MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m. **September 15, 2009**

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

EXCUSED: Chairman Charles LeBlanc

ALSO PRESENT: Principal Planner, Lee Jay Feldman

Vice-Chairman Witham announced that the postponed petitions for 140 Court Street and 245 Middle Street had been withdrawn and would not be heard. He also advised that, while the Board would still need to rule on it, the applicants for 1700 Woodbury Avenue had requested a postponement to the next meeting.

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I. OLD BUSINESS

A) Approval of Minutes – July 28, 2009
August 18, 2009

It was moved, seconded and passed by unanimous voice vote to approve the Minutes of the July 28, 2009 meeting as presented.

Ms. Rousseau stated that she had some corrections to the August 18, 2009 meeting, which included inserting in the last paragraph on page 10 that she had read from the master plan to support her position on the application. She also referenced page fourteen, the second paragraph, and requested that the tape be reviewed for her comments regarding city officials appearing before the Board inappropriately and her comment that the shed was too small to be used for commercial purposes. She also stated that the last paragraph on page fourteen didn't make sense to her and it was a little wordy. She requested that the tape be reviewed for clarification. She abstained from voting on the minutes until she had seen the adjustments.

Mr. Jousse made a motion to approve the Minutes as presented and subject to corrections per Board members. The motion was seconded and passed by a vote of 6 to 2, with Ms. Rousseau and Mr. LeMay abstaining.

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B) 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, July 21, and August 18, 2009 meetings)

Vice-Chairman Witham stated that the applicants had requested that the petition be postponed to October. When Mr. Parrott asked if the Board should be entitled to an explanation as to why, Mr. Feldman stated that the applicant had been trying to deal with the condominium association to straighten out a number of issues and some of the folks had been out of town. He had asked the applicant to consider withdrawal and returning with a new petition, but the applicant had indicated he would be prepared to take up the matter in October.

Mr. Witham stated that there should be a stipulation that this be the last postponement. Ms. Rousseau stated that they hadn't seen a letter regarding this postponement and Mr. Feldman indicated that a copy of the email was in front of them that evening.

Mr. Parrott made a motion to postpone the petition to the October meeting but this would be the last postponement in consideration of the time of Board members who might be visiting the property. The motion was seconded by Mr. Grasso and passed by a unanimous vote of 7 to 0.

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C) 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.
(This petition was postponed from the July 28, and August 18, 2009 meetings)

Vice-Chairman Witham stated that the applicant had requested that the petition be postponed to the October meeting. Mr. Feldman stated that the applicant had requested a postponement to what they hoped would be October. The development had taken twists and turns and it had taken longer than expected. It was now in front of the Conservation Commission and would then have to go to the Planning Board. There would be a discussion of future proceedings with them.

Ms. Rousseau asked why the applicant was not there representing their interest or at least some documentation as to the reason for the request. She stated that they seemed to be relying on city officials. Mr. Feldman noted that the applicant's representative was there.

Bernard W. Pelech, Esq. stated that, under the procedure set forth by the Planning Department, they could not come before this Board before a conditional use permit was issued, for which they applied at the same time as the variance. They had been before the Commission on three occasions and would be returning in October, after which hopefully the Commission would make a recommendation to the Planning Board to be heard at the October meeting. This meant they would not be back before the Board of Adjustment before November as the City requires that the conditional use permit be in place before seeking a variance.

Mr. Witham stated his concern that they were sitting on a packet for a variance request and asked if it would vary significantly. Attorney Pelech stated there were would be changes based on their meetings with the Conservation Commission. Some relief might not be necessary and they were meeting with administrative staff this Friday to discuss issues such as parking to determine impacts. What was in the packet was the worst case scenario and they would be seeing revised plans and a lesser request. He confirmed that they would receive revised packets 3 to 4 weeks in advance of the meeting. When Mr. Witham commented that they want to avoid sifting through two sets of plans, Attorney Pelech agreed but stated that unfortunately they couldn't finalize it until the completion with the Conservation Commission.

Mr. Jousse stated that he had the same concern and felt the cleanest way would be to withdraw the petition and present a brand new case. He didn't want to be in a situation where he was looking at certain pages from the first packet and others from the second. When Attorney Pelech stated that they would endeavor to get this to them as soon as possible, Mr. Witham commented that it should be a crisp, clean packet Attorney Pelech stated there would be a note to destroy everything previously.

Mr. LeMay stated that he had previously expressed concerns about postponements and their effect on abutters. It bothered him that cases went on for months and abutters could fall by the wayside if they were not vigilant. Particularly in a complex case like this, they needed a clean package and abutter notice. Attorney Pelech agreed and noted that he had indicated in a letter that the applicant was willing to pay for re-notification to abutters.

Mr. LeMay stated that he recommended that the Board either request withdrawal of the petition or that they deny it without prejudice, just keep it simple.

Attorney Pelech stated that he would recommend that the motion be to postpone the petition until November because it was impossible for them to come back in October because of the procedural issues.

Mr. Witham asked why, if they were submitting a new packet and were willing to pay abutter fees, they wouldn't just withdraw the application? Attorney Pelech stated they probably would if they could work with the Planning Department. The issue was whether the application fell under the new zoning ordinance or the old. If they did file a new application, it would be before October 13 when the Planning Board was expected to refer the new zoning ordinance to the City Council. Mr. Witham commented that was the reason.

Mr. Jousse made a motion to postpone the petition to the November meeting, which was seconded by Ms. Eaton. Mr. Parrott suggested a stipulation that this be the last postponement. He shared Mr. LeMay's concern and, whether it was intentional or not, the effect of postponements could be the same. Mr. Jousse and Ms. Eaton stated the stipulation was acceptable to them.

The motion to postpone the petition to the November meeting, with the stipulation that this be the last postponement, was passed by a vote of 6 to 1, with Mr. LeMay voting against the postponement.

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D) Case # 8-9
Petitioners: Portsmouth Housing Authority
Property: 140 Court St. Assessor Plan 116, Lot 38
Zoning district: Mixed Residential Office
Requests: 1) Variance from Article III section 10-303(A) Table 9 to allow for a 0'± rearyard setback where 15 is required
2) Variance from Article IV Section 10-401(A)(2)(c) to allow the expansion of a nonconforming structure

As announced at the beginning of the hearing, this petition was withdrawn.

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E) Case # 8-10
Petitioners: Portsmouth Housing Authority
Property: 245 Middle St Assessor Plan 136, Lot 16
Zoning district: Mixed Residential Office
Requests: 1) Variance from Article III section 10-303(A) Table 9 to allow for a 0'± left side sideyard setback where 10' is required
2) Variance from Article IV Section 10-401(A)(2)(c) to allow the expansion of a nonconforming structure

As announced at the beginning of the hearing, this petition was withdrawn

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II. PUBLIC HEARINGS

1) Case 9-1
Petitioners: Maria Elena Koopman & James Peterson
Property: 335 Maplewood Avenue Assessor Plan 141, Lot 26
Zoning district: Mixed Residential Office
Request: Rehearing for a previously heard application which stipulated the number of employees allowed to be employed at the property

Mr. LeMay recused himself for this petition as he was not in attendance with the petition was first heard. Ms. Rousseau assumed a voting seat.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard W. Pelech stated that he there representing Mr. Peterson and Attorney Doyle was also there representing Ms. Koopman. The Board had granted a parking variance at the August meeting with one of the conditions being that there be a maximum of 6 employees at the site. Mr. Peterson was not at that meeting and he was in the process of hiring a seventh employee, which affected the purchase and sale for the property. The sale had not yet been consummated but they hoped to do so that month and there were extenuating circumstances regarding the seller which Mr. Doyle could discuss with them.

Attorney Pelech stated that because this was a rehearing, he had submitted the same memorandum that he submitted for the prior meeting where the Board found unanimously on all five criteria, including regarding whether the variance would be in the public interest. He stated it certainly would be in the public interest to grant the requested variance. As they might recall from the presentation and memorandum, Mr. Peterson had an engineering firm with a unique situation. His office was currently downtown and he had six employees who all walk or ride bikes, with a company car for visits to clients. They usually meet at the clients' places of business and there were minimal deliveries, maybe once a week.

He referred the Board to the photographs he had previously submitted and noted that most members had been out to look at the site. There were 8 head-in parking spaces and then a change in grade which were the special conditions making it not reasonably feasible to create additional parking. He noted that, under the new ordinance, the required parking would be reduced from 12 to 10. Attorney Doyle stated that granting the variance would be consistent with the spirit and intent of the ordinance, which was to ensure that adequate off-street parking was available to prevent overcrowding on the street. Given the nature of the business, number of employees and method of commuting, 8 existing spaces were more than adequate and Northwest was a little traveled street. Citing the Malachy v. Glen court case, he stated that one of the ways to determine if the spirit was violated and if an action would be in the public interest was to look at whether it would result in a change to the essential characteristics of the locality, which he submitted this would not.

Regarding the justice test, Attorney Pelech stated that no public benefit would outweigh the hardship on the applicant if the petition were denied. The entire sale would fall through, which was important to both the owner and applicant. He stated that the value of surrounding properties would not diminish. If anything, this was a less intense use, with less coming and going during the day. Traffic and the impact on public services would be less than with a bed and breakfast. Overall, it would be a less intense use.

Attorney Pelech stated that the reason they were there that evening and that the Board had granted rehearing was that the condition attached to the previous ruling was not acceptable as the applicant was in the process of hiring additional employees. He stated that it made sense to consider whether the number of employees was the best indicator of the impact on parking. There were other uses which might fill the lot, but have less employees, such as a dentist's office. He suggested that the Board, as Mr. Parrott had proposed at the previous meeting, could place a condition that any change in use from an engineering office must come back before the Board for parking requirements. This condition would change the old adage of a variance running with the land. He noted that different types of professional offices created different demands, yet all were subject to the same parking requirements.

Ms. Rousseau stated that it seemed like the only issue was the stipulation as to the number of employees and she was shocked to see that because this was a land use board and she didn't feel it could stand a legal challenge. They can dictate the number of parking spaces but have no business to tell a business owner how many employees he can have. She also felt it was micromanaging to even have someone come up if there was a change in use. If it was zoned office and 8 spaces were allowed, let it be. They should not be running people's business.

When Mr. Witham asked if she had a question or did she just want to say that, she directed to Attorney Pelech, "Wouldn't you agree?" Attorney Pelech replied that he would, which was why he suggested that, rather than a limitation on number of employees, there be a stipulation that if there were a substantial new change in use from an engineering firm that the applicant return back.

Mr. Jousse commented that he believed they did have legal grounds if this happened to go to Superior Court because, as noted in the minutes of the original meeting, Attorney Pelech suggested that the Board place a stipulation that there be no more than 5 or 6 employees and if more were needed, they could come back. The Board was given rights by the applicant to limit the number of employees. He wasn't sure which way to go as he had felt last month that they should not dictate the number of employees.

Attorney Pelech acknowledged that he did make that statement when he was unaware that Mr. Peterson was in the process of hiring another employee. As he had said, they would come back and there they were.

Ms. Rousseau stated that "this was a stand-alone application, a whole new hearing so any court would look at it in that way. And they were not asking for any stipulations in this particular situation. It just becomes messy every time they have to look at a different business every time instead of saying this was zoned office. It has six spaces. Work with it. And if you don't like it, come before us for a variance, but every time a new business goes in there, we would have to look at every single application. That gets a little ridiculous when we're talking about eight parking

spaces. So your application is stand-alone. You're not requesting anything to do with the number of employees per business and that's not an issue. Would you agree that that, your (Attorney Pelech interjected, "yes") application does not include that and that's what we need to look at in this stand-alone application.

Attorney Pelech stated he agreed.

Mr. James Peterson stated that he was from Peterson Engineering, which had been a green firm before the term was coined and that history will continue. He reiterated that the company had been located in downtown Portsmouth and he had walked or ridden a bike to work for years. He outlined how his goals fit in with the city's sustainability initiative. Part of attracting professionals was that he was located in Portsmouth and his intent was to make this building energy efficient, in keeping with sustainability and the environment.

Attorney Peter Doyle stated that he was there on behalf of Ms. Koopman who has been running the bed and breakfast, but was looking to retire and relocate. This sale would permit Ms. Koopman a return on investment which would allow her to retire with a degree of comfort. She had been in bankruptcy and successfully came through with an improved plan to sell this property by September but then they had to request a continuance due to difficulties. He stated that the burden borne if the variance were denied or with the stipulation was that she would lose the buyer without sufficient time to replace him. The result would most likely be a foreclosure. He reiterated previous comments that this business would likely decrease vehicles in the neighborhood.

In response to questions from Mr. Witham and Mr. Parrott, Attorney Doyle stated that there were 4 or 5 rentable rooms in the bed and breakfast. When the inn was in full operation, depending on the day, there would be something in the neighborhood of 10 to 12 people there during business hours, higher on weekends than during the week. There had been one employee and a part-time person to clean.

Mr. David Choate, stated that he was a realtor who had been working with Mr. Peterson to find a property and this was the first which met his requirements which included not forcing people to drive to work. He noted that, were this property 4 buildings closer down Maplewood, it would be in the Central Business B district and have no parking requirement. He reiterated that, without consummation of this sale, the property was probably going to foreclosure and, without a buyer at a number acceptable to the owner, would sit there and deteriorate. He felt it was important to the master plan to not have a building maintained as this corridor had been identified as a gateway to Portsmouth. It was also vital to grant the variance without conditions.

Mr. Jerry Johnson stated that he was the President of the Old Franklin School Condominium Association which had five residents directly across from the property. They had no objections and felt that to go down from 10 parking spaces to 8 would not impact 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. Witham noted that this petition had been previously granted stipulating 6 employees and the petitioners had come back to amend the stipulation, which was denied. A rehearing was granted and now a new request was before the Board.

Ms. Rousseau made a motion to grant the petition as advertised and she wanted to be clear about how that was advertised, which was a variance from provisions from Article XII, Section 10-1204 to allow 8 spaces where 12 were required. She stated she would go through the criteria and Mr. Witham noted that he needed to get a second. Ms. Eaton seconded the motion.

Ms. Rousseau stated that actually she was looking at the applicant's memorandum in support of variances and stated that she agreed actually with every single point as presented in this particular submission to them on all of the Boccia analysis variance points. She stated that she would like to submit them as her position for granting this variance. She stated there was not one there that she disagreed with and she thought they all had it in front of them so they knew what she was referring to.

Ms. Eaton stated that, considering the closeness of the property to a commercial business district and the availability of on-street parking, she did not feel it was unreasonable, considering the use of this property, to allow 8 where 12 were required now and where 10 would be required in the future.

Mr. Witham agreed that it was a reasonable request, given the location. He didn't see a difficulty with the parking and felt that the applicant, if the spaces were needed, would ensure that they were kept clear.

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

Mr. LeMay resumed his seat and Ms. Rousseau returned to alternate status.

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2) Case #9-2
Petitioners:Scott G. Snyder and Danielle Snyder
Property: 24 Suzanne Drive Assessor Plan 292, Lot 93
Zoning district: Single Residence B
Request: Variance(s) Article III Section 10-302(A) Table 8 to allow a 19'± front yard setback where 30' is required
Article IV Section 10-401(A)(2)(c) to allow the expansion of a nonconforming structure

SPEAKING IN FAVOR OF THE PETITION

Mr. Scott Snyder stated that previous improvements had been made several years ago when the side steps were in disrepair. There has now been water damage to the front steps and landing and

they would like to replace them, while proposing a roof in the same footprint to avoid future water damage. When questioned by Mr. Witham and Mr. Grasso, he confirmed that the replacement steps would be the same size but composed of a new composite material with better durability. The roof would only be over the landing section.

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. Durbin

Mr. Grasso stated that the applicant simply wanted to replace weathered steps and add a roof over the landing and he could see no public interest involved. The special conditions resulting in a hardship were that the existing steps needed repair and he was proposing to replace them as they were without enlarging the footprint. The steps were located where they were inside the setback and there was no reasonably feasible method to use to repair them without needing a variance. He felt that improving safety, in keeping with the spirit of the ordinance, was a concern here. Justice would be served and there would be no diminution in the value of surrounding properties by replacing the front steps and adding a roof.

Mr. Durbin stated that he agreed with Mr. Grasso. This was in an in-kind replacement simply adding a protective roof.

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

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3) Case # 9-3
Petitioner:2422 Lafayette Road Associates, LLC
Property: 2454 Lafayette Road Assessor Plan 273, Lot 3
Zoning district: General Business
Requests: Variance(s) Article IX Section 10-906(A)(1)(a) to allow a primary free standing sign of 350 square feet where 150 square feet is allowed; and to allow a sign of 27'10" in height where 25' is allowed and to allow two(2) additional signs at the primary entrance where they are not allowed.
Article III Section 10-301(8) to allow a structure to be placed within the right-of-way along Route 1 with a setback of 20' where 105' is required
Article III Section 10-301(8) to allow a structure to be placed within the right-of-way along Route 1 with a setback of 50' where 105' is required

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard W. Pelech stated that the applicants were there for what appeared at first blush a lot of relief but actually was not. He explained that the City of Portsmouth measured signs differently under the ordinance. Referring to the exhibits, he indicated the existing sign and the proposed sign, stating that the proposed would fit inside the existing. Taking the sum of the rectangles, you would come up with 249 s.f. for the proposed sign. Calculating it strictly as total height by total width, you come up with 350 s.f. so a variance was needed. He stated that the proposed sign would use the same support and be located 50' from Lafayette Road. He stated that the ordinance required 25' from the property line. This was where they differed from the Planning Department who viewed the sign as a structure having to meet the 105' requirement from Lafayette Road. He stated that this was the first time that determination had been made and noted that if the rest of the signs on Lafayette met that requirement, the signs would be behind the buildings.

Attorney Pelech indicated Mr. Doug Richardson from 2422 Lafayette Road LLC who have undertaken major renovations at the plaza. He outlined a brief history of the center, noting that after a down period, that group purchased the center and had submitted a new site plan for improvements which was approved by the Planning Board in the spring. Along with extensive landscaping, part of the plan was to allow these two curved stone walls along the Lafayette Road entryway to make it more attractive. Although fences and walls were usually allowed within the setback, the Planning Department considered the stone wall a structure subject to the 105' setback and requiring a variance. He indicated the entryway and the stone walls on the plan, noting that they were not within the Department of Transportation right of way in case they needed to widen Lafayette Road.

Attorney Pelech stated that it was also determined that a variance was needed to put non-illuminated lettering on the stone wall as he pointed out on the rendering. It was felt that this didn't fit as a monument sign, attached signage or a pylon. Addressing the criteria as it related to the stone wall, he stated that allowing replacement of sign which had existed for more than 40 years with modern signage using the same supporting structure would not be contrary to the public interest. He stated that the appearance would be enhanced and, along with the landscaping, the aesthetics would be improved. The Zoning Ordinance in Article V stated that, if they were 100' from a residential zone, screening would be required and a masonry wall less than 6' high would qualify as screening. While screening was not required in this instance, this plan would meet that definition. He cited several examples of stone walls used as landscape elements along Lafayette Road. Attorney Pelech stated that they were not normally considered structures subject to required setbacks like a building would.

Attorney Pelech stated that granting the variance would not be contrary to the spirit and intent of the ordinance because the ordinance allowed a business to put up a fence along, or close to, the property line and someone could build a stone wall and that would be allowed. Again citing Malachy Glen v. Chichester, he stated that one way to determine whether a variance met the spirit and intent of the ordinance was to determine whether or not it would alter the essential characteristics of the area and this would not. He cited some of the purposes of signage from the ordinance including protecting the public from distracting displays and this would not violate that intent. Likewise the stone walls and lettering would not be contrary to the spirit and intent of the ordinance or threaten public health or safety, but they would provide advertising in a safe and orderly manner.

Another way was to examine whether granting the variance would threaten the public health, safety or welfare and he felt that clearly defining the entryway would only enhance them. He noted the second entryway off Constitution Avenue was not signalized and 95% of all vehicles enter and exit through the primary intersection. The previous ordinance created different types of signage for two types of shopping centers and the applicant could have had another 75 s.f. free standing pylon at Constitution Avenue but they had no intention to do so. They would rather put 70 s.f. of lettering on the stone walls at the primary entryway.

In the hardship analysis, Attorney Pelech stated that the special conditions included the existing pylon sign 50' from Route One which predated the 105' setback. The other special condition was the way the signage was measured, as he had outlined earlier and he felt that the literal enforcement of the ordinance, with the Planning Department stating that the sign had to be 105' from Lafayette Road and the different methodology for measurement, created a hardship. He again noted that a stone wall would be considered screening under Article V. He stated that there was no other reasonably feasible method to achieve the benefit sought of updated signage. They could leave the old and simply put the names of the new tenants on the panels but noted that the sign was not in the best shape and a new one would better identify the various tenants. If the Board denied relief, the sign would remain, which would not be beneficial to the public as the new sign was reducing the height by 7 or 8 inches or aesthetically pleasing.

Attorney Pelech stated that in the justice test, the hardship on the owner would not be outweighed by any public benefit if the variances were denied. They were simply trying to make the property as attractive as possible and revitalize the shopping center. There was a lot of interest in the new center once the improvements were done. He listed the abutting properties whose property values had suffered over the past 5 or 10 years due to the condition of the property. With the improvements and leveling the grade of the parking lot, the values should be enhanced.

Attorney Pelech then addressed the Simplex criteria for the stone walls. The Planning Department memorandum had stated that a use variance was required as these were not allowed as signs in the ordinance. The criteria for the Simplex analysis were the same as he had already outlined except for the hardship test so he would only cover that. He stated that the stone walls were a reasonable use of the property with which the zoning restriction interfered. They had been used for hundreds of years as boundaries and more recently as landscape elements, but here they were not allowed to hold a sign. He stated that there was no fair and substantial relationship between the general purposes of the ordinance and the restriction on the property. Clearly the monument t signage could be placed and a stone wall could be placed, but you couldn't put the two together or it became a non-allowed use. He read from the ordinance regarding allowing signage being done in an orderly and safe manner and this is what the proposed wall signage would do, so it complied with the spirit and intent of the ordinance. Finally, he stated that granting the variances would not affect the public or private rights of others in any way. Their intent was simply to make the entryway of that shopping center look more appealing.

Mr. LeMay asked if he could clarify something. Was Attorney Pelech stating in his presentation that if the stone walls did not have "Southgate" on them, then they wouldn't need a variance. Attorney Pelech replied that they would still need a setback variance, as newly interpreted by the Planning Department as they were considered a "structure."

Mr. Witham clarified that it would be a setback variance for the stone wall and a use variance to put letters on it.

As an editorial comment, Mr. LeMay wondered if their definitions were really straight as he wasn't happy about giving variances for things that might not actually need them. For example, in one of the cases it talked about a sign being 25' back from the right-of-way but it's been construed as being a structure and therefore, 105'. If a sign was a structure, then why do they have a 25' dimension for anything?

Mr. Feldman stated that, if they looked at the way the ordinance was written within the sign section, the plazas or malls that are either under 100,000 s.f. or over are certainly allowed in other areas. It happens that on Lafayette Road, the New Hampshire Department of Transportation had placed a 105' setback for future right-of-way takings and they didn't want any structures located within that right-of-way. If they looked at Woodbury Avenue or any other commercial areas, they didn't have that setback constraint.

Mr. LeMay then stated that they were looking for a total of 270 s.f. of signage, which exceeded the requirement and it looked like about 100 s.f. of that was just to put the words "Southgate" up front three times. Attorney Pelech stated that it was 70 s.f. between the two, 35 s.f. each of the metal letters on the stone wall, 2' x 17'3" so that accounts for 70 s.f. and then basically filling in the air space between the signs and squaring everything off made up the rest. Mr. LeMay asked if he would recap why 70 s.f. was needed right there on the wall when up in the air, they had another 70 s.f. or 35 s.f. with a big sign saying "Southgate" right in the same area. Attorney Pelech noted on the plan the 35 s.f. on each wall, totaling 70 s.f. and Mr. LeMay agreed, and another 35 s.f. on top of the sign. Attorney Pelech stated he was not sure what that was it looked like 32.7 s.f. He called on Mr. Richardson to explain.

Mr. Doug Richardson stated that he was the Vice President for the 2422 Lafayette Road group. He stated that they were doing that, first, because the existing pylon sign was more to be seen from a distance coming along the road. As people were sitting at the traffic light, to entice them to make a decision to enter the plaza, they couldn't look up but could read the signs on the walls. Secondly, they were trying to create an identity and sense of place and he outlined the other steps they were taking to achieve this goal, including architectural elements to draw people into the property.

Mr. Grasso asked if the new pylon sign would be illuminated and Mr. Richardson it would be internally the same as the existing sign. Mr. Grasso asked if he could address the white stockade fence in relationship to the bank and the bank's property in relationship to Southgate. Mr. Richardson noted that they do own a triangular piece of property as the road curves to come perpendicular with Lafayette Road. All of the fence and the landscaping shown was on their property. When Mr. Grasso noted that the white fence was going down Route One, Mr. Richardson stated it was only extending as per the site plan and he pointed out a section on the plan. There were only five sections on each side of that wall. It was hard to see from the rendering, but it was completely on their property.

Ms. Rousseau stated that their signage presentation looked great. She was concerned about was the public rights of the abutters. The last time they were there, the abutters were not notified in the

condominium complex across the street and she "got an earful as a result when she walked out of here." She wanted to make sure that the abutters were notified. Her understanding was that last time they were notified, the notice came back to the city and the abutters lost their chance to speak on the application. She wanted to make sure that they didn't have anything returned back to the city. She stated it protected them as applicants. Her understanding was that there was case law so that if they could not provide that an abutter was notified, they could take it to court and that variance decision got overturned which would cost them money and that should not happen. So she just wanted to make sure that everyone was properly notified seeing as they were back again and it became an issue at the time. Mr. Witham asked if her question was then to Mr. Feldman and she stated it was.

Mr. Feldman stated that they did have a list of abutters who were notified and, with relation to the Springbrook Condominium Association, both they and the management company were both individually notified on this project.

Attorney Pelech stated, in response to a statement of Mr. Feldman, that in 1990 the State DOT created the Route One ten year plan calling for a divided highway from the traffic circle to Seabrook. After ten years, the state realized it was not a realistic goal and rather than insisting on a divided highway, they began requiring anybody who developed land on either side to deed to them a 12' wide expansion easement for curb cuts. That had happened up and down Lafayette down to Rye and was the genesis of the 105' setback. He noted that requirement would be lessened in the new Zoning Ordinance because there no longer was a need to provide for a divided highway.

Mr. Parrott noted that the existing sign had 6 panels and the proposed had 8 and asked if one was set aside for the building next to Water Country. Mr. Richardson stated anticipation of tenants in that building was the reason why the panels at the top became more square. They reduced the size of the panels to get more spots. In response to a further question, he confirmed there would not be a separate request for that building but it would be part of the pylon submission.

Mr. Parrott asked why they had not taken the opportunity to get into compliance with the 25' height restriction, which sign experts said was the absolute height in terms of recognition for people to look up at. Attorney Pelech indicated the 25' distance on the pylon shown in the schematic on display. That was how it would have been measured had they not made it a solid stone wall and left the two unsightly concrete pilings. Because it was now a solid stone wall, Mr. Hopley determined that they had to measure from the grade to the top of the sign which accounted for the extra 2'10". He indicated the distances on the schematic. Mr. Parrott reiterated that his point was that sign experts had indicated that 25' off grade was all they should be looking at, no matter what was at the bottom and why not bring it into compliance. Mr. Richardson stated that was why they had organized all of the identity of the tenants themselves no higher than 25'. The overall sign also had the overall identity of the center on the top. When Mr. Parrott stated that they could then eliminate "Southgate" if no one could see it, he indicated the top was for people approaching along Lafayette Road. Mr. Parrott stated they were also proposing the name on the wall and Mr. Richardson replied that was for those at the traffic light.

Mr. Parrott noted that the Planning Department took the position that the wall was a structure. Was it the position of the developer that it could be put at the very edge of the road and, if not a structure, what was it? Attorney Pelech stated that the applicant believed it was a stone wall and

indicated it as that to the Planning Board. It was only after they filed a sign application that they were told it had to be modified because the stone wall was now considered by new staff as a structure. When Mr. Parrott what was his position, he replied that it was a structure according to the ordinance, but like fences and stone walls between properties, there should be no setback requirement. Mr. Parrott stated that then his position would be that, assuming the edge of pavement was the property line, it could be on the edge of the street. Attorney Pelech stated that was not what he was saying and that would probably be a safety hazard, but there should not be a front yard setback. When asked the setback for a stone wall and how he would treat it if there was none, he indicated there was none and technically it could be put on the edge of the pavement, but nobody in their right mind would put a stone wall of that magnitude on the edge of Route One. Mr. Parrott asked if he then disagreed with the department trying to establish some guidelines by calling a structure. Attorney Pelech agreed it was a structure, but all stone walls were structures and this was the first one that needed to be subject to a setback requirement.

Ms. Eaton asked the purpose of the strip down the right side that would be illuminated and Attorney Pelech replied that they were light illuminated panels basically a design feature with no lettering. If necessary, the applicant would be willing to not light them.

Mr. Richardson stated that ideally in the initial design they intended to have white panels as an architectural feature and, as they could see from the rendering, they placed it on the rear of the pylon facing the center for more for a nighttime situation and also anticipating that during the holidays there might be some color inside. There had been some concern from Mr. Hopley regarding that, but they would still like to do it as a white opaque panel. If the illumination were an issue, they would leave it strictly as an architectural element.

Ms. Rousseau asked what the concern was. It looked very attractive and why would he compromise his design unless there was a major issue. Mr. Richardson stated they would be careful as to the brightness and at the holidays it might have a red or green illumination within it but it was something to enhance the sign itself. Ms. Rousseau stated that was why she was concerned as to what type of concern there was because it looked perfectly reasonable. Mr. Richard stated they had been sensitive to the concerns of the city and they wanted to have something which was first quality so their first intent was to have it illuminated but if they didn't, they would respect that too. Ms. Rousseau stated, "excellent."

Ms. Eaton asked if it were not illuminated, it didn't count as part of the calculation of the sign. It looked like part of the sign to her, illuminated or not. She was trying to establish why it was needed for such a large sign if it was over the ordinance. Attorney Pelech stated that initially Mr. Hopley indicated that, if it were not illuminated and it did not have lettering, it wouldn't be but he thought that was changed after he met with Mr. Feldman and Mr. Taintor. So, it was included in the calculation. Ms. Eaton added, "regardless of whether it's lit" and Attorney Pelech indicated, "right."

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

With no motion being made, Mr. Witham passed the gavel to Mr. Jousse as Acting Chair and made a motion to grant the petition as presented and advertised with the stipulation that there be no lettering on the stone walls. The motion was seconded by Mr. LeMay.

Mr. Witham stated that he understood that there might be a way to bring the pylon sign down a little, but he felt it met the intentions of the 25' height requirement. He didn't see the need to illuminate the top of the sign. The sign would be in greater conformity than the existing one and would not change the essential characteristics of the neighborhood. He had made the stipulation because of concerns about signage on the stone walls which was reminiscent of industrial complexes. He felt it went against the spirit and intent of the ordinance to have that kind of signage so close to the streetway. He like the stone walls as a design element, but didn't find the signage on them necessary.

Mr. Witham stated that it would actually be in the public interest to allow the public to identify the tenants. There had been a sign functioning there for many years and this would be slightly smaller. He stated that this was a unique setting where there were strong restrictions along Route One. He felt it felt like a compromise but it was worth taking to allow a sign which was greater than allowed but smaller than the existing one, which could have remained in perpetuity. He stated that there would be in infringement on the public or private rights of others and it would be in the spirit of the ordinance to allow businesses to identify themselves. Justice would be done and there was no reason to believe that the value of surrounding properties would be diminished. He felt that the project was well thought out and well designed and it would help to pick up that area. He did not find the sign overbearing and the stone walls were a landscape element similar to those at Market Basket, which were far closer.

Mr. LeMay stated that he agreed that the variance would not be contrary to the public interest. The sign had been there for 40 years and he didn't think it had been severely against the public interest in that time. Under the area variance requirement, there was no other reasonably feasible method with regard to the setback. You couldn't move the sign back 100' as it wouldn't serve much purpose at all and the size change was at least partially due to the overall measurement instead of the measurement of the individual signs. He was persuaded that was a factor. In any event, the variance was consistent with the spirit of the ordinance. Given the purpose of signage, it served that purpose which put it in the spirit of the ordinance. He felt substantial justice was done by allowing the sign to be modernized and continue its use. He had heard nothing to suggest that the value of surrounding properties would be diminished. He was in complete agreement with the excess signage on the stone walls not being necessary.

Mr. Jousse stated that he agreed with the motion as made. The signage on the stone wall at eye level would be a distraction and a safety hazard. There was a lot for a driver to pay attention to in that intersection without having to read a sign at that level.

Mr. Grasso stated that would support it but he didn't see a hardship with the height.

Mr. Parrott stated that he agreed with most of the proposal and entirely agreed with the stipulation. He felt that multiplying the name of the shopping center served no useful purpose to the public

and duplication was unnecessary. Secondly, he was disappointed that the opportunity wasn't taken to get within the 25' height standard and there were a number of ways they could have done that.

Ms. Eaton noted that there were two versions of the sign compared to the existing and one shows 350 s.f. as proposed and one shows 236.5 s.f. Was the difference with the stone wall?

Attorney Pelech stated that the 236.5 s.f. was if the individual panels were measured and totaled, but that was not how it was measured so the 350 s.f. was the actual measurement. He had included the 236.5 s.f. to show that the square footage of the new panels was less than the square footage of the existing panels.

The motion to grant the petition as presented and advertised with the stipulation that there be no lettering on the two stone walls at the main entryway which were approved as an architectural element, was passed by a vote of 5 to 2, with Messrs. Grasso and Parrott voting against the motion.

Mr. Jousse returned the gavel to Mr. Witham.

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4) Case # 9-4
Petitioners:Philip S. Mccarthy
Property: 105 Burkitt Street Assessor Plan 159, Lot 23
Zoning district: General Residence A
Request: Variance(s) Article III Section 10-302(A) Table 8 to allow a 3' rear yard setback where 20' is required; a 5'1" right side side yard setback where 10' is required and a 3' left side side yard setback where 10' is required
Article IV Section 10-401(A)(2)(c) to allow the expansion of a nonconforming structure

SPEAKING IN FAVOR OF THE PETITION

Mr. Philip Shane McCarthy stated that, if they had driven by, they would have noted the dilapidated condition of the addition at the back of the house, which did not have a foundation, as well as the garage to the right. They were proposing to replace the addition with one suited to a family style house and attach a garage. With the roof leaking, they were hoping to get started as soon as possible. He stated that his contractor, Mr. Jim Doyle, was there also to answer any questions.

Mr. Witham asked if he could walk them through the project and the need for the variances from the setback requirements.

Mr. Jim Doyle stated that, as they could see from the site plan, the existing house was 3' from both the rear and left sides as they faced the house. The existing garage was 3' from the rear and 2.4' from the right side. They would like to demolish the back portion of the house, which was a one story shed/roof structure which was full of rot, leaked and was substandard at best as well as

the garage. They would replace those two structures with a new two story addition within the same setbacks as the existing structure. The structure was approximately 100 years old and this would allow them to replacing the wiring, insulate walls and bring things up to code. He noted that currently there were no egress windows upstairs and new ones would be added to meet today's requirements. He described the other improvements which would be made, noting that this would have the same setbacks and take up no more room.

In response to a number of questions from the Board, Mr. Doyle stated that they would be leaving the front part of the house alone. The foundation for the main house was brick and stone, 5'5" high with no foundation under the shed. There was one post, but it was rotted. The relatively small piece of the house which was left was salvageable. There was no indication of rot in the main part and the floors were in good shape. The walls would be gutted and there would be new insulation, wiring and windows. There was no structural deviation in the existing structure. The back, which drops down about 6" to 8", has infested siding down to the ground. Part of the structural members holding up the roof had deteriorated and were pulling away from the house allowing water to come down in between. They would like to have a garage to bring it up to the standard of the neighborhood. They were planning to, instead of covering the approximately 20% of the lot which was in the zoning right now, decrease that by attaching the garage to the house so that one portion would actually be smaller. In dealing with construction, the 2.4' setback would actually increase on the right to 5'1". There would be a poured foundation with a basement under the addition only, not the garage.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Clair Prout stated that she lived at 108 Sparhawk and their property abuts this. They welcomed the applicants to the neighborhood and encouraged the renovations, but her concern was that a two-story addition 3' off the property line would leave them feeling walled in. Their values would improve with an improved home, but hers would decrease due to lack of enjoyment of their property and lack of privacy. She felt there would be a different solution if they had a different design. When Ms. Rousseau asked how far back her property sat from the property line, she stated hers was not on the property line, but from their upstairs deck and back patio, they would only have a feeling of a wall. Ms. Rousseau stated that she was looking at an aerial view and it looked like they were directly in back of the property, but not right up on the line and that they would not have an obstructed view in any way as a result of them building up. Ms. Prout stated she would have a great view of the house. Ms. Rousseau stated that it was not an obstructed view, in other words, there was no sunlight which would be obstructed by the addition. They were not right up on their property line. Ms. Prout agreed that they had the setbacks. Mr. LeMay asked if the structure were slid forward 8' or 10' would it make any difference and Ms. Prout stated it would make her more comfortable with more of a buffer.

In response to questions from Mr. Parrott, Mr. Doyle stated that the height of the grade from the ridge line to the front of the existing house was approximately 23' and the elevation of the shed would be plus or minus 12' to 13', so the net gain to the ridge was 11' or 12', including the wall and roof line. The depth of the new room on the back, the replacement for the shed, would be 13'6". Instead of 22'10" which the neighbors are now looking at, plus the 8'6" of the existing garage, a total of 31'4", they were proposing 41'8", a net gain of about 10'4". In terms of the height, the neighbors would be looking at the same height because the ridge was not going to

change but it would be the same distance off the property line as the present, like putting a second story above the present shed.

When Mr. LeMay asked what other configurations they had considered, Mr. McCarthy stated that this was a nonconforming lot with the house sitting at the back edge. If they tried another configuration, it would block the front of the house so essentially it was knock the house down or fill in with an addition as they had chosen. Mr. Grasso asked the purpose of the windows on the second floor of the garage and Mr. Doyle stated that was part of the master suite.

Mr. Witham asked if they had a rough budget in mind because he was trying to see if there was another option. It was a unique situation with the house set so far back but it seemed to him that at some point there was the opportunity of pouring a foundation a little closer up and bringing the whole building forward. Mr. Doyle stated that was probably discussed but, in his opinion after 22 years of doing this and meeting with similar boards, if they got rid of the existing footprint of the house and tried to build in the existing setback area, they became even more constricted. When they incorporated all that, plus the cost of getting rid of the existing building and starting from scratch with a new foundation, utilities, and everything, the cost would outweigh the benefit of what they had purchased the land for. When Ms. Eaton asked the basis for the setback where there did not seem to be a surveyed lot line, Mr. Doyle stated he could not answer that. He asked Mr. McCarthy if it was on a plot plan he may have received when he purchased the house and Mr. McCarthy indicated, "no.".

Mr. William Gindele stated that he lived at 229 Clinton Street, three properties away, and felt this was a poor use of the land and they should move the house to the front. He also questioned the difficulty of maintaining the building with a 3' setback. Mr. James Sparling, also of 108 Sparhawk, reiterated their concerns about seeing a wall and suggested that one story be removed from the addition. The applicants' hardship should not become theirs.

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 deny the petition which was seconded by Mr. Grasso.

Ms. Eaton stated that the applicant had bought a dilapidated house with a shed on a very constricted lot. She felt the proposal to infull was over-development and would result in a wall of house 3' from the property line which was not warranted without considering other possibilities which would be less intrusive. This was an old house which, on the tax map, seemed to be on the property line and there should be a survey to establish where the prop line actually was. This did not meet several of the conditions in the analysis to grant variances. It was not consistent with the spirit of the ordinance to increase a nonconformity. In the justice test, the neighbor at the back would be impacted and the value of surrounding properties could be diminished by the massing at the property line. While there were special conditions on the lot, they didn't overcome the other considerations and all points had to be met in order to grant a variance.

Mr. Grasso stated that one of the sections under the hardship test was that the benefit could not be achieved by some other reasonably feasible method. He felt that another option which hadn't come up was if the addition was toward the street, but he wasn't sure if that would meet the requirements either.

Mr. Witham commented that he thought the design was well thought out visually and in terms of scale, but they had five criteria and he couldn't be convinced that the point regarding diminution in the value of surrounding properties had been met. The abutting neighbor was looking at a large two story wall all the way across which, he felt, would diminish the value of her property. He felt the side setbacks were more common, but he did not feel the rear setback met the criteria. Maybe for an additional $15,000, they could move up the front and gain a whole back yard to enjoy. They had a design which could work, but was in the wrong place. He felt the hurdle was there when they bought the property and it was overreaching to ask for a two story structure 3' from the property line. There were other options which might still require a variance but would be more reasonable.

Mr. Jousse stated that he had viewed the property and there was not much room to work with because the house was so far back. On the right side, there was vegetation and trees so it would not impact the neighbor to the right, but there was a problem with the rear setback. He agreed with the idea of making the addition in the front or only having it one story. There were other possibilities to meet their needs while protecting the neighbors.

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

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5) Case # 9-5
Petitioners:Lindsey G. Carmichael and James Dc. Carmichael
Property: 85 Pinehurst Road Assessor Plan 221, Lot 73
Zoning district: General Residence A
Request: Variance(s) Article III Section 10-302(A) Table 8 to allow a 4.5' left side side yard setback where 10' is required; and 25.8% building coverage where 25% is required

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

SPEAKING IN FAVOR OF THE PETITION

Ms. Anne Whitney stated that she was representing the owner who had had to leave and submitted a list of the immediate abutters who had all signed off on the property. Referring to the photographs, she stated this was a two story hip roof house with a little detached hip roof garage. They would like to remove the existing garage and attach it to the house as a two car garage. She referred to the various views that had been provided showing the existing garage with a 4.4' setback and the proposed at 4.5' setback. There was also a one-story addition which didn't require a variance. The other variance was for two decks in the rear. Originally they had submitted a deck off the garage and a deck off the addition which was pushing it over the allowed coverage.

They had removed the 45 s.f. deck and were still over the coverage but down to 25.3%. She distributed a plan showing the adjusted setbacks and coverage numbers.

She outlined the floor plan configurations and the submitted elevations and pointed out the various elements on the plans. They had tried to keep this as small as it could be. There was no other place to locate the garage and the little 5' space currently was a no man's land between the house and garage. As she had mentioned, the lot coverage requested should be amended to 25.3%.

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

Mr. LeMay stated that he was persuaded that this was as modest a change as could be done in terms of upgrading the garage to a more modern one. There was a small wedge infringing into the setback. This was basically an infill which would not affect the neighbor to the side. The overage on the lot coverage was very minor.

Mr. LeMay stated that it would be in the public interest to improve the property in a way which reduced the nonconformance to the sideline setback. The special conditions creating a hardship were the size of the lot, the siting of the existing structure on the lot and the preexisting nonconformance. It appeared that other methods had been explored in terms of what could be done to minimize the request. It would be in the spirit of the ordinance to improve the functionality of the home. Substantial justice was done and there had been no testimony that the value of surrounding properties would be diminished and it did not appear that would be the case.

Mr. Parrott stated that this seemed a logical and appropriate upgrade. The existing house was well situated on the lot and the garage would simply bring it up to modern requirements. Although it was 4.5' off the property line that was the same as the existing garage. There was no loss there and the back was within the setbacks.

Mr. Jousse stated that he would not support the petition as he didn't see that not having a garage was a hardship.

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 petition.

Ms. Eaton resumed her seat and Ms. Rousseau returned to alternate status.

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6) Case # 9-6
Petitioners: Dicker-Warmington Properties
Property: 1700 Woodbury Avenue Assessor Plan 239, Lot 7-2
Zoning district: General Business
Requests: Variance(s) Article XII Section 10-1201(A)(2) to allow a deviation of the parking aisle width and depth standards from the required 62' to 58'±
Article XII Section 10-1201(A)(3)(e)(2) to allow parking and aisles within 3' of the property line where 40' landscaped buffers are required

This petition had been withdrawn earlier in the proceedings.

III. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 10:00 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary