

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE**

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

CONFERENCE ROOM B

7:00 p.m.

January 19, 2010

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

EXCUSED: Carol Eaton

ABSENT: None

ALSO PRESENT: Principal Planner, Lee Jay Feldman

Mr. Durbin assumed a voting seat for this meeting.

I. APPROVAL OF MINUTES

A) November 17, 2009

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

II. NEW BUSINESS

A) Election of Officers

Mr. Jousse made a motion to re-elect Charles A. LeBlanc as Chairman and David Witham as Vice-Chairman to serve until the next election of officers. The motion was seconded by Mr. Grasso and approved by unanimous voice vote.

III. OLD BUSINESS

A) Petition of **New England Glory LLC, owner**, for property located at **525 Maplewood Avenue** wherein an Appeal from an Administrative Decision regarding the determination of the

Code Officials that the Building Permit to convert the 9 apartments into a 14 room Bed and Breakfast had lapsed as the building continued to be used as 9 apartments.

Notwithstanding the above, if the Administrative Appeal was denied, a Variance from Article II, Section 10-206 was requested to allow the existing 9 apartments to be converted into a 14 room Bed and Breakfast. Said property is shown on Assessor Plan 209 as Lot 85 and lies within the General Residence A district. Case # 7-1. *This petition was postponed to a time indefinite at the August 19, 2008 meeting.*

The Board acknowledged that the petition had been withdrawn by the applicant.

B) Request for Extension of Variance granted February 17, 2009 for property located at 33 Hunking Street

Mr. Parrott made a motion to grant a one-year extension of variance, which was seconded by Mr. Grasso.

Mr. Parrott stated that this was the first request to extend the variance, which they normally grant without any information to the contrary. Mr. Grasso noted that the applicant also had to go through the Historic District Commission review process and had experienced unforeseen delays.

The motion to grant an extension, through February 17, 2011, of the variance granted February 17, 2009 was passed by a unanimous vote of 7 to 0.

C) Case # 12-9
Petitioners: J.P. Nadeau, Owner & Witch Cove Marina Development LLC, Applicant
Property: 187 Wentworth House Rd. Assessor Plan 201, Lot 12
Zoning district: Waterfront Business District
Requests: Variances to establish two (2) residential uses where residential uses are prohibited; To expand two (3) non-conforming residential uses and structures; to expand a non-conforming marine related structure; To allow for the encroachment of two(2) structures into the 100’ Tidal Buffer where the encroachment is not allowed. Article II Section 10-208 Table 4 (43), Article III Section 10-301(A)(2), Article III Section 10-301(A)(7)(a), Article IV Section 10-401(A)(1)(b), Article IV Section 10-401(A)(1)(c)

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 displayed an existing conditions plan and distributed copies to the Board. He stated that reading the public notice, it seemed like a lot of relief but that was not the

case. He indicated on the plan two residences that had been there for 50 years and another that had also been there for a number of years. There was an existing commercial marine related building; the yellow line was the flood zone break line, flood zone x and then zone x. The plan showed one building within the 100' buffer and other houses within 100' buffer and also touching the tidal buffer. He stated it showed houses not meeting setbacks and nonconforming because of their use. What was being proposed was to move them out of the flood hazard zone and then comply with the front and side setbacks. They would be more conforming because they were no longer in the flood hazard zone and met the setbacks, although they were still within the 100' tidal buffer. The use would be the same. They would leave the building outlined in pink on the plan, but add a second story. With regard to the one story commercial building, he stated the proposal was to go up a story.

Referring to a memorandum he had received that day, Attorney Pelech stated that he differed with the Planning Department. They had filed an application for a special exception before the first of the year and now received a memorandum saying that their request was not appropriate and was not on the agenda. He and his client felt a special exception was in order and he read a section from the new ordinance stating that a lawful nonconforming use could be changed to another nonconforming use as long as that use was at least equally appropriate to the district and the impact on adjacent properties was less adverse than the existing use. They believed that moving the two nonconforming uses as he indicated on the plan would be more appropriate and more conforming uses, meeting the requirement for a special exception. Attorney Sullivan and Mr. Taintor did not agree, but he would ask the Board to look into this and see if Section 10.335 of the new ordinance applied.

Mr. Jousse asked how he would reconcile Section 10.335 with Section 10.334, which stated that a nonconforming use of the land could not be extended into any part of the remainder of the lot of land. Attorney Pelech replied that Section 10.335 trumped 10.334 because it said if it were less nonconforming, the Board could grant a special exception. He read the definitions of extend and relocate from tab 4 of his exhibit, stating that they were not extending the nonconforming use to any part where it was not existing and the footprint remained the same, only the location changed. He maintained that relocation was different from extending so the Board could decide that a special exception should be granted. It seemed unreasonable to not allow relocation of a use where there was no adverse impact to abutting properties. The uses as residences remained the same and the change in location was more appropriate. He reiterated his statement regarding the setbacks and stated that moving the houses away from the center of commercial activity and out of the flood hazard zone was in the public interest. He pointed out on the plan where gravel was currently located. If the houses were relocated, there would be a natural vegetative buffer improving storm water runoff. Attorney Pelech referred to tab 1 in his materials which included an opinion from a real estate broker that the impact on adjacent properties would be less and, as they could see in tabs 2 and 3, owners of two adjacent properties had indicated support for the relocation. He submitted to the Board that it was appropriate to grant a special exception, obviating the need for three of the variances. That being said, if the Board determined variances were needed, they felt they met the criteria under Boccia or Simplex.

Ms. Rousseau stated that she was questioning the technical aspect of this. They had applied for variances, not a special exception, and the variances were specific as to what they wanted to accomplish. It hadn't been advertised that they wanted a special exception. They were looking at

Section 10.335, covering nonconforming uses in the new regulations, but they had advertised this situation, variances, under the old regulations so this was a little confusing as to what they should be doing and what had actually been applied for in the first place.

Attorney Pelech stated that the department really had to respond to that. They filed, before the application deadline, a request for a special exception for 10.335, paid their application fee and had their receipt. For some reason, it was never put on the agenda. Ms. Rousseau asked if they had filed for the variance as well, two separate applications, and Attorney Pelech responded they had filed the application for the variance a month before. After consultation with the applicant, he had said that he believed a special exception was appropriate there and they should file for that, which they did. Ms. Rousseau stated that sounded like a question that needed to be reasonably answered, if somebody had applied for a special exception. Attorney Pelech interrupted to add that state statute required the Board to hear it within 30 days. Ms. Rousseau continued, “absolutely.” There were technical questions there. Attorney Pelech indicated his letter dated December 29 submitting the application.

When Chairman LeBlanc asked if he would like to comment, Mr. Feldman stated that, as Attorney Pelech had mentioned, the applicant had filed an application for the specific variances in front of them which was a continuation of the existing application from last month, which had been postponed at the applicant’s request. The information that Attorney Pelech submitted on December 29, 2009 was new information on a request for a special exception. As the letter from Rick Taintor and Attorney Sullivan outlined, they did not believe that the special exception request was a valid request at this point. As far as the 30 day period, where it had not been accepted as an application at that point, if the Board wished, they could direct staff to advertise that and it would be heard next month, but it had not been concluded that it was a valid application at that point. When Ms. Rousseau asked how he determined valid, Mr. Feldman stated that they didn’t believe that the request which had been made relative to the application was appropriate as Attorney Sullivan had put in his memorandum to the Board. They don’t believe it was a special exception request which needed to be heard there, but the variances. The reason they believed that, and he could go further than the memorandum, was simply that they were talking about uses, not structures but uses, which were not allowed in that zone. Once the structures housing those uses were removed, they no longer existed on that property. Therefore, in order for the Board to allow even two residential uses someplace else on that property was extending the use from one portion of the property to the other and those uses had never been approved. They were nonconforming at that point in time.

When Chairman LeBlanc stated they had previously been grandfathered, Mr. Feldman added, “correct.” Chairman LeBlanc also noted that they could grant less than what was requested and he believed that special exceptions were less than variances.

Ms. Rousseau questioned whether, from a legal standpoint, they could even hear the special exception that evening. Should they just focus on the variances because that was the application and, if the applicant felt a special exception was more appropriate, they could apply and come back, although that would delay the project. She was looking at what they applied for as what they should be hearing. That’s how it was advertised to the public. She guessed clarification was needed as to what they should decide upon that evening and maybe it was a decision of the Chair as to what that application really was.

Chairman LeBlanc stated that what had been advertised and what they were dealing with that evening were the variances. Ms. Rousseau stated that, then, they should be hearing from the applicant supporting their arguments for the variance rather than going into the special exception criteria. However, Chairman LeBlanc reiterated, special exceptions were less than variances so those could be granted in place of variances. He felt that the public would have had due notice as to what was being proposed. The form it took would be up to the Board. When Ms. Rousseau asked if his decision was that the variance criteria should be heard, he replied, “at the present, yes.”

Mr. Parrott stated that it might be relevant to put on the record what was in the newspaper as some people relied on that and it was a legal requirement. If the newspaper announcement was not what they were being asked to deal with, he would say they shouldn't be trying to deal with something different. He asked what was put in and Chairman LeBlanc and Mr. Feldman replied that it was the variance. Mr. Parrott noted that the public had been told by the newspaper that it was a variance request and in December there were six variances and one special exception. That was withdrawn if he was correct. His second question was the reason why one section of the ordinance trumped another. What was the exact basis for that determination. Attorney Pelech stated that 10.334 basically said one thing and 10.335 said if going from one nonconforming use to one that was less nonconforming or a use which had less impact on the neighborhood, the Board could grant a special exception. Mr. Parrott asked if his feeling was that they were not mutually exclusive and when Attorney Pelech stated, “no” Mr. Parrott stated that his position would be that they were.

Attorney Pelech asked if he should proceed with the variance arguments and Chairman LeBlanc indicated he should. Attorney Pelech stated that they were requesting variances to allow the change in location of two existing nonforming uses to another location in a district where they were not permitted. There had been residences on this property for over 50 years before zoning and they were seeking to relocate to another more appropriate location out of the middle of the commercial portion of the property. They felt the Boccia analysis applied, but the department felt it was both, so he would go through both. The other variance was to allow encroachment into the 100' tidal buffer zone.

Attorney Pelech stated that, whether using the Boccia or Simplex analysis, all the tests were the same except for the hardship. He stated that the value of surrounding properties would not be diminished. The homes had been on the property for over 50 years, in a flood hazard area, and moving closer to Sagamore Road was most appropriate because it was taking them out of the setbacks and the hazard area. He cited again the letters from the real estate broker and two abutter who believed the change wouldn't detract from property values and was actually a good idea. He stated that relocating the nonconforming uses to an area on the property outside of the flood hazard district and where the setbacks would be met was not contrary to the public interest because one of the considerations in the public interest was to foster the general safety and welfare of the public. He cited the case of Malachy Glen in which the court had set out two tests to determine the public interest, altering the nature of the locality and impairing the general health, safety and welfare of the public. He stated that they met both of those tests, so granting the variance would not be contrary to the public interest. No increase in the need for municipal services would result from moving two residences from one spot to another.

Attorney Pelech stated that, in the justice balancing test, to deny the applicant's request would prevent him from developing the commercial portion of marina and impair the aesthetic appearance of the property. Those hardships would not balance against some perceived benefit to the public in denying the variance. He stated that he had touched on the variance being consistent with the spirit of the ordinance, which had the intent of encouraging the most appropriate use of the land while protecting quality of life and the safety and welfare of the public.

Regarding hardship, Attorney Pelech stated that the Boccia test went away after this month. If an application was seeking a use variance, the Simplex analysis applied which had three parts. First, did the landowner have a reasonable use of the property considering its unique setting. This property had been a marina for many years before a Waterfront Business District was designated. The marina and residences had been all on one lot. There were special conditions also because the lot stretched along Route 1B so all the area he indicated on the plan was within the 100' tidal buffer under today's rules. He indicated the 30' setback and showed the small envelope in which something could be done. He stated that most of the buildings were nonconforming either for use or location so that literal enforcement resulted in unnecessary hardship. They believed the proposed use was reasonable because it had been going on for 50 years while the fact that the portion of the property he indicated was located in the Waterfront Business District was not reasonable because of the location of the navigable waters. That was why they were proposing relocating the houses to the other area. He stated that no fair and substantial relationship existed between the purposes of the ordinance and the restriction on the property. They were not seeking to change the use, just relocate these grandfathered uses for a more appropriate use of the property. Making the property less congested, in compliance with the setbacks, and with structures out of the flood hazard zone was a reasonable use with which the specific restriction on the property interfered. He stated that no public or private rights of others would be affected by this relocation.

Turning to the Boccia analysis, Attorney Pelech stated that there were special conditions and an area variance was needed given those conditions. If they looked at the proposed location, they could see the 100' tidal wetland buffer and the plan showed where the house was right up against the setback, with both encroaching slightly into the buffer. If they took them out of the buffer, then they would be seeking front or side setback relief, which also demonstrated that there was no other method reasonably feasible. They were some 80 odd feet from mean high tide, and with the vegetated buffer, this location would be better. He stated that was the argument for the first three variances, moving the two houses and allowing them to be partially within the 100' tidal buffer.

Attorney Pelech stated that one of the remaining variances was to expand two existing residential use buildings over their existing footprints. It was an expansion of a nonconforming use because a residential use was not allowed so if you went up on a one story building, you were expanding the nonconforming use. He believed that was why they were being required. The fifth variance was the variance to expand an existing marine use building over the existing footprint. He didn't understand that one because the existing marine use was allowed in the wetlands district. He read Section 10-301(7) from the old ordinance where it indicated the entities "except those serving marine purposes and which are otherwise authorized by this Ordinance" which were now allowed to be located within 100' of the salt water marsh wetlands or mean high water line of Sagamore Creek and Little Harbour. He stated that building was conforming as he saw it. It was serving marine purposes and had a marine use for all those years. He didn't know why that building, the

orange one on the plan, could not be expanded by going upward. He would, however, make the arguments for the variance in any event.

Ms. Rousseau stated that they needed to understand how that came on their agenda and why was it the city's position that a variance was needed. Mr. Feldman responded that he had visited the property on many occasions over the last year because of the requests which had been coming forward on the applications. They could call it what they would, but it was a vacant, abandoned structure with no use of any sort in it. Attorney Pelech stated that he thought the department had indicated it was a commercial marine use in its memorandum, but he could be mistaken.

While he was checking his files, Chairman LeBlanc asked if the building was being used for anything at present. Mr. J. P. Nadeau identified himself as the owner of the property and a member of Witch Cove Marine Development LLC. He stated that nobody had ever asked to go into the building. It was used for storage and for marine repair. They've used all their buildings and it had been a marine use building. When Chairman LeBlanc asked if they had used it for repairs on boats, he responded, that it had been used for repairs on equipment. They had also stored, and currently did store, marine supplies in the building. Attorney Pelech interjected that this had been advertised, as least his memorandum said, as "a variance to expand a nonconforming marine related structure" so he was under the assumption that it was marine related.

Ms. Rousseau asked if they should even be considering this particular variance if that was already the use, as the applicant had represented. Chairman LeBlanc responded they wanted to make it go higher and that was an expansion of the use which was in place. Mr. Feldman stated that staff would contend, and they would be happy to go out and take pictures if Mr. Nadeau would allow it, that there had never been anything inside the building all the times they had been out there.

Chairman LeBlanc asked why it was called a nonconforming marine related structure and Mr. Feldman stated because it hadn't had any kind of a use. The building was ready to come down and he wouldn't step inside it. Upon Ms. Rousseau's question, he confirmed it had not been condemned. Ms. Rousseau stated that there was this person who represented as a fact that he had used the building for a marine use. Unless there was a city position representing that it was non-occupiable, that was the representation. Mr. Feldman responded that one of the options of the Board was to not take action on that particular variance if they felt so compelled.

There was a brief discussion among Chairman LeBlanc, Ms. Rousseau and Mr. LeMay about whether the variance should be heard with Ms. Rousseau posing that question as well as whose word should be taken that the building was in existence as a marine building, suggesting a site walk. She felt that, in the absence of a legal position from the city, they should take the applicant's word about the marine use. Chairman LeBlanc stated that the variance had been advertised and the public hearing was being held to hear the presentations. The Board members should then make up their minds as to whether it was valid. Mr. LeMay asked if the only nonconformance they were talking about was that the city thought it was an abandoned use and Chairman LeBlanc stated, "correct."

Attorney Pelech stated that was the fifth variance and noted that it was advertised as a marine related building. The fourth variance request was to put a second floor on the relocated buildings.

Again, because it was a nonconforming use, going up to a second floor was why they needed a variance although they were not expanding the footprint. The new ordinance would allow expansion of buildings in the tidal buffer zone as long as the footprint wasn't expanded. He stated that the criteria were still the same. Granting the variance would not diminish surrounding property values. Two stories would not block views and would be more in keeping with the character of the neighborhood. It would not be against the spirit of the ordinance as a two story compared to one story made no difference in zoning when talking about a single family residence. There would be no violation of the public interest. He stated that justice would be served by allowing a second floor on the smaller of the houses in the picture. There were special conditions there and there truly was a hardship. Basically the argument was the same on all five of the variance requests.

Mr. Jousse stated that he had been looking at the plans and, without a scale, it appeared the two houses could be located so they would not be within the 100' tidal zone and still meet setback requirements. The house to the far left could be dropped and made perpendicular to the street and the one to the right could be moved further back with the front parallel to the street. Attorney Pelech displayed again the plan showing the buildable envelope which he had outlined in green. Mr. Jousse reiterated that the houses could be readjusted, indicating the locations which would allow that. Attorney Pelech stated it was not their intent to separate them but to keep all the residential uses at the end.

Mr. Parrott asked about the street addresses for the residential structures on the property, the two nearer the road and the larger one in pink. Mr. Nadeau stated the one by the water was 185 Wentworth House Road and the two others were 189, which he thought they had made 189a and 189b, he wasn't sure.

Mr. Parrott stated that his second question related to one of the department memoes which addressed the fact that they were in a flood plain and that relief was being sought for being in the flood plain. Attorney Pelech stated that was because they were proposing to move them out. When Mr. Parrott stated not the 185 address building, Attorney Pelech stated that was the existing building and no relief was needed unless they sought a building permit, at which time they would have to comply with what used to be Article VII, or come back to the Board. They had discussed this with the department who had been fine with it. Mr. Feldman clarified that, if they were going to make any improvement to that structure that equaled 50% of the value of that structure in its present state, they would have to either flood proof the property or come back to seek additional variances. Mr. Parrott stated, "so that's recognized." And Attorney Pelech confirmed it was, but that didn't affect the two that they were seeking to move, only the one outlined in pink on the plan.

Mr. LeMay stated that he was a little confused about a detail regarding the second story that they want to put on the smaller of the two houses. The variance said they wanted to expand two residential buildings over their existing footprints. Were they saying they wanted to put a second story on some other structure? Attorney Pelech stated the pink one down by the water, the one that was not being moved and the one story blue building. Mr. Feldman noted it was just one of the one story blue buildings and Mr. J. Nadeau confirmed that was correct.

Ms. Rousseau stated that they were only really expanding one of the residential structures, move two, expand one and then potentially request a variance for the marine building, the pink structure.

Attorney Pelech stated they were seeking to put a second floor on that. When Ms. Rousseau stated that was a marine use, he stated that was the orange one. He pointed out the marine use and the residential use on the plan. Ms. Rousseau continued that they want to put a second structure (story) on one and take it off the table theoretically and then want to expand this one residential use essentially and Attorney Pelech stated she was correct.

Ms. Rousseau stated on a side note that she thought he was absolutely right in his argument on 10.335 and the City should not be telling them to pull in their application on a special exception. The Board should be hearing the special exception and making that decision one way or the other, not the City, so she was sorry that had to happen for him.

Continuing on to the hardship case, Ms. Rousseau stated that she could get there for them on a special exception, on 10.335, but she couldn't get there for them on a variance. She didn't see the hardship. Attorney Pelech stated that they felt there were special conditions and he referred again to the buildable envelope he had demonstrated, the current location of the buildings, and moving them to a more appropriate location. When Ms. Rousseau asked what, though, was the hardship, he indicated the shape and the very minimal buildable envelope on the lot, which was why they were seeking to move them, to make them more conforming. He stated, "correct" when she added, and to be able to expand the marine use.

Mr. J. P. Nadeau stated that he was the owner of the property. He agreed with Chairman LeBlanc that although the petition was advertised for variances, asking for a special exception was less of a remedy and the Board could grant that even if it was not on the application. He didn't fault the department for the way it was advertised after many meetings with them. When they looked at the ordinance, they applied initially to relocate two existing residential buildings which the department chose to advertise as establishing two residential uses. When the matter continued, Mr. Pelech had determined they should only be asking for a special exception. They had checked with the City and were advised the deadline and they submitted an application on December 29 for a special exception. They had no idea until it was in the paper that a variance was advertised. They had submitted to the city for a special exception and that would be a lesser remedy.

Mr. Nadeau stated that, regarding the choice of words, it was not necessarily that one part of the ordinance trumped another. They were separate provisions. One was to be allowed to change a nonconforming use to another and the other two provisions dealt with expanding or extending and they were doing neither of those. With regard to the building with the marine use, they never said anything about a non-usable structure and he could get a permit to repair that structure. Mr. Nadeau stated that the way he understood the provisions of the ordinance, the reason they qualified for hardship was that not allowing the moving of the buildings interfered with a reasonable use of property. They were smack dab in the middle of a marine use, which the City wanted, and the move will also make the marine area more functional. There was no fair and substantial relationship between the ordinance and not allowing them to do this. He maintained there would be no injury to the public or private rights of others. There was no public interest and the abutters approved moving the structures as it would improve their properties. The whole purpose was to make the buildings look better and more compatible. The flexibility and feasibility with regard to driveways were also involved in their decision and they relied on the opinion of engineers. He would hope that, if they approved the request, they would leave it as it was as they had taken considerable care to make it look good as a finished product.

Ms. Rousseau stated this was because he wanted that additional space and the marina up and running and a good business opportunity. Mr. Nadeau stated that people and cars come in between buildings to access the residences which was not as safe. This change would be a huge benefit to the operation of marina and to the surrounding properties. He described the progress of working with the city and stated they were back to square zero before the Board when all they wanted to do was move two buildings and make the property more functional. When Ms. Rousseau asked if it was correct that his intention for the property was a marine business and not to expand the residential use, he responded, “absolutely.”

Mr. Brian Berrigan who had lived on Wentworth Road since 1947. He went by two times a day and had seen the property deteriorate under the present owner and was happy with the improvements made already. He felt that moving the houses off to the side to become part of a residential area made sense and would improve the neighborhood. It would also benefit the community to have a better marine facility. Mr. Justin Finn stated that he had run Wentworth Road since he was a teenager and this seemed like a great idea. He agreed with moving the buildings and felt it would improve that area. Mr. Steve Atkins, a resident at 189 Wentworth Road echoed Mr. Finn’s comments and offered his support. Ms. Deb Drapeau stated that she was a realtor and also felt this was a wonderful idea. A lot of the old mess was now gone and she felt this project would improve everything in that area.

SPEAKING IN OPPOSITION TO THE PETITION

No one rose to speak.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. David Witham stated that he lived at 238 Walker Bungalow Road, one unit in a 7- unit condominium association and an abutter to the property. There was talk of a phase two where they didn’t need a variance but also talk of expansion of a marine related use on the property. He was wondering if any of these uses included a yacht club or function facility.

Attorney Pelech stated, “no.” That was part of an application for which they had been seeking a conditional use permit from the Conservation Commission and the Planning Board and they ultimately withdrew that in order to go forward with this proposal. It might be in the future that something like that would come forward but, right now, it was not on the drawing board.

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

DECISION OF THE BOARD

Mr. Parrott asked if they could take this in pieces and Chairman LeBlanc stated, “yes.” Mr. Parrott stated he would address the two buildings which were proposed to be moved, #189 and some subset of that number, a and b, and it was either Wentworth House Road or Wentworth Road. His motion would be to approve for removal and, if he got a second, he would discuss it. After some brief interjections, he stated there were only two buildings to be moved and his motion applied to those two houses, those two structures. When Chairman LeBlanc asked if it was

moving the two structures, he said, “yes.” When Mr. LeMay asked as a point of clarification if this was strictly the variance and would he also consider the special exception, Mr. Parrott replied it was strictly the variance because that was the way it was advertised. Chairman LeBlanc asked for a second and there was a brief discussion again about what the motion covered, with Mr. Parrott clarifying that he intended to address the variances related to the proposed movement of those two houses. Mr. Feldman stated that the variances would be from Article II, Section 10-208 Table 4 (43) to allow residential uses in the waterfront business district and Article III, Section 10-301(A)(2) to allow the enlargement of the nonconforming structure and Mr. Parrott agreed. Mr. Jousse seconded for discussion.

Mr. Parrott stated that his reasoning was with respect to the residential uses in the waterfront district, which were established anyway so they were grandfathered. The technical question was whether grandfathering related only to the spot on which they were located or could they say something was grandfathered at that spot and still grandfathered if they moved it. He stated that moving the houses to the other locations on the lot would make them less nonconforming with respect to our ordinances, specifically with respect to the 30’ front yard setback which was off Wentworth House Road. They would move out of the inland wetland setback and they would still be partially in the 100’ setback from Sagamore Creek so perhaps that was a trade-off.

With respect to access, the proposed plan looked like it had one driveway off Wentworth Road so that was probably an advantage. The structures would move closer to other residential uses and away from commercial uses, namely the restaurant and the marina, so that seemed logical as well. On balance, he thought moving those structures made sense and, while they didn’t have to deal with aesthetics, it would be more appealing. As far as any alternative, obviously they could be left where they were because they were there a long time before the zoning ordinance went into effect so he felt there was nothing to be gained in terms of compliance with the ordinance. On net, it seemed to make sense to grant approval to move those two houses as proposed and it did seem that they were positioned, at least on paper, as close to the setbacks, namely 30’ on the side and 30’ on the front, as was physically possible.

Mr. Jousse stated that, although he had a problem with the location, he didn’t have a problem with the fact to move those two buildings to a more appropriate location on this piece of property west of their current location. It made sense to put all the residential units together as has been mentioned so that it would look like a neighborhood. Then you would have the marina and BJ’s Boathouse so that the residential units would not be right in the middle of two business properties. He stated he would leave it at that for the present.

Ms. Rousseau stated that she was looking at the variance to allow for residential uses where they were prohibited and she was really not in favor of putting new residential uses where they were prohibited. She agreed with Mr. Parrott’s argument that they should be moved but was wondering if, on the variance, they should put a stipulation that was very design specific, exactly as presented in their plans rather than give them a “carte blanche” variance for this lot so that any other residential uses they desired could go onto the lot. It was a special grandfathered situation so attaching a design specific stipulation was something she would like to contemplate. Chairman LeBlanc stated that he believed it was already there in that they were moving two structures that were currently on the lot to a different location on the property so they couldn’t put in something

else. When Ms. Rousseau asked if they had a variance to allow residential uses where they were prohibited, could they in fact propose additional residential, he stated they could not.

Mr. LeMay stated he would be supporting the motion although for the record he thought that a special exception under 10.335 could easily have been considered. The word, “different” was a very simple word and if the intent of this zoning was that the use had to be different, it would have said a nonconforming use could be changed to a different nonconforming use, not simply another nonconforming use. Given both situations and everything else, he’d go with the variance but he didn’t see where difference was required in this.

Chairman LeBlanc stated that he had difficulty with the expansion of one of the buildings going up to a second story, which was a classic case of adding to a nonconforming use. The Granite State Minerals (case) said that property owners had to get a variance to build up because it was an expansion of the building that was being used even though the footprint didn’t change. Mr. LeMay asked for confirmation that they were only considering one and two at that point which didn’t talk about the second story. He wanted to be clear because that would also affect his vote. Chairman LeBlanc acknowledged that he was right and started to specify the motion when Mr. Jousse asked for clarification about whether they were talking about one and two on their paperwork or the applicant’s paperwork. They had five variances and, on page three of the applicant’s submittal, they had five. Chairman LeBlanc replied that they were talking about the Board’s one and two. Mr. Parrott added that his motion applied strictly to those two building as they currently existed so if they fell apart or an engineer said that structurally they could not be moved, the approval was null and void. Ms. Rousseau asked if that was a stipulation and he stated that he would like to add that to his motion as a stipulation.

The motion to allow the relocation of the two residential structures which currently existed on the lot to be moved to another portion of the lot, with the stipulation that the approved relocation applied to the structures as they currently existed and if they were changed or deemed structurally unsound to move as they were, the granting of the variance would be null and void, was passed by a unanimous vote of 7 to 0.

Chairman LeBlanc stated they also had before them the expansion of two nonconforming residential uses and structures and a variance to allow for the encroachment of two structures in the 100’ tidal buffer.

Ms. Rousseau stated again that she would like to discuss whether or not they even needed to consider the Article III, Section 10-301(A)(7)(2) variance which had to do with the marine structure they had a chat about earlier. Chairman LeBlanc replied that they had to move on it because it had been advertised and was before them, so if they did nothing, essentially it was still hanging and they had to resolve it. When she asked if the applicant could withdraw the request and take it off the table if other people thought the same way, Chairman LeBlanc stated that, once the public hearing was closed, it was their business to deal with it. She suggested reopening the public hearing which he acknowledged, if they chose to do so, could be done.

Mr. Jousse stated that, on the third item, he was in full agreement that it really didn't belong in front of them, but as it was, they had to deal with it. He made a motion that they approve the expansion of the marine related structure as presented and advertised, which was seconded by Ms. Rousseau.

Mr. Jousse reiterated that, although he didn't believe it should be in front of them, it was an allowed use in a location where it was supposed to be right next to the water. He felt the owner was entirely within his rights to expand a business which belonged there and that was all he had to say on it. Ms. Rousseau stated that they could continue the discussion but she wondered if, after the discussion, Mr. Jousse would withdraw his motion and then make a motion to reopen the public hearing to withdraw their variance request on this. Mr. Jousse stated, "no." He agreed when Ms. Rousseau asked if he wanted to vote on it and she stated he ran contrary to his position. When Chairman LeBlanc asked her to speak to her second, she stated she had seconded for discussion only and didn't believe they should be looking at it.

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The motion to allow the expansion of a nonconforming marine related structure was passed by a vote of 6 to 0, with Ms. Rousseau abstaining.

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Mr. Jousse stated he would like to make a motion on the variance to expand the two nonconforming residential uses but questioned the (3) in parentheses in that advertised item. Mr. Feldman clarified that the two referred to the residential uses. The third was the application they had just voted on. Mr. Jousse made a motion to deny that part of the petition as presented and advertised, which was seconded by Mr. LeMay.

Mr. Jousse stated that nothing has been presented as to why those nonconforming structures ought to be extended. No argument was made for it except to say this was what they wanted to do. It appeared that the structures were structurally sound. He didn't believe that granting the variance would be a benefit to the general public and there was no special condition that warranted the expansion of those two residential buildings. He didn't believe that substantial justice would be done by granting the expansion or enlargement of those two dwellings and nothing had been presented as to the property values.

Mr. LeMay stated that he was in favor of moving the buildings because it helped the use as a waterfront business primarily which he thought was in the spirit of the ordinance. However, he felt that expanding the residential use in this zone was not consistent with the spirit of the ordinance and he had heard no argument of hardship regarding the specific need for expansion of these structures.

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The motion to deny the request to expand two nonconforming residential uses was passed by a unanimous vote of 7-0.

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There was a brief discussion on whether there was a final item, the encroachment, with Mr. LeMay stating that was implicitly approved and Chairman LeBlanc stating that had been taken care of under Mr. Parrott's motion.

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

IV. PUBLIC HEARINGS

1) Case # 1-1

Petitioners: 337 Pleasant St. LLC Owners

Property: 337 Pleasant Street Assessor Plan 103, Lot 62

Zoning district: General Residence B

Request: **Variance(s)** from:

Section 10.321 to allow the enlargement of a lawfully nonconforming structure

Section 10.521 to allow a front yard setback of 1.5'± where 5' is required

SPEAKING IN FAVOR OF THE PETITION

Attorney Tom Watson stated that he was appearing on behalf of 337 Pleasant Street LLC and was there with Katherine Williams and Anne Whitney, the architect. He stated that they were there in November but noted this was not the same applicant or property. This property sat next to the one considered then and was an approximate 6,500 s.f. pie-shaped lot sitting at the corner of Howard, Washington and Pleasant Streets. The latter was determined to be the frontage which controlled the setback requirements and, because of the shape of the lot, the structures sat at an angle to that street. The lot lay in the General Residential B zone and contained a 3 story brick building now which had a small one story add-on.

Attorney Watson stated that, historically, what was 337 Pleasant consisted of 33 Pleasant plus a piece of another lot which were reconfigured and had been used as a boarding residence for medical staff. The applicant wanted to restore the classic home and use it as her primary residence. Referring to page one of the submitted plans, he stated that there presently was a 16' x 10' addition sitting on center to the southeast wall of the main house which was nonconforming. Page 2 of the plans gave a sense of what they were proposing to do, which was to demolish the existing 10' x 16' addition and replace it with a two story 14' x 14' structure, again on center with the southeast wall of the house. Changing the dimensions actually removed a significant portion of structure currently in the 5' setback but further from the main structure it again went into the setback at 1.5' as did the current structure. He stated that they were asking for a variance from 10.321, which said that you could have a legal nonconforming structure but not expand it and 10.521 because they were within the 5' setback and were asking to be allowed to continue that incursion.

Attorney Watson stated that the addition didn't quite fit with house and was constructed before there was a Historic District Commission. If it came in now, it wouldn't fly. They had gone to a

work session with the HDC and the comments at that session were that whatever was built should be centered on the wall and there was agreement that two stories was more historically compatible than one story. If they tried to move the addition out of the setback, they would have to move so far back that it would go beyond the existing rear wall of the brick building and make it really incompatible with the requirements of the HDC. If they shrunk it, they would make it an incompatible and largely unusable addition to the house. The proposal was to blend the first floor with the rest of the house and make the upstairs bedroom more contemporary than the former rooming house bedroom space.

Addressing the criteria to grant a variance, Attorney Watson stated that they were there because of the unique nature of the property which sat at an angle to the street with an existing structure which already invaded the setback. There would be no diminution in surrounding property values as they were flanked by streets on three sides and the only other adjoining property was a lot owned by an affiliate company. They were not too close to a neighbors lot or making shadows or anything of that nature. There would actually be an expansion of pavement so this expansion into the setback was to that pavement. If they looked at other houses on that street and in that district, this was compatible with the existing development pattern and consistent with the small lots with many houses closer to the front property line. The improvement in the nature of the addition would increase the value of this property and make it more presentable and more consistent with its historic nature. Attorney Watson stated that granting the variance would not be contrary to the public interest. The reason for setbacks was to avoid overcrowding, allow adequate light and air and promote safety. None of these would be negatively impacted. This was an existing nonconforming use which they were expanding by going up, not closer to the street or neighbors. The spirit of ordinance was again light and air as well as not being contrary to its basic nature. There were a lot of different districts and setbacks to reflect existing development patterns within the city and they were part of that. They were not talking about a new structure but one which had been there for 130 to 140 years. They also couldn't divorce the ordinance from that portion dealing with the Historic District Commission. If they wanted to be consistent historically, they had to follow certain architectural rules which occasionally would run contrary to the vision in other parts of the ordinance. This Board had to look at all aspects.

The special conditions creating a hardship, Attorney Watson stated, were that they were already within the setback and this would be the same 1.5' distance. To be consistent with the historic confines of the HDC presented unique challenges and limited alternatives. They couldn't put the addition at the back because it had to tie into the layout of the structure. The question was whether the proposal was a reasonable use of the property and whether the ordinance unfairly burdened the property owner by preventing that from happening. He believed they had shown that. Justice would be done by granting the variance. The single family use was o.k. and the open space o.k. This was a minimal variance which wouldn't change the character of the neighborhood or adversely impact surrounding properties or neighbors. There would be no interference with sight lines and the existing trees would also serve as a buffer.

Anne Whitney stated that she was the architect for the project. When they took a look at this one story addition, they had initially thought they could rework it but the foundation was not in great shape and it made sense that, if it had to be taken down, to turn it into a more usable space. While this seemed like a large house, it was actually a three bedroom house and there were restrictions as to how they could develop it. There would be a minimal area increase, well within requirements.

She cited several properties which were similarly close to the front property line, many right on the line and some with three stories.

Ms. Lee Roberts stated that she lived at 40 Howard Street, one lot over. She felt it was a wonderful building and the plans were terrific. It would be a real improvement to get rid of what was there and go up, enhancing the building. She agreed absolutely about the setback issue, noting there were a number of similar homes on the road so this would not be out of keeping with the area. If anything, it would be a real asset and increase the value of the property.

**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. Witham

Mr. Jousse asked if the Boccia analysis was out and Mr. Feldman stated, “yes.”

Mr. LeMay stated there would be no public interest in denying the variance as there would be no increase in the nonconformity. The siting of the house on the lot was the preexisting nonconformance that was the hardship. Granting the petition would also be consistent with the spirit of the ordinance. There was adequate light and air, with no infringement on abutters’ rights. It would allow substantial justice, a reasonable expansion and a reasonable use of the property. The applicant’s representative had spoken to the issue of considering other alternatives, what placement was discussed and why there was no other method to pursue. Mr. LeMay stated that he saw no evidence that there would be any negative effect on property values.

Mr. Witham stated that they looked to be sure there was no overintensification of a lot. Even with this change, they would be 25% below lot coverage so there would be no overintensification. There was a certain rhythm along Pleasant Street and this was in line with that rhythm. There were others which were close to the front setback so this would not represent a change in the essential character of the neighborhood. Albeit there would be another floor, but it would be a minimal expansion and, by and large, all the facades on that side of the street were two stories in height. He stated that the proposal was well thought out and not overly aggressive. In the spirit of the ordinance, light and air would not be put in jeopardy.

Mr. Jousse agreed, noting that this was the south end and many of the houses were right up to the property line.

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

2) Case # 1-2

Petitioner: George Byron McAlpin & Glenn P. Smart, Owners

Property: 428 Ocean Road Assessor Plan 294, Lot 15

Zoning district: Single Residence A

Requests: **Variance** from:

Section 10.521 for the placement of an 8’ x 10’ shed at
428 Ocean road with a building coverage of 10.5% where 10% is allowed

SPEAKING IN FAVOR OF THE PETITION

Mr. Byron McAlpin stated that they had run out of storage space and wanted to put an 8’ x 8’ shed on the back of the property 30’ from the back property line and 12’ from the neighbors. He stated you could barely see it from the road as it was screened by trees.

Mr. Jousse noted that the variance listed the shed as 8’ x 10’ and asked for verification of the size, which Mr. McAlpin confirmed was 8’ x 8’. When Chairman LeBlanc noted they could grant less, Mr. Jousse stated he wanted to be sure he had not misspoken.

**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 advertised and presented with the size of the shed changed to 8’ x 8’, which was seconded by Mr. Grasso.

Mr. Parrott stated that the variance would not be contrary to the public interest as there would be no public interest in somebody having a shed in the backyard of a relatively of a large lot. The spirit of the ordinance would be observed to allow the owners maximum use and enjoyment of their property. Justice would be done as there was no overriding public interest and the value of the surrounding properties would not be diminished, or in fact changed at all. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. They had explained the reason they want it which was to provide storage space so he felt it passed all the tests.

Mr. Grasso stated that a variance for lot coverage was not needed and this would be a smaller shed. He agreed with Mr. Parrott’s comments.

The motion to grant the petition as advertised and presented with the size of the shed changed to 8’ x 8’ was passed by a unanimous vote of 7 to 0.

3) Case # 1-3

Petitioner: Saco Avenue Professional Building, Inc., Owner and Stan Pasay, Applicant

Property: 125 Brewery Lane Assessor Plan 154, Lot 2

Zoning district: Business

Request: **Special Exception** from:

Section 10.440, Use #4.42 to allow a Fitness Center of more than 2,000 square feet proposed to be located within an existing building in the Business zone

SPEAKING IN FAVOR OF THE PETITION

Mr. Stan Pasay stated that he wanted to open a women’s fitness facility at this address which required a special exception for a change of use. The facility would be self contained on the first floor of the structure creating no traffic issues. With 150 spaces adjacent to the front and rear, parking was sufficient. Addressing the 10.232 standards, he stated that there would be no hazard from explosion. They operated treadmills were human-powered and the operation was completely enclosed. There would be no disturbances to the residential areas, which were set back. He stated that clients walk in and walk out creating no additional demand for municipal services.

In response to questions from Messrs. Grasso, Jousse and Parrott, Mr. Pasay stated that the total rented area would be 5,500 s.f., with the use of a 1,000 s.f. entry. He explained that a spinning room held stationary bikes for high energy workouts.

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

Mr. Durbin stated that this petition was straightforward. There would be no hazard to the public and it would probably be a benefit to have a physical fitness facility there. There would be no detriment to property values as the surrounding uses were commercial. With about 75 parking spaces out of 150 used, there would be no creation of a traffic or safety hazard. He stated that there would be no excessive demand on municipal services. They were basically using the same building as existing entities and all were contained within the structure so there should be no increase in storm water runoff.

Mr. Witham stated that a special exception was needed because this was in a business zone but the nature of the operation was more reflective of the eclectic mix of businesses in the immediate area which included a restaurant and a bike repair shop. He felt this would be a good fit for the area.

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

4) Case # 1-4

Petitioners: David J. & Vasilina Tooley,

Property: 166 New Castle Avenue Assessor Plan 101, Lot 24

Zoning district: Single Residence B

Request: **Variance(s)** from:

Section 10.321 to allow the enlargement of a lawfully nonconforming structure

Section 10.521 to allow a rear yard setback of 1'2"± where 30' is required

Section 10.521 to allow a building coverage of 50% where 20% is allowed

Section 10.521 to allow open space coverage of 41% where 40% is allowed

SPEAKING IN FAVOR OF THE PETITION

Ms. Jennifer Ramsey stated that she was appearing on behalf of the applicant and passed around a letter from neighbors and abutters. They had a single family residence with a small detached garage which was in poor shape and the space between the structures was affecting the main house. They want to improve drainage and have a better structure for the garage. Referring to the submitted materials, she noted that the first page, a tax map, provided an illustration of how different the property was from others in the Single Residence B district. The special conditions were that it was smaller than average, only 38' in width, which got pinched in the middle which presented a challenge. The lot was deeply sloped with a change in grade from the garage to the home of 4' so a series of steps were necessary to get down to the home. Ms. Ramsey stated that these conditions created a 3' wide alley which acted as a catch place for snow and resulted in rot. They were proposing to close the alley by attaching the garage to the house.

Ms. Ramsey stated that the proposal improved the light and air for the neighbors and gave them a better view of the water. They had started this project years ago and, after all the advice and compromises, the result was the proposal in front of them. She noted that the final proposal was 240 s.f. smaller than the original plan, although there was a slight lot coverage increase, which was that 3' alley. The final square footage was 290 s.f., which was the encapsulation of the small space and the new garage, resulting in an increase of only 3% in lot coverage and they now complied with the open space requirement. They had been challenged to keep the integrity of the home given the special conditions of the site but they did receive Historic District Commission approval earlier that month. She identified the various submitted photographs showing the space, the change in grade, and the tightness of the lot, presenting the challenges she had mentioned. The lot predated zoning and had a very small buildable area. It wouldn't be a buildable lot by today's standards. She continued through the exhibits, pointing out on one the changes made to satisfy the HDC and on another a chart showing the existing home and resulting dimensions. They had lessened the driveway and increased the garden so there was more open space.

Mr. Tom Watson stated that he was a resident a 200 New Castle Avenue, not a direct abutter. He hadn't signed the petition but was familiar with the property. He felt they couldn't have a more classic example of a lot which created a hardship for the owners in trying to do anything. The combination of the shape of the lot and the slope make anything else unworkable. Mr. Jim Coughenor stated that he lived at 150 New Castle Avenue and had no objection to the project. Anything would be better than the way it sat at present.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Grasso stated that they were trying to solve a gather and freeze cycle. With the change in elevation and the small size, the lot was unique and four variances were required for their proposal. He stated that there was no immediate public interest in the garage and this would be an improvement over the existing situation. The special conditions creating a hardship were the conditions of the lot and the applicant had demonstrated the small buildable area. Almost anything they wanted to do would have to come before the Board. The proposal would eliminate a winter problem which was causing some erosion. He stated that the zoning restriction as applied interfered with a reasonable use of the property. Again, it was the size of the lot so that almost anything would require a variance. Regarding the relationship between the ordinance and the restriction on the property, he noted that there were several lots that were undersized for the zone. There would be no injury to the public or private rights of others and an abutter and neighbors had spoken in favor of the project. It was in the spirit of the ordinance to allow adequate light and air between neighbors, which this proposal allowed. He stated that there would be no benefit to the public in denying the variances and surrounding property values would not be diminished.

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

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

V. ADJOURNMENT

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

Respectfully submitted by,

Mary E. Koepenick
Administrative Clerk