MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m. **August 18, 2009**

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

EXCUSED: Charles LeMay

ALSO PRESENT: Principal Planner, Lee Jay Feldman

Chairman LeBlanc announced that a tentative date and time had been set for a work session with the Planning Director regarding the proposed ordinance at 7:00 p.m. on September 1, 2009. The members would be polled regarding availability and final details confirmed and posted.

I. OLD BUSINESS

A) Approval of Minutes – June 16, 2009
- July 21, 2009

In separate motions, it was moved, seconded and passed by unanimous voice vote to accept the June 16, 2009 minutes as presented and the July 21, 2009 minutes with the editorial changes provided to the Board earlier that day.

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B) Case 7-10
Petitioners: Maria Elena Koopman & James Peterson
Property: 335 Maplewood Avenue Assessor Plan 141, Lot 26
Zoning district: Mixed Residential Office
Request: Request for Rehearing and/or Modification of Stipulations

DECISION OF THE BOARD

Mr. Witham made a motion to amend the previously granted variance by removing the stipulation that there be a maximum of six employees. The motion was seconded for discussion by Mr. Jousse.

Mr. Witham stated that he had thought they were allowing for granting enough parking for more employees than the applicant already had. Noting that the majority of the employees were within walking distance and the lot could handle 8 parking spots, he was comfortable with capping the maximum at 8 employees, if the Board wanted a cap. He felt that to not allow the company to grow beyond the 6 employees was restrictive.

Mr. Jousse stated that he was under the impression that they had stipulated 6 employees to ensure sufficient parking for the employees and/or clients visiting site. After reading the request for rehearing, he realized that a lot of the employees would be walking and he didn't feel they should tell the business how many employees it could have.

Mr. Grasso asked if this was an amendment to the stipulation or removing the stipulation. Mr. Witham stated that he was going to lift the stipulation altogether.

Chairman LeBlanc stated that he would not support the motion. The limitations were to keep the neighborhood as it was and they had to remember that this organization might be good citizens, but if the number were not limited and the business were sold, someone could come in with as many employees as they wanted.

Mr. Parrott stated that his recollection was that one of the speakers for the applicant said that approval subject to limiting the employees to 6 would be acceptable, so his reasoning was that, with that number and never more than 1 or 2 clients, 8 parking spaces made sense and he had voted for the motion to grant the variance.

The motion to amend the approval given by the Board in July by removing the restriction regarding the maximum number of employees failed to pass by a vote of 3 to 4, with Ms. Eaton and Messrs. Grasso, LeBlanc, and Parrott voting against the motion.

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C) Case # 4-4
Petitioner: Jonathan Schroeder
Property: 324 Maplewood Avenue Assessor Plan 141, Lot 1
Zoning district: Mixed Residential Office & Historic A
Requests: 1) Variances from Article III, Section 10-303(A) and Article IV, Section 10-401(A)(2)(c) to allow a two story addition on an existing garage/storage building to house two additional dwelling units on a 3,210 sf lot (that also contains a second building with a commercial use on the 1st floor and a dwelling unit on the 2nd floor) with:
a) a 5.47'± left side setback where 10' is the minimum required,
b) a 1'± rear setback where 15' is the minimum required; and,

c) 1,070 sf of lot area per dwelling unit where 7,500 sf of lot area per dwelling unit is required for a total of three dwelling units on the property requiring 22,500 sf of lot area.

2) Variance from Article XII, Section 10-1201(A)(3) to allow the required parking spaces to back out onto the street where such parking layout is not allowed.

3) Variance from Article III, Section 10-301(A)(2) to allow dwelling units in two separate buildings on a lot where all dwelling units shall be located in one building.

(This petition was postponed from the April 21, May 19, June 16, and July 21, 2009 meetings)

Mr. Grasso made a motion to take the petition off the table, which was seconded by Mr. Witham and approved by unanimous voice vote.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard W. Pelech distributed some exhibits along with his memorandum. He stated that the petition had been pending since April but that the issues previously raised had been resolved to the satisfaction of the Planning and Legal Departments. The property consisted of a relatively small lot with 2 structures, the big blue building with an address of 324 Maplewood Avenue housed a cabinetry business on the first floor and an apartment on the second. Adjacent at 11 Dennett Street was a single story cinder block building which had housed various commercial uses since the 60's. Currently, it was used as a cabinet shop as part of the owner's business. He stated that the Mixed Residential Office district was appropriate for this site with the buildings mainly surrounded by residential uses, but with some commercial uses along Maplewood Avenue.

He then distributed an architectural rendering of their proposal, which was to add a one and a half story addition on top of the existing cement block building. He pointed out the current and proposed views, noting that this would be a vertical expansion and the footprint would not change. Each unit would have a two car garage on the first floor, with the above story and a half residential components. The second floor would be 499 s.f., the third 344 s.f., with the height approximately 28'. He stated that the existing structure was nonconforming and cited the variances needed for the requested 1' rear setback and a 5' left side setback, 10' required. A variance was also required to allow 1,070 s.f. of lot area per dwelling unit and to allow the parking spaces to back out into street. The MRO district allowed multi-family structures and the conversion of existing residential structures up to four units with 1500 s.f of lot area per dwelling unit but because the building was not a residential structure, it was held to higher standard. As a correction to the departmental memorandum, he stated that the two parking spaces in front of 324 Maplewood Avenue did not back out, although the four others would back out onto Dennett Street as they had done in the past. There was 14' between the building and Dennett Street and there were many lots in the area which required backing out onto the street. He stated that the final variance needed was to allow dwelling units in two separate buildings.

Addressing the criteria, Attorney Pelech stated that the public interest would be served by granting the petition. The two additional housing units were not high end and could be considered workforce or medium income housing. For years this concrete structure had been the

subject of much concern for the neighbors and there were problems with tractor trailer deliveries and traffic generated by a commercial use. This use would be much less intensive and in keeping with the characteristics of a residential neighborhood. There would be no increased demand for municipal services and no adverse effect on the school system. Street congestion would be lessened. The special conditions creating a hardship were the unique features of the property. These were two separate lots, together for zoning purposes which constituted a small, long rectangle on which it would be impossible to build another building lot today. A vertical expansion required a variance as a result of the existing nonconforming structures.

Attorney Pelech stated there was no reasonable alternative to the proposal. Even if they demolished the concrete building, it would be difficult if not impossible to build another structure. He stated there was sufficient distance between the garage and the street for vehicles to back out and this practice was allowed for 1 and 2 family dwellings. With 3 dwelling units, they lose the ability to back out. He stated that the spirit of the ordinance would be served as the ordinance allows up to 4 dwelling units. Unfortunately, the structure was not a residential structure so a variance was required. Taking a commercial structure out of this residential neighborhood would be more in keeping with the ordinance and this would be the most appropriate use of the property, less intense and more aesthetically pleasing. In the justice balancing test, there would be no benefit to the public if the petition were denied but a hardship would be created for the owner, who wanted to enhance the neighborhood. Regarding the effect on property values, the before and after photographs were the best evidence. He reiterated his statements regarding traffic and the appearance of the property. Correcting a blight on the neighborhood would increase values. He noted that the owner, the designer and the proposed contractor were available for any questions.

Ms. Rousseau asked if, looking at the before and after views, he could explain why the value of surrounding properties was not an issue when 3 floors of the building behind would have an obstructed view, as well as a smaller house in back that would lose light.

Attorney Pelech stated that there was no entitlement to a view under the law although he acknowledged it could be considered in looking at diminution in values. However, he didn't know what the views were at present from the surrounding buildings and they had spoken to many of the neighbors who had no objection. He was certain that the abutters were there if they had any concerns. What they were looking at now was not overly attractive. The brick building behind was a multi-family. The building to the left from Dennett Street looked at this building and, over the top, could see 324 Maplewood Avenue and that was their view.

Ms. Rousseau stated they were seeing windows not a wall or a roof. When she asked if the multi-family had one or multiple owners and Attorney Pelech stated he was not sure. She asked how he knew if the abutters were notified and Chairman LeBlanc stated that the planning department took care of that. There was a brief exchange with Ms. Rousseau maintaining the issue was Attorney Pelech's responsibility and was relevant for the abutters who would have obstructed views. Chairman LeBlanc reiterated that the city had handled the notification

Mr. Durbin asked about drainage issue cited in the departmental memo. Attorney Pelech stated it was not the purview of this board but they would comply with the recommendations of the planning department. Any roof drainage would be directed away from the property to the street

by gutters and there would be no increase in the impervious area. The natural flow was toward Dennett Street.

In response to questions from Mr. Parrott, the architect stated that the roof was slanted and was 13' from grade to the highest point and 28' to the ridge line of the proposed structure. Mr. Parrott asked how that compared to buildings on either side, referencing the green house in the photograph. The architect stated that the blue building on the right of the proposed building was approximately 10' shorter ridge to ridge and that on the left shorter by approximately 5'. Mr. Parrott stated that then the proposed building at 28' to the ridge line would be significantly lower than adjacent buildings and the architect replied that was what they intended.

Mr. Jousse noted that they had stated there would be less deliveries. Where would the cabinets be delivered or was the shop going out of business? Attorney Pelech stated that they would be direct shipped in the future to the installation site and Mr. Schroeder added that there was an offsite facility to unload any cabinets which needed to be stored. Chairman LeBlanc asked if the current cinder block building was going to be demolished and a new one erected, the architect stated that it would remain. The wood roof section would be removed and the new structure built on top of the concrete base. Mr. Parrott asked if all commercial uses of the building would be discontinued if the petition were approved and Attorney Pelech stated that was correct and noted that approval would also be needed from the Historic District Commission.

Mr. Jousse raised a question regarding the provided plan which went in conjunction with the set of drawings, A-101, stating that things just did not add up. On the plot plan, it had a width of 30' and presently the building had a 1' setback. There were no dimensions for building #11 so he had to go to A-101 and it was 27'3" outside to outside, plus the 1' makes it 28'3" and you look at the front of the building and it said 6.26', or 6'3". The total came out to 34'6" but the lot was only 30' deep. There was a 4½' discrepancy someplace.

Attorney Pelech stated that had been the subject of several meetings with Mr. Feldman, the city attorney and Lucy Tillman. They asked for a surveyed plan which was provided. Ms. Tillman asked for additional information and that the plant be stamped by a surveyor, which it was. As recently as last week, they had met with the planning and legal departments and were told the site plan was sufficient to go before the Board. He stated that the discrepancies between the site plan and the tax map and the change in the roadway had been the subject of many meetings. It was an area that could not be reconciled. Mr. Feldman had gone out to try and find the boundary markers and Attorney Sullivan had checked the records to see if there had been a change in the city records when they reconstructed Dennett Street in the 90's. Mr. Schroeder remembered that the construction company put in the rounded granite curbing and cut off the point but there was nothing in the registry of deeds that showed any change to the boundary. What they did know was that the distance between the concrete block building and the traveled area on Dennett Street was much more than was shown on the plan, probably in the vicinity of 10' to 14'. He couldn't explain why there was a difference in what the plan showed.

When Mr. Jousse reiterated that something was wrong someplace, Attorney Pelech responded that the building was 27+', call it 28' in width and there was a 1' setback in the rear. Mr. Jousse stated that the lot was 30' wide. Attorney Pelech agreed that was what the plan showed. Yet the tax map and the survey showed the building set back from the front lot line. Mr. Jousse stated he was going by the "survey" done in 1962.

Mr. Jousse noted that there were two parking spaces between building #11 and the building on Maplewood Avenue and a bulkhead going into 324 Maplewood along with a condenser. He wanted to know how far the bulkhead went into where those 2 parking spaces were designated to be. Attorney Pelech stated that there was adequate space and he circulated three photographs, one depicting the bulkhead and the condenser with the two vehicles, the second showing the parking area in front of 324 Maplewood and the third depicting some tractor trailers unloading.

Mr. Parrott asked if he understood correctly that there was a surveyed plan which had been withheld from the Board, as he had the same concerns as Mr. Jousse. Attorney Pelech stated there was no other plan but the stamped plan before them. When Mr. Parrott stated it was not stamped, Attorney Pelech stated that he had submitted a stamped plan to the planning department at Ms. Tillman's request. It was the same plan they had before them, but had a stamp placed upon it, which Mr. Feldman could confirm. Mr. Parrott reiterated that what he had was not a stamped plan so his question was, if there was a recent survey why did they not have it. Attorney Pelech stated there had been no recent survey done. The stamped plan was the stamped 1962 plan. He was not withholding anything from the Board and resented the implication.

Chairman LeBlanc stated that the plan which the Board members now had was the plan. Attorney Pelech stated that, when he submitted his application in April, he was not told that it needed to be stamped. Sometime in May or June, Ms. Tillman indicated that she would like to have it stamped, which he had done and submitted it to her. Mr. Feldman had it in his file.

Mr. Parrott stated so then they had a stamped plan which showed a 27' building plus a 6' setback plus another 1' setback on a 30' lot. That was physically impossible, even if it was stamped. He asked why it was being submitted to them when it was obviously deficient. Attorney Pelech stated that the plan was presented because it was prepared by a licensed New Hampshire surveyor, and then stamped by a licensed surveyor when requested. He was not a surveyor and could not explain the contents of the plan.

Mr. Parrott asked about the issues which Attorney Pelech had stated that the city attorney had addressed. Attorney Pelech stated that one issue was whether the property was considered to be fronting on Dennett Street. Ms. Tillman felt it fronted on Maplewood but the city attorney said it could be considered Dennett Street so the 5.4' was a side setback and not a rear. The second issue was that Ms. Tillman believed there had been an illegal subdivision n the 60's. He had presented all the evidence in an abstract on all parcels and the city attorney had determined it was not an illegal subdivision. The third issue was the discrepancy between the surveyed plan, the tax map and what was on the ground at Maplewood Avenue and Dennett Street. The city attorney determined it could go forward as there was adequate space. He deferred to Mr. Feldman for additional explanation.

Mr. Feldman stated that they had a meeting on Thursday of the previous week to try and bring some closure. The biggest issue was the survey and the city attorney had suggested that, because of the age of the survey and the issues that existed along with a lack of information from Public Works as to what happened when the road was reconstructed, the information at this point was adequate and they could move forward. It would be the Board's decision to do as they chose with the application. He noted that Attorney Sullivan was there that evening.

Mr. Parrott stated that he was concerned that they had to drag this information out. It was very relevant to the Board's decision and, if they hadn't heard it, they could come to the wrong conclusion. Attorney Pelech stated he regretted the time it had taken, noting that this was the same application they had submitted in April and Ms. Tillman's concerns were discovered to be unfounded. In response to questions from Ms. Eaton, he stated that the property line had been determined from the city tax map. The stamped plan did not show it but the deed itself stated that the property line ran 1' from the rear of the concrete block structure.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Michael Flynn stated that he lived at 334 Maplewood Avenue which was directly behind the proposed structure. He passed out some photographs and plans noting that they could see from the picture of his back yard the wall of the proposed structure on the left. He stated that his house would be stripped of privacy and denied light and air, resulting in a decrease in the value of his home. He referred to maps showing no boundary between the two homes and now there was a defined boundary and he would like to know who drew that line. He also wanted to point out for the record that the indicated 37' measurement was actually 37'7". This was important because there was an egress door at the corner of the garage which, according to code, required a 3'x3' platform for egress and it would encroach on his property Noting that there was no mention of the bulkhead, the condenser, or the easement that the second floor tenant uses to exit, he cited additional measurements to show that parking spaces 1, 2 and 4 were not viable.

Mr. Flynn noted that someone had questioned the runoff and stated that the plans showed a small soffit in the back of the building. With a 1' setback, they could not get it on without encroaching on his property. In the front, he questioned how they would prevent flooding and freezing up Dennett Street in the winter. As a final point relative to the plan, Mr. John W. Durgin was deceased so he didn't see how he could stamp the owner's set of plans.

Mr. Jerry Johnson stated that he was there as president of the Old Franklin School Condominium Association, five homeowners who lived in the large brick building behind this property at 348 Maplewood Avenue and opposed the variance. He confirmed that they were notified of the April meeting and had then submitted a letter. They then had to follow the petition. He stated that the applicant had not contacted him. He referred to the criteria set out in the ordinance which the applicant had to meet indicating he had a different take on these than the attorney. He noted that the zoning regulations were in effect when the applicant purchased the property and could not claim a hardship now. Regarding loss in property values, he stated that 3 of their units faced directly on this property and two had decks. He submitted photographs from one of the decks, which was 25' in height. The proposed building would be 33' and would totally block their view. He did not feel this was in the spirit of the ordinance considering the 1' setback, the square footage requirement reduction, backing into the street and two buildings on one lot. His house would be stripped of privacy, denied light and air and would lose value. He noted that he had been there for 15 years and never inconvenienced by the cabinet shop. He stated that the only public interest he could see was that the garage would be gone. He concluded that granting the variance might provide justice to the applicant but not the surrounding homeowners.

Mr. George Dempsey stated that he lived at 42 Dennett Street and wanted to reinforce the comments of the previous speaker. He also wondered where the written documentation was of the four meetings the attorney had referenced and stated there was no rebuttal to the letter the

previous speaker had sent. He raised the issue of snowplowing and stated there was no place to pile it on the property which meant dump trucks coming in. With an easement for the second floor of the blue building which ran into the driveway, the snow would be plowed up against that or block an emergency exit. What stuck out to him was why a 2009 survey had not been done. He mentioned that the city had removed the curb and he thought it was a kindness to Mr. Schroeder because people were backing into it, but the city was in fact defining property. He was also concerned about the hazard created with vehicles backing out into the traffic coming around the corner. He questioned how congestion would be lessened when going from maybe 2 vehicles to 8. Mr. Dempsey outlined additional concerns arising from his study of the file and provided a short past history of his property and the neighborhood.

Ms. Nicole Abshier stated that she lived at 31 Dennett Street, the property to the left and passed out some photographs. They could see that she had 2 windows on the right side of property. She detailed the structural features which would result in taking away all her natural light and privacy. She supported the comments on the difficult with snow removal, stating that the snow might end up partially on her property. She read into record a letter from a real estate agent which concluded that the "sell ability" of her home would be impacted by the issues of light, view and privacy.

SPEAKING TO, FOR OR AGAINST THE PETITION

Attorney Pelech stated that he had additional aerial photographs, which he distributed, which indicated that all the light to the rear was not going to be blocked. The aerials also showed the relative height of the old franklin school building as opposed to what was existing there. With regard to property lines, he stated that there was nothing in the registry with showed that the city had taken additional land from Mr. Schroeder or changed boundary lines. As far as records not being kept of meetings with the city, that was not under his control. What he applied for was what was before the board and it was Attorney Sullivan who had determined that Ms. Tillman was not correct, that Dennett Street was the front, and that the plan stamped by Mr. Verra was sufficient. Attorney Pelech stated he was not trying to mislead or withhold any information.

DECISION OF THE BOARD

Mr. Parrott noted that that the plan was not signed. It was stamped but not signed across the stamp as was usual practice.

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

Mr. Durbin stated that they had heard a lot of testimony, but applying the criteria, he felt that granting the variance would be contrary to the public interest. There were a number of logistical discrepancies and a number of issues related to drainage, but also there was the potential for overreaching into other properties and easements. There was also the issue of snow removal which had not been addressed by those in favor of the petition. This represented quite a bit of over-intensification for the district which could set an adverse precedent. Regarding hardship, while it was potentially true that there were special conditions in the property with its dimensions and location, there were probably other reasonably feasible alternatives for the property which would be more conforming than that proposed. The fact that the existing building was not attractive while this was a nice looking project could not overcome the rest of the analysis. Mr.

Durbn stated that the spirit of the ordinance would not be served for reasons he had already mentioned and the variance failed in the justice test. He concluded that they had heard testimony that property values could be diminished and there was the potential for economic diminution.

Ms. Eaton stated that this was not a certified survey, which they should have had at a minimum so they could see what they were granting. She stated that this would be an overintensification for the area and there were public safety issues as well as evidence of the diminution in the value of surrounding properties.

Mr. Witham stated, in Attorney Pelech's defense that he had worked with the planning department and provided what they asked for and the city attorney had more or less signed off on the packet presented. While the application was lacking, he did do what they asked. He agreed with the motion as he felt that granting the variance would result in a diminution in property values, not so much as to view but light and air. The scale was too much for this lot and this building and the wall presented to abutters would have a detrimental effect. While there was a need for housing, this proposal was too intense for the lot.

Mr. Jousse commented that he passed the area frequently and agreed with the comments about the cinder block building. He was not against a dwelling place in that location, but a residence which looked like a residence. He reiterated the need to protect light and air of the surrounding properties and noted again the discrepancies in the plot plan, with the numbers not adding up.

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

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Chairman LeBlanc announced that the applicants for 229 Pleasant Street and 187 Wentworth House Road had requested that their petitions be postponed and they would not be heard that evening.

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D) Case # 6-5
Petitioner: CCV Group, LLC
Property: 4 Sagamore Grove Assessor Plan 201, Lot 4
Zoning district: Waterfront Business
Request: The following to allow a 535 sf 1 ½ story addition with a basement and chimney to a previously approved single family dwelling in a Waterfront Business District:
1) Variance from Article IV, Section 10-401(A)(1)(c) and to allow a residential use to be expanded in a Waterfront Business District, where such use is not allowed.
2) Variance from Article III, Section 10-304(A) and Article IV Section 10-401(A)(2)(c) to allow:
a) a 12'1"± left side setback where 30' is required, and
b) a 26'± front setback where 30' is the minimum required.

3) Variance from Article III, Section 10-301(A)(7)(a) to allow said addition to have a 75' setback from the salt water marsh wetlands and mean high water line where 100' is the minimum setback required for all.
(This petition was postponed from the June 16, and July 21, 2009 meetings.)

Messrs. Parrott and Witham announced that they would be stepping down for this petition. Mr. Durbin and Ms. Rousseau assumed voting seats.

SPEAKING IN FAVOR OF THE PETITION

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

Mr. Jousse made a motion to invoke Fisher v. Dover, which was seconded by Mr. Grasso.

Attorney Malcolm McNeill addressed the chair stating that the city attorney had indicated the right of counsel to speak to this issue.

Ms. Rousseau stated that she did not believe a public hearing was in process, which Chairman LeBlanc confirmed. He stated he would like Mr. Jousse to make his presentation then Attorney McNeill could speak.

Mr. Jousse stated that this was essentially the same petition which had been in front of them earlier this year. The old proposal was for a 575 s.f. addition, this was 545 s.f.., only a 5% diminution in coverage. While the addition was now in more of a straight line, 100% was still within the setback from the water. There was mention that additional parking had been given but parking was never an issue as he recalled. The dock access was not an issue. This was essentially the same proposal with the pot stirred a little. It wasn't that the property was not uninhabitable – it was. The variance had been granted to raise the roof. Other than that, there was no new evidence.

Mr. Grasso stated that he could find no material change in this application from the previous application against which they did grant the replacement of the building which was in disrepair. They had heard all the testimony at that time.

Ms. Rousseau stated that she agreed with the all the points made, but if this happened to go to court, she would like the courts to know they had carefully considered Fisher v. Dover and carefully looked at the old application and the new one. This was why she had requested of the city a copy of the old application along with the Fisher v. Dover ruling. To clarify for the public, she stated that the cited case states that if there were no material difference from one application to another, then the Board did not need to consider the petition. She read a relevant section from the court decision, noting that it also stated the burden of proving a material change of circumstances lay on the parties seeking the variance.

Ms. Rousseau read additionally from #6 of the ruling which stated that while diminution in the value of surrounding properties was relevant to the consideration of a variance request, it was not relevant to the required threshold determination that a material change of circumstances had occurred and should not be considered until the threshold determination had been made. She

applied that to one of the arguments in the new petition relative to diminution of property concluding that they couldn't consider that until they determined whether there was a change of circumstances or use. This also applied to the applicant's submittal of a reconfiguration of the parking for access to the dock and the dimensional variance argument for the new addition. Ms. Rousseau indicated that she was looking at the master plan right then which told them that one of the goals of the city was to actively support all areas that comprised the city's water dependent working waterfront. There was also some mention in the master plan about identifying locations and conditions in which live/work units could be safely and appropriately allowed. She saw no evidence in the package before or now that a business would be maintained on the property. All they had in their application was residential and while the applicant did provide a letter from the prior owner regarding gassing up at this location, there was no formal or legal documentation to support the claim of a waterfront business. She noted that the storage facility was smaller and would not accommodate storage for a business. She saw no material change of use or circumstance so believed that Fisher v. Dover did apply and would support the motion.

Attorney McNeill stated that he was there with Ms. James, a real estate agent, and Mr. Sean Donnelly, to rebut various evidence submitted in January regarding the views. He also had another witness since the January decision. He stated that Fisher v. Dover was not as simplistic as Mr. Jousse stated. He had compared a few dimensional changes and come to a conclusion that there was no material change. In context of this case, there had to be a review of why the plan was denied and how the changes were responsive and material. He explained the significant effort they had undertaken before determining to bring this case back to the Board. They had consulted with the city and showed them a revised plan because the applicant was not going to come before them again, recognizing what Fisher v. Dover meant, if the public officials gave any indication that what he was proposing was not a material change. Since that date, not only did they have a meeting in March but a meeting in June and discussions in July.

When Attorney McNeill stated he would like to go back to January, Chairman LeBlanc asked if this was relevant to the Fisher v. Dover discussion and he stated it absolutely was. He did not intend to waste anyone's time. He stated that, when the case was denied in January, it was based on several findings which he read from the letter of decision issued after the hearing. One dealt with the increase in footprint and the impact on the neighborhood with an inference being a diminution in value. With reference to the "change in access to the water," he showed the old plan and indicated where various walkways were eliminated. The new addition was moved into the location it was because on this unique site, only on 146 s.f. could anything be built legally. He referenced the findings that the change in access would "squeeze the door on any good faith use of the property in the spirit of the Waterfront Business District," and that the addition could be placed allowing access to the water and not affecting the surrounding properties. He noted that in the minutes of the meeting, Mr. LeMay had stated that the lot as it existed appeared, with the driveway going down to the dock, to have been used as a commercial waterfront with an ancillary use as a residence. Mr. LeMay's concern was that the driveway appeared to cut off much of the ability of any future owner to continue even the modest use by allowing for a pickup to unload a boat. Mr. LeMay had also stated that they seemed to be cutting off access to the dock. Attorney McNeill stated that these were the reasons for denial. He also noted a statement from an abutter who said they had bought their property for the water view and that the real estate agent had said the value of their property would go down as it concerned water views. He maintained that statement was false. This was all material as these were the grounds on which the application was denied, not over 35 s.f. He quoted the final comments by Mr. LeMay before

the vote was taken regarding the "squeezing of the door," the adverse effect on property values, easier access for fueling of boats and preserving the neighbor's water view.

Ms. Rousseau interrupted to state that this had nothing to do with Fisher v. Dover and Chairman LeBlanc stated it did. Mr. McNeill had the floor and he felt he was speaking to the subject. Ms. Rousseau stated if others were to have the floor to speak to the other side of this because this was essentially a public hearing. Chairman LeBlanc stated this was for the applicant's lawyer to address Fisher v. Dover. When she stated that others might have different thoughts about that, Chairman LeBlanc stated the meeting was not going to be opened up to other people to speak to Mr. McNeill's points. It was for the Board to determine.

Attorney McNeill quoted statements from Mr. Grasso that a residential use was acceptable but he would like to see something done with the addition or some other configuration to the proposed structure (as it related to the waterfront uses in Attorney McNeill's opinion). He noted that Mr. Jousse had added that the environmental impact would be less than existing but subsequently voted against the project. Attorney McNeill stated that this was important as they had now responded in this file to every one of those grounds for an appeal. First, they had produced evidence that the evidence on which they relied for reduction in property values was in error. Secondly, they clearly changed the plan to provide access to the water. In fact, they had made ten changes as they related to this site. Reading from their submittal to the file, he stated that the first change was that the revised plan was materially different because the new proposal's impact on the neighborhood's view had been completely changed. The complainant abutter would see an 8% increase in view. He stated this was a material piece of evidence. He read from and enlarged on the additional points in their June 26, 2009 memorandum.

Attorney McNeill stated that the waterfront business which was there now was negligible and, if the Board did not entertain this matter, there was no guarantee of any waterfront commercial business on this site at all, nor could they compel it. He added that they were proposing waterfront business activities and, when Ms. Rousseau questioned what activity, he stated it was the existing waterfront business activity as indicated by the letter from Mr. Golter. Ms. Rousseau stated she didn't see a lease regarding this and Attorney McNeill stated that could be imposed as a condition of approval based on the representations in Mr. Golter's letter. There had been a question of the ability to utilize the dock so they put in a new walkway and had a letter from Mr. Hanscom to indicate that in fact fueling could occur. They also put in a legal shed and they had testimony about kayak use on the property in keeping with the neighborhood, which he reiterated was all residential. He stated that another material change was to provide for marine use and storage and an additional parking area. When Ms. Rousseau again interrupted to question the marine use, Chairman LeBlanc asked that she address her questions to the chair and not interrupt the speaker.

Attorney McNeill noted that the new addition had been moved 4' to the west on a small nonconforming lot. There was a letter from the abutter to that side indicating no objection, which was also new. They had also provided information from Ms. James, a reputable realtor, in addition to an unsolicited letter from Ms. Golter speaking to no diminution in the value of surrounding properties. That was clarifying evidence which didn't exist before. He stated that he would like Attorney Sullivan to speak on this issue as well as Mr. Witham who was the architect and had participated in discussions where the city had found material differences.

Chairman LeBlanc asked if they would both speak to Fisher v. Dover, Attorney McNeill stated they would and Chairman LeBlanc directed him to proceed.

Attorney Robert Sullivan stated that he was there at the request of Attorney McNeill. He agreed to do so because this was an unusual case with a complex procedural history. Attorney McNeill had approached him, not so much as the city attorney, but as a person present at the meetings. Attorney Sullivan noted that the planning staff had a legal duty to assist applicants and Ms. Tillman had honored that duty by meeting with Mr. Sieve before he purchased the property and discussing issues such as were before them now. There were several meetings with the applicant who was a cooperative person to deal with and who took the observations seriously and approached the application in good faith. That extended to the application before them that evening and the earlier application.

Attorney Sullivan stated that what he believed happened was that the authority for making a decision regarding Fisher v. Dover had been misunderstood. He had provided a written memorandum which said that this Board made the Fisher v. Dover decision. Staff members might have stated that it looked like it might pass the Fisher v. Dover test as it was their duty to help discuss the issue. Before Attorney McNeill was involved, the applicant may have believed that the staff had a greater role than they did and things may have seemed more of an encouragement than they should have. Those staff members had gone and the new staff members might view the situation somewhat differently, but what was important was what the Board thought. He noted that Attorney McNeill felt it important that they have the information and background they needed.

Ms. Rousseau asked what his statement had to do for or against, or about their decision regarding Fisher v. Dover. Why was he there? After Attorney Sullivan indicated he was there at Attorney McNeill's request, a brief exchange followed regarding the issue, with Ms. Rousseau reiterating her position that they should not be listening to Attorney McNeill as the public had no right to comment. She stated they had plenty to look at to make their decision.

Mr. David Witham stated that he was breaking his usual protocol of keeping silence on his projects and probably no one even knew he was involved in this. He would have had to recuse in any case because he was an abutter and had been working with the applicants on renovating the house in which they lived. He felt this project had taken on a life of its own, similar to a previous notable case. He didn't feel this was a case of an over-zealous applicant trying to force his view on the Board. The homeowner had not done this blindly but had gone before the city to get their views and made changes accordingly. He remembered that Mr. Jousse had asked why the applicant had not obtained a variance before he bought the property, but Mr. Sieve had sat down with the planning department staff before doing so. With the change in staff, something had gotten lost along the way. After the denial in January, they had obtained a video of the meeting and looked at the reasons for the denial along with reviewing the records. He had suggested a meeting with city officials to discuss Fisher v. Dover as, although the Board made the decision, memoes could carry weight. Mr. Holden, Ms. Tillman and Attorney Sullivan had discussed with them changes and ideas on how to revise. He had asked them pointblank if they would, based on what they saw, invoke Fisher v. Dover and Ms. Tillman had stated the shed and paths were materially different and Attorney Sullivan had stated it was materially different He knew the Board made its own decision, but when the memorandum came out citing Fisher v. Dover, he felt that didn't reflect their meetings at all. Through no fault of Mr. Feldman, there

was a huge gap. There were also changed circumstances that affected the merits of the decision made in January. One of the major points of the denial was the diminution in value based on what the abutter had said. He felt the new material affected that argument. In any case, the fact was that views are not protected. He stated that Mr. Sieve could build a tall shed and affect the value of her property, but this proposal would actually increase her value. He couldn't say how the Board should feel or vote, but he could state that, if he and the applicant had any indication from the meetings that this application was not materially different, they would have been done. He was uncomfortable being up there, but he just felt this had gone off track and he was trying to get it back on track.

Ms. Rousseau stated that she hoped all the applicants that evening hired Mr. McNeill so that they could have a ZBA member come before. At this point, Chairman Leblanc banged his gavel and asked Ms. Rousseau to ask her question. She stated she was about to ask her question but continued, "and, you know, have the city attorney speak on behalf of their case. I hope you all can afford that because that was a bad". Chairman LeBlanc again asked what her question was and she stated it was how they were going to get over the fact that this was re-characterizing the property from a waterfront business district to residential. She and Mr. Witham had a brief discussion about the proposal as it related to the character of the waterfront.

Attorney McNeill then provided a chronology of events beginning in January with the denial of the addition, through the meetings with staff and the new application. He stated he had been shocked when he saw the memorandum in the context of the previous contact with the city. After the June meeting, he had expected some moderation because of what had happened in the previous meetings but the only thing that occurred was turning over the new evidence he had provided with no comment. He resented the comments about his relationship with Mr. Witham and he respected Attorney Sullivan, who would not be there just because someone had asked, but only if he felt it was appropriate.

Attorney McNeill continued that, when nothing further had come from the planning department, Attorney Sullivan wrote a memorandum to the Board on July 21 from which he quoted. Attorney Sullivan had reviewed Fisher v. Dover including material changes in the evidence, all of which Attorney McNeill felt he had presented to them. He stated that Attorney Sullivan in his memorandum had, after outlining Fisher v. Dover, stated that the 10 items which Attorney McNeill had referenced that evening could present a factual basis for the Board to find this application materially different from the former plan. He reiterated the process they had gone through, stating that everything done from the beginning had been in good faith. He suggested that they hear the evidence that had been provoked by discussions with former city staff and see if they came to the ultimate conclusion that this fit the characteristics necessary to grant a variance. Again he reiterated what they had done which provided a step by step, methodical, response to every ground on which this was denied.

Ms. Rousseau asked, if the Board of Adjustment made the decision on Fisher v. Dover, why would he think that, just because the city put something in writing regarding that ruling that they, as a seasoned Board would not already talk about Fisher v. Dover anyway because this application, they had all done this before. They know this application. It had just come before them not even a year ago so they would of course talk about Fisher v. Dover anyway regardless of anything in writing by the city. They would have to consider it so the city did not influence

their decisions. They made their decisions very independently based on a lot of experience so they would have done that anyway.

Attorney McNeill stated he understood that. That was the reason he went through the process. In reviewing the memo of the March 18 meeting in discussions with prior city staff, they said they did not like to take a position in their memo to the ZBA. They said the Board might be offended by the opinion and take a contrary position. Then the new staff came in with a memo on Fisher v. Dover. He stated that in the context of this case, it was disruptive to the process but beyond that he hoped he had made reasonable arguments that the case should be heard on the merits.

Chairman LeBlanc called for a vote, noting that a positive vote was that they would not hear the merits of the case and a negative vote would be for them to go forward with the merits of the new application.

The motion to invoke Fisher v. Dover and not hear the merits of the application was passed by a vote of 4 to 2 with Messrs. Durbin and LeBlanc voting against the motion.

Messrs. Parrott and Witham resumed their seats and Mr. Durbin and Ms. Rousseau resumed Alternate status.

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E) Case 6-7
Petitioners: Irving and Victoria D. Canner
Property: 229 Pleasant Street
Zoning district: Mixed Residential Office
Request: Variances from Article III, Section 10-303(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow a 163 sf deck with a 5’8”± rear setback where 15’ is the minimum required.
(This petition was postponed from the June 16, and July 21, 2009 meetings)

As noted earlier in the meeting, this petition was postponed at the request of the applicant to the September meeting.

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F) Case # 7-2
Petitioner: William Pingree
Property: 6 Sagamore Grove Assessor Plan 201, Lot 5
Zoning district: Waterfront Business
Request:1) Variance from Article III, Section 10-301(7)(a) to allow the expansion of a structure within the 100' inter-tidal zone adjacent to Sagamore Creek.
2) Variance from Article IV, Section 10-401(A)(1)(b) to allow a nonconforming use to be extended into another part of a building or structure.

3) Variance from Article IV, Section 10-401(A)(2)(c) to allow a nonconforming building to be added to or enlarged where such addition or enlargement does not conform to all regulations of the zoning district.
(This petition was postponed from the July 21, 2009 meeting)

Mr. Witham advised that he would be stepping down for this petition. Ms. Rousseau assumed a voting seat.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard W. Pelech distributed a memorandum he prepared in support of the petition. He stated that there were primarily residential uses on this road. There was a state approved three bedroom septic on site and the house had three bedrooms, but only two were used due to the second floor height. They were proposing to put a dormer on the 2nd floor not affecting the footprint or the site. He stated that this complied with the Comprehensive Shoreland Protection Act. Referring to the submitted elevations of the building, he stated that no views would be affected and the height of the structure would not change. Three variances were required, one to allow expansion within 100' of Sagamore Creek, a variance to extend a residential nonconforming use in the Waterfront Business District, and a variance to allow a nonconforming building to be added to or enlarged.

Addressing the criteria, Attorney Pelech stated that there would be no detriment to the public interest. The building was constructed in 1974 before zoning and the creation of the waterfront business district. The nonconforming use, that of a residence, was not changing and there would be no additional demand for police, fire or municipal services. He stated that the zoning restriction as applied did interfere with a reasonable use of the property. The uses along Sagamore Grove Road were predominantly residential and most of the other uses require more space. The existing dwelling was within 100' of the creek, which created a hardship. There was also a narrow road which terminated at the property. Given the nature of the road and the size of the lot, the property was not reasonably feasible for retail sales of marine goods or other uses. In keeping with the Waterfront Business District, there was a commercial boat slip rental on the site and that existing commercial use would continue, but the water was not deep enough for an excursion boat.

He stated that there was no fair and substantial relationship between the ordinance and the restriction on the property. The proposed expansion was reasonable and allowing the dormer would not increase storm water runoff or alter the topography. The impervious surface would remain unchanged and the environmental impact would be negligible. The addition would be allowed by the Shoreland Protection Act and the use would remain unchanged as a single family three bedroom dwelling with a garage and a commercial dock. The existing septic system was adequate and compliant with state department of environmental safety requirements. The purpose of the Waterfront Business District was to allow waterfront uses, which was there.

Attorney Pelech stated that nothing would be changing which would affect the public or private rights of others. There would be no increase in traffic. It would be in the spirit of the ordinance to lessen congestion, allow adequate light and air and prevent the overcrowding of the land. This was the most appropriate use of the land. In the justice test, the public interest would not be

benefited by denying the variance, but there would be substantial hardship for the applicant. The bedroom would remain non compliant and without adequate emergency egress through windows. The dormer would not be seen from most of the properties and he was unaware of any opposition from abutters. There were no view or light or air issues so the value of the surrounding properties would not be affected.

Mr. Walter Allen stated that he lived at 1 Sagamore Grove Road and represented the interest of Ms. Diane Coughlin and others. They felt this would have no impact on the neighborhood.

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 grant the petition as presented and advertised, which was seconded by Mr. Grasso.

Mr. Parrott stated that it was hard to see any general public interest in this proposal with where the dormer was situated and with nobody directly next door. The special conditions creating a hardship were that they want to expand but were close to the creek and the structure was already nonconforming. There was no other means to increase the size of the house. The expansion was entirely vertical, basically an infill project. He stated that it would be in the spirit of the ordinance to update and expand the building to make it more usable. The expansion was modest and the building not overly large. In the justice test, there was no evidence that the there would be any benefit to the public in denying the variance. Improving this property would only make it more attractive and reflect favorably on property values.

Mr. Grasso agreed. This was a vertical expansion with no expansion of the footprint or increase in the building coverage, which was relatively low for this lot.

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

Mr. Witham resumed his seat and Ms. Rousseau resumed Alternate status.

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A board member mentioned the ten o-clock rule and Mr. Witham suggested that the Board hear the first three petitions. Mr. Grasso made a motion to consider Public Hearing Petitions 1), 2) and 3) and continue Petitions 4) through 11) to the following week. The motion was seconded by Mr. Witham and passed by unanimous voice vote.

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G) Case #7-9
Petitioners: J.P. Nadeau & Witch Cove Marina Development, LLC
Property: 187 Wentworth House Road

Zoning district: Waterfront Business Assessor Plan 201, Lots 12, 17 and 18
Request: 1) Variance from Article II, Section 10-208 Table 4 to allow 5 single family dwellings in the Waterfront Business District, where residential uses are not allowed.
2) Variance from Article III, Section 10-301(7)(a) to allow a yacht club structure and 2 single family residences to be constructed within 100 feet of the mean high water line of Sagamore Creek where structures are not allowed.
3) Variance from Article III, Section 10-304(A) Table 10 to allow a relocated residential structure with a front yard of 14' where 30' is required and a left side yard setback of 12' where 30' is required, and a right side yard setback of 24 feet where 30 feet is required.
4) Variance from Article XII, Section 10-1201(A)(1)(b) for 10 parking spaces which lie outside the 300' distance of the subject property.
5) Special Exception from Article XII, Section 10-1201(A)(1)(b) to allow parking on another lot in the same ownership; provided all spaces lie within 300 feet of the lot in question.

As noted earlier in the meeting, this petition was postponed at the request of the applicant to the September meeting.

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II. PUBLIC HEARINGS

1) Case # 8-1
Petitioners: Martin L. Ryan
Property: 221 Woodbury Ave. Assessor Plan 175, Lot 10
Zoning district: General Residence A
Request: Variance from Article III Section 10-302(A) to allow for a new lot with 60.45'± of frontage where 100' is required

SPEAKING IN FAVOR OF THE PETITION

Mr. Martin Ryan stated that he had owned the property since 1996 and his intention was to subdivide it. His request was for relief from the 100' of frontage to 60.45'. Addressing the criteria, he stated that this was an irregularly shaped corner lot and the existing structure made it difficult to subdivide. He had done a survey of the surrounding lots and only 25% met the frontage requirement. He stated that the size and scale of the lot would meet the spirit of the ordinance, with proper setbacks and buffering. It would be designed to fit the residential nature of the rest of the community. In the justice consideration, not allowing the variance would lend itself to an expansion of the current structure which would be more intrusive than what he was proposing. A variance would allow them to increase the value of the property while producing another buildable lot.

Mr. Grasso asked Mr. Feldman for clarification of the reference in the departmental memorandum to the new lot having an address of Thornton Street. Mr. Feldman stated that what they would see if they looked at the plan was that the applicant was proposing to create two

undersized lots. Because the address for the main lot from which the parcel would be cut was a Woodbury Avenue address, not Thornton Street, they needed to look at the frontage on Woodbury Avenue, rather than Thornton as the width of the lot. Even if they were going to look at Thornton Street as the width of the lot for the frontage, the depth of the lot still wouldn't meet the requirements. Mr. Grasso agreed but stated it would be less impact. His follow-up question was, if this were met favorably by the Board, would the two addresses be Woodbury Avenue. Mr. Feldman stated that they would.

Mr. Parrott referred to Mr. Ryan's memo to the Board under "Conditions," where he had said that if the parcel were vacant, it would be possible to configure the proposed lot lines in a manner that would not require a variance. As he looked at the plot plan provided, Mr. Parrott saw 133' on Woodbury Avenue and 145' on Thornton Street and he was trying to figure out how either of these could end up with 200'. Mr. Ryan stated it would be achievable if Thornton Street were considered as frontage and with the creation of a division that was irregular in shape that could have angles back from the corner back toward the opposite deep corner of the lot. Mr. Parrott asked if he meant an L-shaped lot and Mr. Ryan replied it could be an L or triangular. Mr. Parrott asked him if he were aware of a general requirement in the city zoning ordinance which said that lots generally should be of a rectangular nature, his point being that the applicant might not be able to take an essentially rectangular lot and reconfigure it in some odd way.

Ms. Rousseau stated that Mr. Ryan had mentioned the benefit to the city re. tax revenue and asked if he intended to put a three bedroom house on there. Mr. Ryan stated his intention was to build a single family residence. He hadn't explored all possibilities. Ms. Rousseau stated that would bring in about $10,000 in tax revenue and it cost $10,000 per child in the school system. With more than one child, the city was in a deficit position, which she felt would not be in the public interest.

Mr. Ryan stated that he would just like to add that he had read the comments from the planning department and if it were an issue of whether or not he had requested the proper variances, depth versus frontage, he would like to go after a continuance and adjust the request. Chairman LeBlanc stated that it was too late as they had already opened consideration.

Mr. Witham directed a question to Mr. Feldman. The way he was reading it, if the applicant used the address of Woodbury Avenue, he needed 100' of frontage and, if he used Thornton Street, he needed 70'. Mr. Feldman stated, "no." He still needed 100' of frontage but he needed 70' of depth because it was a corner lot and he didn't have that either. Mr. Feldman concurred when Mr. Witham asked if, then, 70' x 100' was the minimum lot size.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Witham stated that he was usually hesitant to approve a subdivision which brought one lot into nonconformity. One of the key considerations was a change in the essential character of the neighborhood. When you look at the site map of the neighborhood, what the applicant was proposing conformed to 75% of the lots in the area so that the essential character of the area would not be changed. Mr. Witham stated that each lot met the lot size requirement and there was room to build. He could understand hesitance in putting another lot into nonconformance but the structure on the one lot now was nonconforming.

Mr. Witham stated that granting the variance would not be against the public interest. They were not creating substandard lots. The properties would be larger than required for lot size but did not have the street frontage. He didn't feel the information about the cost to maintain one student could be used as an argument in determining the public interest. The special conditions would be the corner lot and the shape which made it difficult to divide and meet the requirements. He felt there was no public benefit to having one oddly shaped lot as opposed to two standard lots with two houses. He stated that the spirit of the ordinance would be served by allowing a reasonable use of this lot and creating another housing unit which would be of such a size as to be affordable. He reiterated that the essential character of the neighborhood would remain unchanged. Justice would be served by allowing the owner to create another lot in keeping with the area and the value of surrounding properties would not be diminished. There was plenty of space between the proposed properties and the homes to the sides.

Mr. Grasso stated that he was on the fence. Mr. Witham made a strong argument and he was going to go with his motion to grant the petition. Given the current zoning the house that would go in the buildable section of the new lot would not be overbearing for the neighborhood.

Mr. Parrott stated that if they approved the request, there would not be just one nonconforming lot but two and a 60' wide lot line was very short. Absent some extraordinary circumstance or hardship presented by the land, there was no strong reason for the subdivision except that the owner wanted to do so. The fact that there were plenty of others in the neighborhood was not a good reason to make two new nonconforming lots.

Mr. Witham stated that he didn't feel he was making a motion to create two nonconforming lots. The lot was already nonconforming considering the location of the structure. It would be conforming with regard to size and it was noted that he could make two conforming lots by having an odd shape but again that flew against the recommendation to which Mr. Parrott referred about having the regularly shaped rectangular lots. To have the applicant go do it without a variance seemed to require going through a lot of hassle to make this odd shaped lot work and he questioned whether it was in the public interest to do so. He also noted that, while 60' was narrow, it was the average for 75% of the homes in that area.

Ms. Eaton stated that the application could not meet all the criteria, especially the special conditions for the lot.

The motion to grant the petition failed to pass by a vote of 3 to 4, with Ms. Eaton, Ms. Rousseau and Messrs. Durbin and Parrott voting against the motion.

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2) Case # 8-2
Petitioner: Cross Roads House, Inc.
Property: 600 Lafayette Rd. Assessor Plan 243, Lot 2A
Zoning district: General Business
Requests: Variance from Article III Section 10-304(A) to allow for a 5' ± left side sideyard setback where 30' is required to expand the dumpster pad for the placement of a backup generator

Ms. Eaton and Mr. Witham stepped down for this petition and Ms. Rousseau assumed a voting seat.

SPEAKING IN FAVOR OF THE PETITION

Mr. Eric Weinrieb, of Altus Engineering, stated that he was there with Mr. Mark Ryan of Driver Ryan Architects and Mr. Chris Sterndale, the Executive Director of Crossroads. He stated that the parcel containing Operation Blessing and Crossroads was in the General Business District. In November of 2007, they had come before the Board of Adjustment for three variances for the most recent development and had a long history before that. He pointed out on the exhibited plan what had been approved at that time and what was under construction. They expected occupancy this fall. During the initial planning, they had discussed an emergency generator but, due to budget considerations, it had been taken out. In light of last year's storms and power outages, they realized it was needed. He stated that the City of Portsmouth had helped him find the generator noted in the packet which he then described. He noted that there was no need for storage of fuel or to refill the generator as it came in from the street. It was sited in an area where it would have the least impact, near the utility services which came into the facility and utilizing the same enclosure. It would abut an automobile dealership, not a retail location and would be "exercised" only once a week.

Mr. Weinrieb stated that it would be in the public interest to avoid a greater burden on the community during a power outage. With a generator, all the residents could remain at Crossroads. The special conditions were that Crossroads was not a business but a nonprofit. There were no other shelters in the city and they needed to keep people there during an emergency. Granting the variance would not be contrary to the ordinance as it was the intent of the ordinance to protect abutters from structures and nuisances. The area on the property was heavily landscaped and was sited in the least objectionable location. Justice would be served as they provided a benefit to the community by helping those less fortunate. With similar adjacent uses, the value of surrounding properties would not be diminished.

In response to questions from Mr. Grasso, Mr. Weinrieb confirmed that the decibel level was 70db. He did not know what it was 5' from the property line and would have to check with the supplier. He pointed out that noise would be generated only during emergency situations which typically would be in winter when windows were closed. Chairman LeBlanc asked what comparatively would have a sound level around 70db and he and Mr. Jousse concluded it would be like a diesel truck idling. When Mr. Grasso asked the duration of the weekly "exercise," Mr. Weinrieb stated it would be less than 5 minutes. In response to questions from Ms. Rousseau, he stated they had not talked specifically about this with the neighbors but the project had been before two boards and there was a letter in the file supporting it. The abutters had been notified and no one had expressed opposition.

Chairman LeBlanc asked how the pad would be fenced and Mr. Weinrieb stated it would be chain link fencing with vinyl slats which would attenuate the sound a little. Mr. Parrott asked about the sound emissions in dba portion of the spec sheet where it listed exercising and normal operation at 7 meters and he wondered what the difference was between the two. Mr. Weinrieb stated that in exercising, it started up and ran through the system and turned onto the panel inside the building and basically shut off. It was not running to the full voltage, which was why it would be at a lower decibel level than normal operation. As Mr. Grasso stated, it would not be under load.

Mr. Parrott stated that the nearest residential abutters were across the fence on the west side and asked if there were a way to project what the sound level would be at the property line because that was his concern. When Mr. Weinrieb stated they could get additional information if that were necessary, Mr. Parrott stated that seemed pertinent if the system were run every week and for a substantial time in emergency situations. Those people would be subject to noise.

In response to questions from Ms. Rousseau, Mr. Weinrieb stated that the system was not yet hooked up as the building was under construction. If they were to take a site walk, they could see where it would be as the conduit was there. He confirmed that they could not get an idea of the noise from a site walk, but it was not all that different from the emergency generators used in residences.

Mr. Witham stated that he was Chairman of the Furnishings Committee for this project. The reality was that this would be used only in emergency situations which would usually occur in wintertime. Whenever the power was lost, you could hear generators and sump pumps running. This would be an emergency situation and people's expectations changed. In terms of the 5 minutes a week to exercise the system, the sound generated would be no different from a garbage truck backing up. He didn't see any issues or complaints for noise. Chairman LeBlanc asked if he had any idea of the amount of sound attenuation over 100' because this appeared to be 100' back from the property line. Mr. Witham stated, shy of doing a test, they would be guessing, but 100' was a good distance. Ms. Rousseau asked if either an emergency situation or the weekly testing would be disruptive to the business next door and Mr. Witham responded that whatever business was there would probably be relying on their own generator to be up and going or they would be closed. Chairman LeBlanc asked Mr. Weinrieb how far the generator was from the property line and he responded that it would be about 125'. There would also be additional landscaping at the back.

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 with the stipulation that the property boundary decibel level met city zoning. Chairman LeBlanc stated that those were the performance standards and he believed it was measured at 4' at the property line. Mr. Grasso stated it might be different with commercial on one side of the property line and

residential on the other. Mr. Feldman read from the ordinance the sound levels in residential and all business districts between 7:00 a.m. to 9:00 p.m. would be 60 decibels. When Chairman LeBlanc noted that was almost met at the source and there was a fence and the distance, Mr. Grasso withdrew his stipulation. The motion was then seconded by Mr. Parrott.

Mr. Grasso stated that the generator would allow the operation to have some continuity in nasty weather which would be in the public interest. The special conditions resulting in a hardship were that they were conducting approved remodeling on the property and were trying to keep the generator away from other buildings. There was no better location. Putting it in the middle would not be reasonable. He stated that granting the variance would be in the spirit of the ordinance and there would be no benefit to the public in denying the petition. As described, he could see no diminution in the value of surrounding properties as a result of granting the variance.

Mr. Parrott stated that the sound level on the west side seemed not to be a problem and, in practical application, he could not see that it would bother anybody.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 6 to 0.

Ms. Eaton and Mr. Witham resumed their seats and Ms. Rousseau resumed Alternate status.

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3) Case # 8-3
Petitioner: Nancy B. & John E. Howard
Property: 179 Burkitt St. Assessor Plan 159, Lot 10
Zoning district: General Residence A
Request: Variance from Article III Section 10-301(A)(7)(b) to allow for the construction of an accessory structure within 100' of North Mill Pond

SPEAKING IN FAVOR OF THE PETITION

Mr. John Howard stated that they resided at 179 Burkitt Street and were proposing to build a sundeck and needed a variance as it would be within 100' of a pond, as was a large portion of the existing house. He felt that the hardship was that sundecks were a common and useful way to enjoy property. In response to a question from Chairman LeBlanc, he stated that there was grass in back all the way to the North Mill Pond and they were seeking a shoreland permit, which was in process.

Mr. Jousse asked him if they had considered, instead of building a porch or deck which would mean removing some of the limbs of the tree in back, putting in a patio which would be at ground level and accomplish the same thing with less expense. Mr. Howard stated that he was a certified arborist and would prune the tree properly. They had thought a lot about a patio versus a sundeck and the sundeck was the way they would like to go. He noted that they had gardens built between where the deck would be and the pond and the deck would not even extend out that

far. In response to questions from Mr. Parrott, Ms. Eaton and Ms. Rousseau, Mr. Howard stated the shoreline behind was not natural but fill. The neighbor's lot was higher and level because that lot had more fill. The access to the deck from the house would be a side entry. There were now precast concrete steps and these would go up to a portion of the deck and then lead to a side door of the house. Comparing his proposed deck to his left-hand neighbor, the neighbor's deck, which was grandfathered, came out further. His would be less intrusive and not visible from the street. He noted there were no objections from neighbors. He had one photograph of the proposed location which he then passed around.

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

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

Mr. Parrott stated that, given the fact that the house was already in the 100' setback and the back was developed with lawn, an open deck would be not very much more intrusive and it was relatively modest size with no foundation. Beyond that, the petitioner had indicated that the area had been filled. He felt that coming out only 12' from the house left plenty of room to the pond. He stated that it would be hard to see a public interest in this deck at the back of a house. The unique setting creating a hardship was that this was on fill land adjacent to a pond, but set back a reasonable distance. There was no fair and substantial relationship between the ordinance and the restriction on the property. It was hard to see any precedent which would be created by granting the variance and the rights of others would not be hurt. He stated that it would be in the spirit of the ordinance to allow property owners to make useful improvements. In the justice balancing test, there was no overriding public or private interest which would argue for disapproval. Regarding the value of surrounding properties, others had similar deck and adding a little value to this property should reflect favorably on those surrounding it.

Ms. Eaton stated that there would be a minor increase in the footprint and, unlike pavement, a deck would allow some water to pass to the ground. She noted that there would be another layer of protection in their having to obtain a shorelands permit.

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

III. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 11:00 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary

Minutes Approved 9-15-09