Chairman David Witham, Carol Eaton, Thomas Grasso, Alain Jousse, Charles LeMay, Arthur Parrott, Alternate: Robin Rousseau

EXCUSED: Alternate: Derek Durbin

ALSO PRESENT: Lucy Tillman, Chief Planner

I. PUBLIC HEARINGS

8) **Petition of Murat Ergin and Sandra Carver Ergin , owners**, for property located at **251 Walker Bungalow Road** wherein Variances from Article III, Section 10-302(A) and Article XV, Section 10-1503(D)(2)(a) were requested to allow a 9'6" x 28' farmer's porch with a 20'± front setback where 30' is the minimum required. Said property is shown on Assessor Plan 202 as Lot 13-2 and lies within the Single Residence B district.

251 Walker Bungalow Road

SPEAKING IN FAVOR OF THE PETITION

Ms. Sandy Carver Ergin stated that they would like to construct a 9'6" x 28' farmers porch and enclose it for protection from the elements. She noted that they had submitted a proposal for a porch several years ago, which was denied. They have now redesigned the porch to sit further back from the street and reduced the size by 40%. The porch would provide a protected area for their children and shade in the summer, as well as adding a little more character to their home. She stated that they had an unusual arrangement in that there was a city street through a condominium development. They must comply with two sets of regulations, those in the Zoning Ordinance and those for the condominium association. She referenced the signatures of neighbors that they had submitted as an indication of support. She stated that one direct neighbor was in support of a front porch but not one on the side, noting that meant under condominium regulations, that a side porch was not an alternative for them.

Ms. Carver Ergin stated that there would be no harm to the public interest as they were at the end of a cul de sac and the closest point of the porch would actually be 30' from the edge of the

street. There was no opposition from neighbors and the essential character of the neighborhood would not be changed as similar additions had been made to a number of homes. She read a definition of a Planned Unit Development, or PUD, as well as the section from the ordinance dealing with PUD's. While this appeared to be a single family home it was actually a condominium within a PUD and a hardship was created by the imposition of the requirements of the Single Residence B district onto such a unit. She stated that the benefit they sought was to enjoy the front of their home and protect the doorway, while having the ability to monitor their children. There was no other reasonably feasible alternative as they couldn't move the home back. The light and air protected by the ordinance would not be affected as the porch was 30' from the street. Regarding justice, granting the variance would not result in any loss to the general public while it would create a hardship for them if they were denied a reasonable use of the property. There was no evidence that the value of surrounding properties would be diminished.

Ms. Rousseau asked if she was correct that the condominium association held the deed to the land and Ms. Ergin stated that they owned their lot. Ms. Rousseau stated that, without a copy of the condominium documents, she didn't know the requirements of the Association. She questioned if they were talking to the right applicant – who legally owned the land and who should be applying? Ms. Ergin stated that, when they bought their unit, they were told they owned the land, but were limited by the condominium association as to what they could do with it. There was also common property.

Mr. David Witham, speaking as a member of the public residing at 238 Walker Bungalow Road, stated that it was a confusing scenario. There was common area and all the insurance was on one policy. Ms. Rousseau asked who had rights to the land and Mr. Witham stated it was each individual owner, with another area the PUD and 11 acres in common ownership. Mr. Michael Maglioli, another abutter, confirmed they own their own unit with some property in common. The project had his enthusiastic support. With the way they live with shared space, a front porch provides the ability to monitor children and this would not be a burden to anybody.

In response to questions from Chairman LeBlanc Ms. Ergin pointed out the front door and stated that the porch would start at the left hand side of the door all the way to the right. She confirmed that the grass area in front was 13' from the pavement to their property line.

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

Mr. David Witham stated that the setbacks hindered the ability of ability of owners to place porches on their property. He added that, in order to get 11 acres dedicated to conservation land, the City had allowed structures to be tighter in this PUD. He felt the combination of the PUD with the SRB requirements constituted a hardship and the request met the criteria.

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

DECISION OF THE BOARD

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

Mr. LeMay stated that the application was concise and to the point. Clusters like this were encouraged to have houses close together to preserve open space. He felt the request was reasonable.

Mr. LeMay stated that there would be no harm to the public interest considering the location of the property and the setback there now. The essential character of the neighborhood would not change. He stated that there was no other practical alternative to having a porch that would view the common area. The hardship was the fact that the property was in a cluster, or Planned Unit Development, with the requirements of the Single Residence B District imposed. The spirit of the ordinance would be served as there was still a 30' setback to the street. He stated that, in the justice test, there would be no loss to the general public if the variance were granted. There would be no loss in the value of surrounding properties and the neighbors were in favor of the petition.

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

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9) The Portsmouth Board of Adjustment, acting pursuant to NH RSA 12-G:13 and Chapter 300 of the Pease Development Authority Zoning Requirements, will review and make a recommendation to the Board of Directors of the Pease Development Authority regarding the petition of **NH Avenue Retail Center LLC, applicant**, for property located at **30 Manchester Square** wherein a Variance from the Pease Development Authority Zoning Ordinance Section 303.05(b) 16(f) was requested to allow a gas station/convenience store with a 15'± right side setback where 40' is the minimum required. Said property is shown on Assessor Plan 302 as Lot 7 and lies within the Business/Commercial district.

Mr. Witham resumed his chair and Ms. Rousseau returned to a non-voting status.

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

Attorney Bernard W. Pelech stated that he was there with a representative from Hoyle Tanner. This was a vacant lot upon which there used to be located a gas station. Until recently, no retail uses had been allowed other than existing restaurants. The Pease Development Authority was working on their ordinance and now retail uses were allowed in Manchester Square. This was a unique situation because there was a land-locked lot contained within this lot, as he had indicated on the plan on display and in the packet. This lot had no frontage and was surrounded by the rest of Manchester Square. While the owner will be consolidating two lots in the future, currently the landlocked lot resulted in the proposed convenience store requiring a variance for being 15' from the interior lot line.

Attorney Pelech stated that it would be in the public interest to have a location in Pease where the many employees could get gasoline instead of driving off the tradeport, which was not

energy efficient. The special conditions creating a hardship and requiring a variance were that there was a lot within a lot surrounded by the rest of Manchester Square. He stated that there was no other reasonably feasible method available as there was no other way in which they could locate a gas station on that lot without being in close proximity to the HCA property. He stated that the spirit of the ordinance would be served as the area in close proximity was a parking lot, not a building, so they would not interfere with light and air or impede access for emergency personnel. Regarding justice, the hardship on the applicant if the variance were denied would outweigh any perceived benefit to the public. There would be no diminution in the value of surrounding properties and there were no problems with abutters or the Directors of the Pease Development Authority.

Referring again to the plan on exhibit, he flipped it over to show the architects' perspective of the fueling station, which he stated was in keeping with the architecture at Pease and will not detract from surrounding properties. He indicated the locations of the fueling station, the convenience store, the corner of the HCA building, and the HCA parking lot.

In response to a question from Ms. Rousseau, Attorney Pelech outlined how, pursuant to an agreement between the Pease Development Authority and the City of Portsmouth, the Board of Adjustment makes a recommendation to the Authority when a variance is needed. Ms. Rousseau asked if they would derive a benefit from the increased tax base and Attorney Pelech confirmed they would as it currently was an open lot.

Mr. Jousse asked if there were still underground tanks and Attorney Pelech stated that the old ones had been removed and the site had been extensively excavated. New underground tanks would be installed.

Chairman LeBlanc asked if there was a travel lane between the proposed structures and the other property. The Hoyle Tanner representative stated that one of the issues they had was circulation and the intent was to have a 15' to 16' travel area between this building and the HCA building. He noted that vehicles go across that area now and currently there was one way parking.

Mr. Witham asked if HCA had taken a position on the petition and Attorney Pelech stated they hadn't voiced any opposition to them. Ms. Rousseau commented that she had visited the property that day and couldn't see any other method which was reasonably feasible. Attorney Pelech stated that they had been constrained by working within this corner of the property to fit in a store and still have adequate circulation. They couldn't bring everything forward because that would violate the front setback and diminish the circulation around the pump area.

**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. Parrott made a motion to recommend the granting of the petition as presented and advertised to the Board of Directors of the Pease Development Authority. The motion was seconded by Mr. Witham.

Mr. Parrott stated that this was the logical placement for the proposed structures. It was easy to make the argument that it was in the public interest to have a gas station and convenience store in an area where thousands work every day. The special conditions were the odd layout of the lots as they existed currently. The travelway was adequate as proposed and the setback to the lot line was artificial because the lot causing the problem was not a lot in the normal sense in that it had no frontage. The intersection was the logical placement for a gas station. He stated that it was in the spirit of the ordinance to take into account unusual conditions, in this case the arrangement and layout of the lots and roadway. There was no argument that to deny relief from the ordinance would benefit the general public. Surrounding property values would not be diminished as this would fit in with the commercial and retail nature of that part of the tradeport.

Mr. Witham stated that it would be a public benefit to have a gas station out there and not have cars going off the tradeport. This was a unique case where the lot lines with which they were dealing were for an individual lot floating in a larger lot. He noted that there would be 50' to the roadway on one side and 40' on the other.

The motion to recommend the granting of the petition as presented and advertised to the Board of Directors of the Pease Development Authority was passed by a unanimous vote of 7 to 0.

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10) Petition of **Ali S. Kodal and Pamela Henry, owners**, for property located at **845 South Street** wherein a Variance from Article III, Section 10-301(A)(6) was requested to allow construction of a fence on a corner lot within 20' of a line joining points 20' from the intersection of the rights of way. Said property is shown on Assessor Plan 132 as Lot 23 and lies within the General Residence A district.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard W. Pelech stated that there was a confusing section of the ordinance which said that, if you own a lot which was on the corner of two streets, you cannot put a fence within 20' of the intersection of two rights of way. Basically, there was a triangle 20' long touching each of the rights of way in which the property owner cannot put something which would obstruct the view. As he indicated on the plan they had submitted, from the edge of the pavement on Union Street, the right of way contains 12' of lawn which the property owner has maintained. On the South Street side, he indicated the edge of the pavement and then a 6' wide sidewalk and then the property line. If they measured 20' in each direction from the intersection of the two rights of way and drew a line between those points, it would yield the orange line they could see on the plan. Measuring the same distance from the edge of the pavement resulted in the blue line on the plan. If the Board members had visited the property, they would have seen the indicators they put up showing this area. He also noted that the head of the Department of Public Works was only concerned that snow plowing not damage the proposed fence and had no problem with the proposal as far as visibility was concerned.

Attorney Pelech stated that the public interest would not be affected and the head of DPW had indicated there was no obstruction to the view from either street. The fact that the rights of way and the edges of the pavement were so different was what created the special conditions resulting in a hardship. If they followed the strict language of the ordinance, there would be a large triangle cut across the property owner's lawn so there was no other method for the applicant to pursue. The intent of the ordinance was to prevent obstructions on a corner lot and this met the intent. The 20' from the edge of the pavement provided a line of sight in both directions. He stated that the hardship on the owner if the variance were denied would not be outweighed by some benefit to the public. The fence was attractive and was not going to result in any diminution in the surrounding property values.

Mr. Grasso asked how far the proposed fence was from the edge of the sidewalk on the South Street side. Attorney Pelech stated that it would be 18" to 2'. The edge of the sidewalk was pretty much the right of way. He confirmed that the sidewalk was cleared by the city.

Mr. LeMay asked who currently maintained the 12' of lawn and Attorney Pelech stated that it looked just like the rest of the property and had been maintained by the property owner. The survey had determined that the 12' he had been maintaining was within the public right of way.

Mr. Witham asked if they could legally put the fence right up to the sidewalk and Attorney Pelech stated that it was cleared with the Director of DPW and they had also talked to Ms. Tillman. In response to a question from Mr. Jousse, Attorney Pelech stated that they wanted a fence for security reasons and to make the yard look better.

Chairman LeBlanc asked if, the way it was going to be constructed, you would come to the corner of the lot and make a 45 degree angle from South Street to Union Street? Attorney Pelech stated that was correct.

**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

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

Ms. Eaton stated that this was a reasonable compromise. The line of sight was not an issue as confirmed by the Director of the Department of Public Works. It would improve the public interest to have the fence set back a little. The special conditions creating a hardship were that having a fence angled across a lawn wouldn't improve safety and would result in blocking a large portion of the lawn. She stated that the intent of the ordinance was to provide sufficient line of sight which this would have. Justice would be served by allowing a fair use of the owners' property and the value of surrounding properties would probably increase by improving the appearance of the property.

Mr. Parrott stated that the applicants had taken a logical approach. The concern was visibility and this had been addressed. This was a good proposal for the intersection of two relatively low speed roads.

Mr. Witham stated that there wasn't another reasonably feasible method for them to pursue. They could put the fence on an angle, but then they would be giving up over 200 s.f. of yard and creating 40' sight lines when the intent of the ordinance was to have 20' sight lines.

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

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11) Petition of **Joseph Gobbi Supply Corp., owner**, for property located at **685 Islington Street** wherein a Variance from Article II, Section 10-208 was requested to allow an auto towing company office and outside storage for towed vehicles for less than a two week period. Said property is shown on Assessor Plan 164 as Lot 12 and lies within the Business district.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard W. Pelech stated that the property had received a variance in August for an auto repair facility. At the time they submitted the initial application, they didn't know they had to have a separate variance for Superior Towing, although the (building permit) application did list the Two Brothers Garage and Superior Towing. The two brothers were there that evening. Mr. Kevin Gilman also operates Superior Towing and would like approval to tow vehicles that the City of Portsmouth Police Department needs to have removed. Attorney Pelech stated that this use was not allowed anywhere in the city so any location would require a variance. He described the intersection of Bartlett and Islington and listed the surrounding uses, with the only direct abutting residential unit being that owned by Mr. Gobbi. They would also be towing vehicles to the site for auto repair as, he stated, had been done for years. Looking up and down Islington there were numerous auto repair facilities so this would serve a need for the general public. Attorney Pelech stated that the plan submitted in August and resubmitted for this petition shows a vehicle storage area. Mr. Gilman would put a chain link fence around those vehicles for security purposes.

Attorney Pelech stated that there would be no vehicles stored beyond the two week period allowed by the ordinance. Specifically addressing concerns raised in the departmental memorandum, he stated that the safety of vehicles on the street was not a concern as this was an area with traffic congestion causing vehicles to go slowly. They felt there was adequate on-site maneuvering space. Vehicles had been towed there for years and could be placed there without blocking traffic. Regarding proximity to an abutting residential property, that property was owned by Mr. Gobbi. Attorney Pelech stated that he didn't agree with the concern about the hours necessitated by the nature of the business. There might be some calls after working hours but they wouldn't disturb the entire neighborhood and provided a service to the general public. If the hours were restricted, people could be stranded. If the Police Department needed a vehicle towed in the middle of the night someone had to do it. This would only happen occasionally and it would not be like a Store 24 with constant business. He also disagreed with

the statement that the railroad bridge abutment blocked the line of sight for vehicles on Bartlett Street.

Addressing the criteria, Attorney Pelech stated that a towing service such as this, especially as accessory to an auto repair business, provided a public service. There was only one other towing service in the city so this was needed. The hardship was that this was a reasonable use for the site and, since the 50's had been used for auto repair, with vehicles towed to and from the site. This was not contrary to surrounding uses and the restriction interfered with a reasonable use of the property. The unique setting of the property was its location at a busy intersection and the site and area were conducive to this type of business. He stated that there was no relationship between the general purposes of the ordinance and the restriction. The restriction was that, in a business district or any other district, an auto towing business was not allowed. For any location in the city, a variance would be required.

Attorney Pelech stated that one of the general purposes of the ordinance was the safety, health and welfare of the general public and nothing in this request would be contrary to that purpose. There would be no increase in traffic, noxious noise, smoke or dust or demand for public services. The area was easily accessible and they would not be disturbing a residential neighborhood. He stated that granting this variance would not be inconsistent with the spirit of the ordinance as the ordinance does not address towing businesses. Justice would be served by allowing the applicants to continue their business, with towing as one part, and the hardship on them if it were denied would not be outweighed by some benefit to the public. Surrounding property values would not be affected.

Mr. Jousse stated that he believed a variance had been granted to Superior Towing for a fenced in area on Banfield Road. If that was so, why did they need two places to store vehicles. Mr. Kevin Gilman stated that they lost their lease on Banfield Road and had not been in operation there for over five years. They moved to Newington. When Mr. Jousse noted that if they towed a vehicle at the request of the Police Department, it had to remain within the city limits, he stated that was correct.

Mr. LeMay noted that the parking spaces were 8½' x 19' and there would be a security fence and he was trying to understand how there was room to jockey vehicles around without blocking the street. Attorney Pelech stated he believed they could and Mr. Gilman had put vehicles in there in the past. Rather than believing they could, Mr. LeMay asked if they knew that they could. It looked almost impossible. Mr. Gilman stated that he had towed into all the garages there before. If the trucks come in off Bartlett and back toward the trestle, they will not block traffic. The repair facility can also drop cars beside the building from Islington Street.

In response to further questions from Mr. LeMay, Mr. Gilman stated that the measurements of the fence and how it opened up were a little unclear. They were trying to keep away from Bartlett Street to allow space for snow after the plows come through. For access, they would drive in from Bartlett, go back on a slight angle and through the gated area.

Ms. Rousseau asked if most of the cars were from downtown Portsmouth. Mr. Gilman stated that the purpose for the storage would be for the Police Department contract. Other vehicles would be towed for repair and only there for a few hours. Ms. Rousseau mentioned again that

the lot was mainly to service the downtown area? They were really doing a service for the downtown area? She stated that, sometimes visitors to the area don't park where they were supposed to. This would allow tourists to walk to pick up their cars - keep them in line, but have them coming back. Mr. Gilman responded that one of the reasons the Police Department rejected their Newington location was exactly because owners couldn't walk to pick up their cars.

Mr. Parrott noted that, on the sketch, 10 parking spaces were up against the railroad tracks and asked how wide the sideline was from the edge of the right of way back to the next property. Attorney Pelech stated it was 57'. Mr. Parrott asked if, with a setback of 14', how far was it from the fence to the parking lot and then two lengths of parking. Attorney Pelech stated it was probably a foot from the rear spaces to the property line.

Mr. Parrott commented that this allowed zero space for snow and, if the spaces were 9' wide, that would be 45' of width. There didn't seem to be room for sliding sections of the fence. How were the posts positioned so they could slide. It didn't seem feasible for cars moving around these posts. Attorney Pelech stated that Mr. Gilman had been talking to some fencing companies and there would have to be at least one post. Mr. Parrott commented that they couldn't have a 45' sliding section. Attorney Pelech stated there would be a 14' to 16' opening and then vehicles would be maneuvered in by hand.

When Mr. Jousse asked why they had to have a fence, Attorney Pelech stated it was a requirement for security and for the Portsmouth Police Department.

Chairman LeBlanc asked where the tow truck would be parked if the security area were filled and Attorney Pelech stated normally on one side of the garage. Mr. Gilman added that the trucks were mainly garaged in Newington. He reiterated that there was enough room to maneuver.

Mr. Witham stated that when the last variance came before them, he didn't remember any mention of towing. While Attorney Pelech had stated it was on the plan, he didn't remember it in the presentation. Attorney Pelech responded that he had received no questions about towing. He had put the name of Superior Towing on the (building permit) application, but he didn't think there was a special request needed as a part of the petition.

Mr. Witham stated that he had supported the previous variance and would like to wrap his arms around this one, but heard the concerns from Board members. The way it was drawn and presented, he couldn't see how they could get into the parking spots without backing up onto Bartlett Street. He was considering a motion to postpone the petition if they wanted to come back with a more detailed plan to show how this would work. As of that moment, he couldn't see how it would. He heard the description and could only see a traffic hazard. He would consider postponing this if they thought they could pull together a site plan that would be more convincing.

Mr. Gilman stated that the reason for their request was to get back on the list of the Police Department. Most vehicles had keys and they can drive them in. There was plenty of room for a flat bed and they could pick a vehicle off the flat bed and maneuver it in. That was what the

smaller truck was for. The street would only occasionally be momentarily blocked if the Police Department required backing into the bay for some reason.

In response to a question from Chairman LeBlanc, Mr. Gilman stated that the Police Department requires an area for 10 spaces. They don't actually have a specific size of space. Attorney Pelech stated that he had submitted in the packet the towing agreement and the strict requirements of the Police Department.

Mr. Witham stated that he had posed a question in terms of possibly upgrading the site plan. He asked them if they wanted to just move forward with what they had before them. He wanted to support the Police Department, but couldn't envision how it would work. He felt that the site plan was almost hurting them and didn't know if other Board members would like to comment on this.

Ms. Eaton stated that she didn't see it working. She would want to see much better plans on how to maneuver and how the parking would be stacked. Ms. Rousseau suggested that, perhaps, a site walk would be in order and they could get comfortable in that way and the business owner could demonstrate. Attorney Pelech stated that, if the Board wished to postpone the petition, they could come in with a new site plan and maybe a video. Mr. Witham stated that he was not trying to push them, but without that, they would have a no vote from him.

Ms. Rousseau stated that she thought, speaking to Mr. Witham's comment, "Why didn't you bring this up last time when you went for the repair variance," it sounded to her like they had a business idea and they wanted to service the Police Department and this had just come up and so they needed to accommodate their site for that purpose and so this was in addition to that. It had come up since that particular repair variance, unless they had this in their thoughts all along, she didn't know, but it sounded like something that had come in addition.

Attorney Pelech stated that the plan they did showed the compound, the fenced in area, and it said Superior Towing, but he didn't realize that they needed to get a special variance, a separate variance, for the towing business also.

Mr. Witham made a motion to postpone the petition to give the applicant time to produce a site plan to address the needs of the Board, including the turning radius, and also to schedule a site walk through the Planning Department.

Ms. Tillman asked if they were scheduling to a time certain or did the petition need to be readvertised and notices sent to abutters. Mr. Witham stated that it would be to the next month. Ms. Eaton seconded the motion.

Mr. Parrott asked if they should see if there was any others there that evening who might want to talk, holding the motion in abeyance.

Chairman LeBlanc asked if there was anyone who wished to speak further in favor of the petition, in opposition to the petition, or to, for, or against the petition. With no one further rising, the public hearing was closed.

## **DECISION OF THE BOARD**

Chairman LeBlanc stated they could now bring up and vote on the motion.

The motion to postpone further consideration of the petition to the November meeting was passed by unanimous voice vote.

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12) Petition of **Caroline A. Newman Revocable Trust, owners, Michael Jacques, Patricia Newman and Caroline A Newman, Trustees, applicants**, for property located at **342 Spinney Road** wherein a Variance from Article II, Section 10-206 was requested to allow the conversion of an existing single family dwelling to a two family dwelling in a district where such use is not allowed. Said property is shown on Assessor Plan 169 as Lot 5 and lies within the Single Residence B district.

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

Attorney Thomas Watson stated he was there with three of the applicants, who were requesting to use what was currently a single family in the Single Residence B district as a two family residence. Included in the packet were photographs, a site plan and a floor plan. He stated that this property was unique because of its history and design. The main house, the part not highlighted in yellow on the plan, was built in 1949 and, in 1954, the highlighted 2 and a half story addition was added. The grandmother lived there until 1975 in separate living quarters, but with an interior door. The current layout was almost identical to that in 1954, with a separate kitchen, dining room, living room, bedroom and entrance.

Attorney Watson stated that the only real connection between the addition and the main house was a single door on the first floor and an exterior window straddling both, which had been covered up at some point. For all intents and purposes, the present property had a separate unit but for the fact that it had one door inside. In 2005, his clients purchased the property specifically for its layout. Patricia and Michael occupied the main house and Patricia's mother wanted a separate area so this fit their needs. Now, three years later, her mother wished to live in a group facility and they now have a house with over 3,000 s.f. and 4 bedrooms which exceeds their needs and has a unique layout. They were asking the Board to permit them to return it to the purpose and design as in 1954 by allowing two dwelling units in a single dwelling unit area.

Attorney Watson reiterated that the property was unique. He stated that there would not be any diminution in the value of surrounding properties as there would be no exterior changes to the building, landscaping or driveway. There was adequate parking in the garage, plus room for two cars in the driveway. He stated that the residential character of the neighborhood would not be changed and the property would be exactly as it was right now in almost all respects. He stated that the public interest was best embodied in the purposes of the ordinance, which is to not have incompatible uses in the same area. These types of single family uses were to prevent overcrowding, but this property will be similar in use and not result in overcrowding. This will

be a single bedroom unit of approximately 1100 s.f. and the number of vehicles on the property will remain the same.

Attorney Watson stated that the property was also unique in that it sits on the corner of two streets so two of the sides do not have abutters. An undeveloped piece of land is on one of the other sides. Across the street was the North Church Parish House. This request will meet the aims of the ordinance in that it would not result in overcrowding or street congestion and would be the most appropriate use of the land. There will be plenty of parking and turning area so there will be no vehicles backing into the street and there would be no additional traffic generated. Granting the variance would allow maximization of the existing structure and add a unit of affordable housing. He stated that strict enforcement of the ordinance would interfere with a reasonable use of this unique property. He stated that justice would be served by allowing the applicant to return the property to the use for which it was designed and built without any adverse impact or concerns.

Ms. Rousseau asked if he would also agree that the benefit would also not be contrary to the public interest in that revenue would be generated by a one bedroom without adding children or cost to the city.

Attorney Watson stated that he would obviously concur.

Ms. Rousseau continued that they would be taxed higher as a two family, which would add to the tax base. She stated that they needed affordable housing in Portsmouth and it sounded like they would have an additional affordable unit which would be helpful to service industry in the downtown area.

Attorney Watson stated that he couldn't have said it better.

Mr. Jousse asked if the building was single or multi-service for utilities and heating. Attorney Watson stated it was single for utilities but separate heating zones.

Mr. LeMay asked if this was the first time this would be a rental use and would they be removing the door between the rental and the main house. Attorney Watson stated it was the first, to his knowledge, and at a minimum the door would be blocked off.

Mr. Al Sanderson stated that he had grown up in the house and that portion of the house would not have existed if they had not needed a place for his grandmother to live. At her death, they did not choose to turn it into a rental unit. The family still owns the large abutting plot of land, with his sister next to this property. She had no problems with the request. He was just down the road and didn't feel that this rental would in any impact the residents as the density was low and it was reasonable because the building was designed for that purpose.

Ms. Carol McGinty, of 300 Spinney Road, stated she was also a member of the Sanderson family. She had no opposition to the property becoming a two family and neither did her father who was the other direct abutter.

Attorney Peter Loughlin stated that he lived on Thaxter Road and was there for another hearing but he wanted to speak in favor of the petition. He commented that he had been the paperboy at the house and remembered the grandmother moving in. He thought it was a two family to this day. He stated that the property had a great deal of frontage on both Spinney Road and Middle Road.

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

Mr. Grasso stated that the applicant was seeking to use the structure as a two family dwelling as it had existed for at least half of its life. They were not proposing to build anything new, just use the current structure as it was designed and built. Mr. Grasso stated that it would be in the public interest to add an additional housing unit to the community in keeping with the building's original character and intent. The hardship was the restriction as applied interfered with a reasonable use. The restriction was placed when this was a two family and the Board could remove that restriction. There was no relationship between the general purposes of the ordinance and the restriction as the general aims of the ordinance were light and air and there would be no injury to the public or private rights of others from this half acre property with plenty of frontage. Granting the variance would not be counter to the spirit of the ordinance as there would be no more impact than had occurred over the past 50 years. In the justice test, there would be no benefit to the public in denying the petition and the value of surrounding properties would not be diminished.

Mr. Parrott stated that, in another neighborhood, this might be a questionable proposal but this was unique in the design of the house and the non-residential use across the street. The lot size was large and it would be logical to allow an additional unit in this particular house, with its history of use, in this particular area.

Mr. LeMay stated that he had a difficult time with the hardship aspect. This was the first time that this in-law apartment would be locked off and used in a for rent type of situation. He felt that the only hardship was that owner had decided that it would be nice to rent it out. The history was that it's been used successfully as a single family for 30 years. Although it was built with an in-law apartment, that use had been long abandoned. To have as justification for a reasonable use of the property simply the owner's situation made it unreasonable. He felt it did not pass the requirement for hardship.

Mr. Witham stated that he also had been trying to think this through and he felt that the way the analysis was written, they need to show that the literal enforcement of the ordinance results in an unnecessary hardship. He agreed with the maker of the motion that a literal enforcement of the ordinance – being a single residence – resulted in unnecessary hardship considering that this

property probably predated zoning. The structure was built in such a way that they would be essentially forcing them to take out the kitchen and create hallways and other changes. That felt to him like an unnecessary hardship. And, again, he felt that they just had to show that literal enforcement of the enforcement resulted in an unnecessary hardship. In looking at the analysis for the variance, the two pairs of words that jumped out at him were “unnecessary hardship” and “reasonable use”. He felt this was a reasonable use and to deny it would be causing unnecessary hardship.

Mr. Jousse stated he agreed with Mr. Witham. He viewed it as a request to approve an existing condition. There would be no changes to the property except for the fact that someone else would be living in the apartment.

The motion to grant the petition as presented and advertised was passed by a vote of 6 to 1, with Mr. LeMay voting against the motion.

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13) Petition of **Kish Revocable Trust, owner, Gary A. and Patricia A. Kish Trustees, applicant**, for property located at **70 Pleasant Point Drive** wherein a Variance from Article III, Section 10-301(A)(7) was requested to allow: a) an 18' x 25' one story addition with a 77.8'± setback, b) a 5' x 15' open deck with a 79.4'± setback, c) a 10' x 10' entry deck and steps with an 84.5'± setback; and, d) 4' wide stairs to the water replacing an existing dirt and stone path where all four improvements require a 100' setback from the salt water marsh wetlands or mean high water line. Said property is shown on Assessor Plan 207 as Lot 15 and lies within the Single Residence B district.

Ms. Eaton stepped down for this petition and Ms. Rousseau assumed voting status.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin passed out some additional exhibits, stating that he was there with Patricia Kish, one of the owners. The property was a one story, two bedroom, home with less than 600 s.f. of living space on a 28,500 s.f. lot in a district where the minimum lot size was 15,000 s.f. The lot coverage permitted was 40% so they could have a considerably larger home. This was one of the larger lots in that neighborhood but many of the other homes were two stories and considerably larger. They were proposing an addition with one new bedroom which would add somewhat under 450 s.f., two decks, and steps down to the water. He stated that the current structure predated wetlands protection requirements and he outlined some of the history in the development of state mandated setbacks from the wetlands and the City's wetlands ordinance. The idea had been to create some type of restriction on the amount of development in proximity to the wetlands, but the drafters of the ordinance were not thinking of how it would affect existing buildings. For tidal wetlands, the only relief was to come to the Board and seek a variance.

Attorney Loughlin stated that there would be no diminution in the value of surrounding properties. They could see in the submitted photographs #8, #9 and #10 that the home was protected by mature landscaping. To the northwest were evergreen trees and he didn't believe

the neighbors would even see this addition. In trying to locate the addition, concern for a Japanese maple on one side was a motivating factor in placing the addition and limiting its size.

Citing the ruling in the Town of Chesterfield court case, Attorney Loughlin outlined the conditions necessary to a determination that a variance was contrary to the public interest and stated none were present with this application. Indicated on the map he had submitted was the line delineating 100' from mean high water. The entire house was within that line so that anything that they might want to do would require relief. He stated that substantial justice would be done as the improvements were set away from the water. The house faces out toward the harbor and the improvements were to the back side of the home. Although further from the water, relief was still required. The special conditions creating a hardship were that there was water on two sides and the lot had been in existence since the 1950's and the house since the 1960's without much change. There was no way to add any square footage to the home without requiring relief. Referring to the floor plan submitted that evening, he indicated what they had considered in designing the addition to satisfy their needs while not compromising the flow in their home or getting nearer to the water.

Regarding the stairs, right now there was a well worn trail and stone steps which were hard to negotiate and tore up the soil. They would like to replace the stone steps with a set of wooden stairs. They had included for reference a photograph of a neighboring home which was not quite so steep so they could get an idea of the low impact of a set of stairs. He stated that granting the variance would be in the spirit of the ordinance which had the intent when written to protect tidal wetlands and prevent new development too close to the shoreline. Existing homes, however, created special circumstances. He stated the purposes of saltwater wetlands setbacks in maintaining the quality of the water and maintained that none would be affected by this proposal. He referred to the 13 wetland function values, stating that none applied. All conditions were met and the relief could be granted with no adverse effect. There was a good balance between protecting the resource and a reasonable use of the property.

Ms. Rousseau asked if the Conservation Commission had recommended approval and Attorney Loughlin stated that the DES had 60 days from the date of submission, which would be up November 11. This was pretty routine and they didn't anticipate any issues.

Mr. Grasso noted that the Chairman had cited a 18' x 25' addition, but the sheet showed 18' x 22'. Attorney Loughlin stated that the 18' x 25' included the overhang and it was his mistake in including it in the request. The footprint was 18' x 22' so they don't need the requested relief, only what was shown on the plan.

Mr. Jousse asked if they had considered building up for the new addition. Attorney Loughlin stated he was not sure it would be aesthetically pleasing to the neighbors and they had labored with the architect to come up with this plan. They could see from the photographs that this was a very attractive one story home. Most of the requests he had seen involved tearing down the existing structures and erecting 2,000 s.f. homes but this was a modest home. Ms. Rousseau asked if they had city sewer and he confirmed they had.

Ms. Rousseau asked why she should vote in favor of this proposal with its proximity to the shoreland area. Attorney Loughlin stated that the proposal would have zero effect on the

wetlands. The intent of the ordinance was to protect water resources. The lawn was now mowed and they would be substituting some square footage of roof with clean water coming off. He noted that the closest point was still 70' from the water and there was a great deal of screening vegetation. The owners had maintained their property well. Others might go out further into the front yard, but they had put the development away from the water.

Ms. Rousseau stated that the regulations were put in for a reason and any closer to the water would be harmful. Did it fall within the state regulations? Attorney Loughlin responded that, according to the state wetlands protection ordinance, if you are adding to an existing home and not getting closer to the water resource and not within the 50' primary setback area, it was automatic approval. Ms. Rousseau asked what he was referring to and Attorney Loughlin stated it was the Shorelands Protection Act. They look to see how the wetlands would be impacted and, if it was no closer than he had stated or generated some other type of problem, it was pretty much automatic approval. They balanced property rights with protection of the environment.

**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

Ms. Rousseau made a motion to deny the petition, which was seconded by Mr. Grasso for discussion.

Ms. Rousseau stated that as far as their analysis for the variance, she did think it was contrary to the public interest. She felt there was thought behind the 100' setback. The house was already within that 100' and to increase the density, to her, was just not in the public interest and did not, in any way, do what the ordinance was supposed to do to protect the shoreline. They were increasing the density as far as adding another bedroom so she didn't think this particular variance was in the public interest. That was one of the criteria she couldn't get over. She also thought the owner had reasonable use of their property. There was nothing wrong with a two bedroom house on a large lot on the waterfront. They bought it that way. They had reasonable use of the property and she just didn't think that, with the addition, she could get over the fact that they don't have a reasonable use of this property. She just couldn't get through those two particular variance criteria.

Mr. Grasso stated that he had seconded for discussion and disagreed with the maker of the motion. The applicants were building away from the wetlands and the home potentially predated the existing zoning. The ordinance did what it was intended to do in preventing building closer to protected tidal water.

The motion to deny the petition failed to pass by a vote of 2 to 5 with Messrs. Grasso, LeBlanc, LeMay, Parrott and Witham voting against the motion.

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

Mr. Grasso stated that the applicant was proposing to make a few additions which were laid out away from the protected resource. He stated that there would be no public interest as the building was to the other side of the water, with no further intrusion into the wetlands. The hardship was that the house predated zoning and there were different criteria when it was built. The special conditions were that the house was completely within the 100' setback for tidal water and there was no other reasonably feasible method. The only other option would be to build on the water side, which would not be acceptable to the Board. He stated it would be in the spirit of the ordinance to allow the ordinance to do its job by having the applicant build away from the water. There would be no benefit to the public that would outweigh the hardship on the applicant if the variance were denied and the surrounding property values would not be diminished.

Mr. Parrott stated that the requested additions were pretty modest and were on a lot where they would have the least impact. They were not adding multiple bedrooms on an existing septic system, but had city services, so any impact on the salt water would be minimal. There was certainly enough space between the existing house and the addition and the edge of the water to provide the necessary filtration that the setback was all about. This would not degrade the resource.

Mr. Witham stated he would also support the motion and didn't believe this proposal would have any impact. Having served on the Conservation Commission, he took setbacks from the high water mark and shoreland zone seriously. He didn't believe, however, that the intent of the ordinance was to take properties such as this, which predated zoning, and freeze them in time.

Mr. LeMay stated that this was a relatively small house on a large lot and this was probably as much intensification as would be had for some time.

The motion to grant the petition as presented and advertised was passed by a vote of 5 to 2, with Ms. Rousseau and Mr. Jousse voting against the motion.

III. ADJOURNMENT

It was moved, seconded and passed to adjourn the meeting at 9:45 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary