

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

**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**March 16, 2010**

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

**EXCUSED:** Carol Eaton

**ALSO PRESENT:** Principal Planner, Lee Jay Feldman

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**I. APPROVAL OF MINUTES**

A) December 22, 2009

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

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B) January 19, 2010

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

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**II. NEW BUSINESS**

A) Revised Rules & Regulations, Board of Adjustment

Chairman LeBlanc stated that, in Section VI, 2, instead of “the membership shall annually elect from among its membership the Chair and Vice-Chair,” he would like to have it read, “the membership shall annually elect from its regular membership a Chair and Vice-Chair.” He asked if there were any other changes or corrections.

Mr. Jousse stated that was acceptable to him.

Mr. Witham stated that he remembered that when Evelyn Sorel was mayor, there was some kind of provision about how many meetings members needed to attend a year and he didn't see that in the rules and regulations. Mr. Feldman stated it was not part of that document, but he would look into it and see if there were any rules and regulations pertaining to the issue. Mr. Witham stated it might have been at the state level.

Mr. Feldman commented that, with all of the Boards, the Council did request attendance sheets so they could review attendance. Mr. Jousse added that he thought there used to be something in the rules 6 to 8 years ago. Mr. Witham thought it used to be that they had to attend nine out of twelve meetings or something like that. Mr. Feldman reiterated he would look into the issue and advise the Board.

Ms. Rousseau stated that she proposed to add an additional line item under Section IV, which she identified the section for the watching public as "Applicant's Responsibilities." She proposed adding the following language as No. 11: "In the case that an abutter to the applicant is a condo association, all unit owners of record as of the application date be notified via regular mail." She stated that she proposed this as part of the City of Portsmouth having best practices for their land boards as she anticipated that the state law would change in that direction within the next year or so.

Chairman LeBlanc asked for a second to the proposed change, with no response from the Board. He commented that was also the purview of the City Council to deal with that sort of thing.

Ms. Rousseau stated it was also the Board's and they could proactively take that measure as best practices. Since there was no comment on her proposal, she stated she would also like to bring up Section VI outlining the rules for Board members. In No. 10, it currently said that "any Board member who recuses him/her self from the board for any reason on any application should not participate in any fashion with regard to said application unless the board member is the applicant." She felt that particular rule was hard to be enforced especially since they might have a personal interest as an abutter in certain cases or there may be a case that they felt passionately about. They might not feel it was appropriate to sit in on a particular case but wanted to have their voice heard before the Board and the community. Just because they volunteered their time on the Board didn't mean they should give up any of their rights as a citizen to speak on the record about issues that they felt were important for the city. She asked for reconsideration on Item No. 10 for language change to accommodate that and specifically proposed that "in any fashion" be stricken.

Chairman LeBlanc stated that, when they had discussed this with counsel, Mr. Sullivan was fairly adamant that when they became members of the board, they did in fact give up some of their rights as ordinary citizens and that's why this language had been proposed.

Ms. Rousseau countered that Mr. Sullivan was not always right and, in this case, she believed he was very wrong. They sat on a quasi-judicial board and kept an open mind on all the cases before them and, if they had a personal interest or a relationship with an applicant, they stepped down but that did not mean that they gave up their rights as citizens. She asked the Board to consider that.

Chairman LeBlanc asked Mr. Feldman to bring this up with their attorney and he said he would do so.

Mr. Jousse stated that he believed that, if a Board member recused on a particular case and made a presentation to the Board to, for or against a particular application, at the very least it gave the impression to the public that the Board could be swayed one way or the other, or listen more carefully to the board member on the floor. They try to be impartial and by not testifying one way or the other, they alleviated this impression. Ms. Rousseau stated she respected his opinion but there might be issues and interests that went beyond the importance of appearance. She had faith that everyone on the Board was independent and would act appropriately. She reiterated that their rights should not be taken away.

Chairman LeBlanc stated that this was going to the City Attorney for review. Mr. Witham suggested that it could read, “unless the board member is the applicant or an abutter.” Chairman LeBlanc stated this would be worked over and brought back the following month.

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### **III. OLD BUSINESS**

#### **A) Request for Rehearing – 103-131 Congress Street**

Mr. Jousse stated that there were two reasons to grant a rehearing: the presentation of new information not available at the time of the original hearing or if the Board made an error in the application of the law. In this particular case, he would like to make a motion to grant the rehearing. Mr. Parrott seconded the motion.

Mr. Jousse stated that they had rendered a ruling on a dollar value while the application was for a number of parking spaces. Although it might have come out to the same thing, they really were not the same. The wording and the way they went about it was, he thought, not correct and he believed the applicant had the right to have a rehearing and for them to vote on the motion as advertised and presented, not as they had interpreted it.

Mr. Parrott agreed. He also noted that they had a short Board when they took the vote. The other point was that there was a disagreement as to whether three or four votes were required to carry a positive motion, so he felt there was enough to justify a rehearing.

Mr. Witham stated these were valid points. He thought the Board had understood what was being asked, but the variance as requested and advertised was different from the way they handled it in terms of the motion. He stated he had made the motion and accepted

the responsibility but had been trying to apply common sense and provide a fair resolution to a muddy issue.

Ms. Rousseau asked if the three or four votes had been clarified and Chairman LeBlanc responded it was four. He stated that he felt that the Board had hashed it over. He had heard all the arguments for a rehearing and saw nothing new. He felt there was no confusion as to the number of votes. There had been, and were, four votes needed by the Board. He would not support the motion.

The motion to grant a rehearing was passed by a vote of three to two, with Messrs. Durbin, LeMay and Ms. Rousseau abstaining as they had not been at the initial hearing.

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B) Request for Rehearing – Portwalk, Lot #1 Deer Street

Mr. Jousse made a motion to deny the request for rehearing which was seconded for discussion by Mr. Grasso.

Mr. Jousse stated that the reasons to grant a rehearing were that new information had been presented that was not available at the time of the original hearing or that the Board made an error in the application of the law. He did not believe that either of these criteria were met.

Mr. Grasso agreed. Although there was a short Board, he felt the petition was well presented and he found no basis for granting a rehearing.

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Before hearing the next petition, Mr. Witham stated he would like to skip back to the discussion on the 103-131 Congress Street request for rehearing. Since that would be coming back before the Board, he would like to have an opinion from city counsel given to them and/or the Planning Department to get a better sense of their opinion on this. He felt last time the packet they received could have been a little more substantial considering the seriousness of the case.

Mr. Feldman stated he would pass that on. At this point, he was not sure what kind of response they would get, simply because there was a sub-committee of the Planning Board that was in the middle of investigating the whole parking issue and would be making a report to the City Council. He was not sure if it would be ready by the time of their meeting, but he would provide some communication to the Board.

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## C) Case # 2-1

Petitioner: Kuzzins Bowden Hospitality LLC

Property: 300 Woodbury Ave Assessor Plan 175, Lot 4

Zoning district: General Business

Requests: Variance to allow a freestanding sign of 343 square feet where 100 square feet is allowed

Variance to allow wall signs of 304 square feet where 200 square feet is allowed

**Section 10.1251.20**

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Alec McEachern stated that there two separate variance requests before the Board. The first involved a free-standing sign previously approved by the Board at its June, 2009 hearing. The second was for the allowance of 343 s.f. of wall sign where 200 s.f. was the maximum allowed. On the free-standing sign, he believed the legal notice was misleading because it made it sound like they were requesting an addition where what was going on was the applicant wanted to illuminate the side panels. In June of 2009, the Board approved a variance to replace the old free-standing sign with a newer, smaller one measuring 137.5 s.f. under the old ordinance. This was the same sign that was there now. The difference in square footage was that, when a sign was measured under the new Ordinance, the base of the sign had to be included. He stated that was what brought the free-standing sign to 343 s.f., not a request to increase the size of the approved sign.

Attorney McEachern stated that, when Mr. Frank Hansler, the representative of the applicant, was filling out the sign permit application, he was asked whether or not the base was going to be illuminated. Based on the representation of the sign company that it would not be, that is what he wrote on the sign permit application and how he responded to the Board when asked that question. Following that hearing, it became known to the applicant that the side pieces on the sign base would be illuminated. He then advised the Building Inspection Department of that fact. The sign was subsequently erected and the side panels on the sign base, measuring approximately 1'4" wide by 23', 5" high, were internally illuminated. At night, those panels appear to glow. He noted there should be a picture in the City's file.

Attorney McEachern continued that it was noted by someone that the sides of the sign were illuminated and the applicant was then instructed that they would need to obtain a variance to increase the size of the sign. The sign permit application was filled out in conjunction with the Building Inspection Department and the variance request was prepared based on that. It identified an increase in the size of the sign from 137.5 s.f. to 343 s.f. He stated that what should have happened on the sign permit application was that the area of the sign should have been calculated under the new Ordinance. The Zoning Ordinance changed, expanding the definition of what constituted a sign, so that the size was now 343 s.f. For that reason, he maintained, requiring the applicant to apply for an additional variance to increase the square footage was improper because the sign

base was approved in June, 2009 and constituted a valid pre-existing nonconforming use. The issue before the Board should be whether the base, which was considered a part of the sign under the current zoning, could be internally illuminated. Under Section 10.1261.10, free-standing signs in Sign District 5 could be internally and directly illuminated. It was their position that no variance was needed for the sign. At the most, they would concede that the Board might want to go back and look at the 2009 variance, and there was a stipulation attached to that variance, and decide if it would remove that stipulation. His understanding that under the Zoning Ordinance in effect at that time there was no prohibition against illuminating this sign, but for some reason, it was asked of the applicant if the base was going to be illuminated. He reiterated that Mr. Hansler had been told it would not be. Attorney McEachern stated it was not material to the variance, but it was a factor that building inspection and this Board was interested in learning. He pointed out the illumination on the sign panel in the photographs noting that it was quite minimal. It was not even visible if you faced the sign, only if you were angled to it.

Regarding the wall sign, Attorney McEachern stated that this was another issue which involved the new Zoning Ordinance. This variance on the wall sign involved a determination that certain external fixtures which illuminated the building façade constituted a wall sign under Section 10.1252.80 of the Zoning Ordinance and that the combined area of all the decorative lighting violated Section 10.1251.20 because it exceeded the maximum wall area. Under the new Zoning Ordinance, decorative lighting or illumination of parts of a building constituted signage and counted toward the aggregate. The lighting on this building at issue was three uplights on the front of the building and two downlights on the porte-cochere. He handed out photographs, noting that this green lighting could only be seen at night so he had indicated in pen on the daytime photographs the approximate location of the light and the illuminated area.

Attorney McEachern stated that, as indicated on the sign permit application, the illumination involved five separate and distinct light fixtures. The three directed upward illuminated three separate building panels above the main entrance. The two on the porte-cochere were directed downward to illuminate two separate porte-cochere columns. It was the applicant's position that, because the square footage for the decorative lighting was being determined by reference to the illumination of distinct non-contiguous portions of the building, it was an impermissible construction of the ordinance to aggregate these distinct and non-contiguous areas for purposes of determining whether the 200 s.f. size limitation for a wall sign was exceeded. He stated that you could put a wall sign with 200 s.f. on one part of your building and another wall sign on a different part of your building as long as you didn't exceed the maximum allowed aggregate. What they couldn't do was say you've got one wall sign here, 200 s.f., and another over there, 200 s.f. and then combine them and say you have a 400 s.f. sign. Each sign had to be looked at as a separate and distinct entity so that each of the three upward directed fixtures then had a sign area of 85.3 s.f. as per the sign permit application. Each of the two downward directed fixtures had a sign area of 24 s.f. As such, these separate and distinct signs did not violate the maximum allowed area for a wall sign, which was 200 s.f., so it was their position that no variance was needed for them.

Attorney McEachern stated that he would also like to address something in the departmental memorandum. It was not advertised as needing a variance, but he wanted to be sure the Board was aware of the issue. In June of 2009, when the applicant received a variance for a free-standing sign, they also received a variance for a wall sign on the back to replace an existing much larger wall sign. The applicant had received the variance for a replacement wall sign but has not installed it. They would like to move the location from the back to the side over the main entrance, further reducing in the process the size of the sign. This had not been advertised as needing a variance and apparently Planning determined it did not need one, but he wanted to be sure the sign did not go up and then have someone on the Board drive by and say they never approved that. He just wanted to put that on the record. For any curiosity the Board might have, he added that the maximum aggregate square footage for this property was based on 1.5 s.f. per linear foot of lot frontage. This was a corner lot with frontage on two streets so, he maintained, it was entitled to claim frontage on both streets and according to the city's tax map, with the frontage identified, the property had 533.8 of linear lot frontage, yielding a maximum aggregate sign area of 800.7 s.f.

Ms. Rousseau asked if what he was basically saying was that they didn't need a variance. Attorney McEachern stated that was essentially correct and there were two separate issues. On the free-standing sign, he believed an error was made at some point in the process by the applicant or someone assisting him, but when the sign permit was completed the existing square footage for the free-standing sign should have been identified as 343 s.f. because that was what it was under the existing Zoning Ordinance. He stated the applicant was not seeking to increase the size of the sign. He reiterated that there was a stipulation on the June, 2009 variance that the base not be illuminated. Attorney McEachern responded affirmatively when Ms. Rousseau asked if then what he wanted was to remove that stipulation.

With respect to the second issue, the wall sign area, if there was illumination or decorative lighting to portions of the building, those portions that were illuminated were included in the maximum aggregate signage under the new Zoning Ordinance. Their position was that five different light fixtures illuminating five different architectural elements did not constitute one sign, but should be viewed as five separate signs in determining whether or not they violated the maximum area for a wall sign. He agreed when Ms. Rousseau asked if his position was that they did not and he was asking for clarification.

Mr. Feldman pointed out that, while Attorney McEachern had suggested that the issue regarding the free-standing sign was a stipulation, if they read the letter of approval for the previously taken action, there was no stipulation. The issue was that the lights had come on after the permit had been issued. On the issued permit, there was an indication, handwritten in by the applicant, that it would not be a lit base. Since that time, they were found in violation and it was suggested that they needed to come back and seek a variance under the new ordinance for that additional signage, which was now lit, if they wanted to continue to keep it lit.

Attorney McEachern responded that their position was because the base was more than 1/3 of the width of the top, it was by definition a sign. It couldn't be counted twice because the side was illuminated. Chairman LeBlanc stated that, when they had originally granted the variance, they were considering just the Holiday Inn at the top. Attorney McEachern stated that was correct. Under the prior ordinance, the base wasn't included in the square footage, but the sign itself as presented was approved and constructed, and then the ordinance changed. When an ordinance changed, then it became a pre-existing nonconforming use and was there by right. The applicant came back in to fill out the sign permit because someone noticed this issue and said they needed to come in and address it.

The sign permit application for the existing size was completed in January when the new ordinance was in effect and it was filled out as 137.5 s.f. Determining the size of the sign at that point in time should have been done under the then existing ordinance, which would have included the base or as 343 s.f. When Chairman LeBlanc stated that the base was not to be lighted, Attorney McEachern stated that was correct but it did not mean it was not a sign under this Zoning Ordinance because the illumination was allowed. This was really an honest mistake by the applicant who was attempting to do this himself. Attorney McEachern stated that, having read the Minutes of the June hearing, he didn't think this issue was material. The representation was made and the condition was on the sign permit. They were asking that it be stricken and the sign be allowed to operate as it was, but it did not require a new variance.

Mr. Parrott read a section from the department memorandum stating that, "The applicant specifically indicated on the sign permit application that the freestanding sign would not be illuminated. However, the sign support is in fact illuminated by vertical tubes, which is in violation of the approved permit and requires the supports to be included in the sign area calculation." Mr. Parrott thought Attorney McEachern had indicated that, when the permit was filled out, the applicant was perfectly happy to have those tall green lighted strips not be lighted and also that the base illumination was minimal. His question was that, if the applicant didn't make an issue of the illumination and, in fact, made a positive statement that the sign would not be illuminated, and if they were of minimal effect anyway, as Attorney McEachern had stated, why not just turn them off and delete this whole issue? The vertical tubes were bright and distracting, but with no words on them, what was their purpose?

Attorney McEachern stated that one purpose could be aesthetic. Also, at night, the sign really almost wouldn't be visible but for the side illumination. With respect to the applicant's statement on the sign permit that the sign would not be illuminated, he maintained there was no intent to deceive. They would have put that down if that's what they were asked. Mr. Parrott asked if it was his position that the city should have known that he was putting down a false statement or something that he would later regret, Attorney McEachern reiterated that there was no intent to deceive. Mr. Parrott stated that since he still had done so, would they agree to just turning them off? Attorney McEachern replied that because the illumination was allowed under the old ordinance



and under the new, it was not material to the variance that was granted. The sign was designed to be illuminated and, although he was not an electrical engineer, it was probably best for it to stay illuminated.

Mr. Jousse asked whether the sign approved in June of the previous year had physically changed since that time and if all they were requesting was to allow the sides to be illuminated. In essence they were asking for a wrong to be righted, whoever had created the wrong. Attorney McEachern replied that those statements were correct.

Ms. Rousseau stated that she felt it looked perfectly fine illuminated and that every business should have the sign that they needed to attract their customers. It wasn't really a big deal if the base was illuminated so how could they get this corrected? She asked if the applicants would be open to a variance consideration for the illumination to correct the issue? Attorney McEachern responded that they would be open to any consideration by the Board that would allow the lighting to exist.

Chairman LeBlanc asked Mr. Feldman whether, if the base of the sign was not illuminated, it took it out of the square footage for that particular sign. Mr. Feldman stated, "yes," based on current ordinance definitions. He confirmed it would not have counted last year, adding that it was also self-imposed that it would not be lit. Chairman LeBlanc stated that he understood and that they also made their judgment with that understanding.

Attorney McEachern stated that he would like to address the definition of sign area in Section 10.1252.22 where it said that the vertical supports of a sign should not be included in the sign area provided that the total width of the supports was less than 1/3 of the width of the sign and that the supports were not illuminated. He stated that, in this case, the base was greater than one third so it constituted a sign of 343 s.f. whether or not it was illuminated.

Mr. Feldman stated that the issue for staff was that the sign was represented to not be lit and it was lit and under the new ordinance definition, lighting like that constituted signage. Attorney McEachern reiterated his previous statement that the sign couldn't be counted twice. In response to further questions from Mr. Jousse and Ms. Rousseau, he confirmed that the upward and downward lighting just lit the wall, noting again that under the new Zoning Ordinance, that counted against aggregate signage. He agreed with Ms. Rousseau that this type of lighting arrangement was common for this type of motel and was dictated by the Holiday Inn franchise.

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

With no one rising to speak, the public hearing was closed.

### **DECISION OF THE BOARD**

Mr. Witham made a motion to grant the variance to allow the illumination of the sign posts resulting in a freestanding sign of 343 square feet and to deny the up and down lighting on the façade of the building, representing 304 s.f. of wall signs. The motion was seconded by Mr. Parrott.

Mr. Witham stated that the reality of the freestanding sign was that the sign was the one they had approved except for the fact that the side panels were illuminated where it had been noted on the sign permit that they would not be. He felt it was an honest mistake and, even with the illumination, it would have been approved. While he was uncomfortable with 343 s.f. where 100 s.f. was allowed as it seemed very generous but the reality was that the sign was up and all they were allowing now was the illumination of 14” wide panels which would have been allowed in 2009.

With regard to the second variance request, he felt that past experience with other petitioners had forced zoning to be rewritten and he would back up the Zoning Ordinance with regard to the up and down lighting. He felt that having facades glowing green from a distance did not meet the spirit and intent of the ordinance or the criteria necessary to grant a variance. He felt it was an unnatural condition of identifying. The middle section was plenty and green glowing stripes were not necessary.

Mr. Parrott stated that he essentially agreed. The addition of the green lights was not attractive and, under the revised Zoning Ordinance, this decorative illumination was considered a sign and was to be included in the calculation of the sign area. He felt that the motion was a reasonable compromise and he would support it.

Addressing the criteria for granting the variance, Mr. Witham stated that granting the variance would not be contrary to the public interest. He didn't feel that a 14” wide strip facing either the traffic circle or down the street would change the essential character of the neighborhood. He felt it would be in the spirit of the ordinance as this type of lighting was allowed when the sign was originally approved in 2009. There would be no harm to the general public if the variance were granted and no diminution in the value of surrounding properties. He stated that no fair and substantial relationship existed between the purposes of the ordinance and the restriction on the property. While it sounded like the signage was almost tripled, it was only lighting these 14” strips and he didn't feel that denying that was the intent of the ordinance. Again, he felt this was an honest error and this was one of those situations where they needed to apply common sense.

Mr. LeMay noted there were other uplights on the building and he asked how they discriminated between green uplighting for the panels that clearly are part of a sign on the one extreme and other lighting which was there to illuminate the front of the building. Mr. Feldman stated they could ask the applicant to speak to those lights, but he believed the other lights that they could see did not illuminate the whole building, only the immediate cornice area just above the lights. Mr. LeMay stated that he was just seeking a clear distinction for the purpose of this variance. For example, they didn't want to see those lights being green. He wanted to give the applicant clear instruction on what it was

that they expected. Mr. Feldman stated that it was not to light the building as it was currently being lit. As it was, the lighting that was being discussed for signage that evening was also part of what was being considered in violation, if they would, by the code enforcement officer who brought it to their attention when they were seeking approval to move from the wall sign from the side to the front of the building. When they looked at the green lighting, they determined that it constituted signage.

Chairman LeBlanc stated that he did not feel the same as Mr. Witham or Mr. Parrott. When they approved signage, they looked at the total effect on the neighborhood and adding those panels added a lot more to it. He would not support the motion.

Chairman LeBlanc stated they would take separate votes on the two parts of the motion. The motion to grant the variance to allow a freestanding sign of 343 s.f. where 100 s.f. was allowed was passed by a vote of 6 to 1, with Chairman LeBlanc voting against the motion.

The motion to deny a variance to allow wall signs of 304 s.f. where 200 s.f. was allowed was passed by a unanimous vote of 7 to 0.

Mr. Witham stepped down for the next two petitions. Ms. Rousseau assumed a voting seat.

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D) Case # 2-3

Petitioners: JP Nadeau, owner and Witch Cove Marina Development, LLC,  
applicant

Property: 187 Wentworth House Road Assessor Plan 201, Lot 12

Zoning district: Waterfront Business

Requests: Variance to allow the expansion of a nonconforming structure

Variance to allow the expansion of a nonconforming use

**Section 10.321**

**Section 10.331**

Mr. Jousse stated that he would like to invoke Fisher v. Dover and not hear the petition. He stated that this was an application which was essentially exactly the same as what they had heard back in January when the vote was 7 to 0 against the expansion of this nonconforming structure. He had seen absolutely nothing in the packet which indicated anything different from what had been requested originally and voted on. The motion was seconded by Mr. Parrott

Mr. Jousse reiterated that the vote was unanimous back in January when they had granted the moving of the two structures on the property but explicitly denied the vertical expansion of those structures. Nothing new was being presented that was not presented in the first place. There was no new information that was not available at time of the

original hearing and he saw no reason why they should hear the same thing two months later.

Mr. Parrott stated that his recollection was the same and, if memory served, he made the motion to move the structures and he had made the explicit condition that they were to be moved exactly as they were. He thought he had even said that, if they fell apart, so be it. The idea of this Board was that, on balance, it was reasonable to move them but not do anything else. Moving them off to the side with a little setback from the road even though they still violated some wetlands was the extent of what the Board wanted, not start enlarging them.

Chairman LeBlanc advised that Ms. Rousseau would be sitting in for this vote and she stated that she did have a question as she didn't think she would be sitting in on this. She stated that they typically allowed the applicant to speak to a Fisher v. Dover issue and it would be interesting to hear what they had to say given the discussion that happened the last time. Chairman LeBlanc stated that the last time they allowed that, there was a very special condition in place and they would not hear from the applicant. Ms. Rousseau stated she didn't recall a special condition and Chairman LeBlanc stated that the City Attorney had advised them to allow the individual to speak.

Before calling for the vote, Chairman LeBlanc advised that, once Fisher v. Dover had been invoked, they could not get to the merits of the case. If the Board felt that the application before them was essentially the same as what came before them, they would vote for the motion and the petition would not be heard.

The motion to invoke Fisher v. Dover and not hear the petition was passed by a vote of 6 to 0, with Ms. Rousseau abstaining.

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E) Case # 2-4

Petitioner: South Mill Investments LLC, owner James Sanders, applicant

Property: 25 South Mill Street Assessor Plan 102, Lot 16

Zoning district: General Residence B

Request: Variance to allow a second story addition with a 6" side yard setback where 10' is required

Variance to allow a two story addition off the rear of the existing structure with a 5' side yard setback where 10' is required

**Table 10.521**

**Section 10.321**

**Section 10.324**

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Jim Sanders stated that he was the owner of 25 South Mill Street. He was there with the Assistant Manager of Sanders Lobster Company who had assisted with the

renovations. The current structure was a rental duplex in desperate need of renovation. Their hope was to renovate the building and keep it as a duplex. They were proposing an addition off the rear in order to upgrade the existing one bedroom units into two bedroom units and justify the expense of the renovations. The two-story addition would be 18' x 18' and the one-story section of the building would have a second floor addition added as shown on the site plan. He stated that the two variance requests were needed because a portion of the proposed second floor addition over the existing floor would have a 6" right setback and the other addition would have a 5' right setback, both where 10' was required.

Addressing the criteria, Mr. Sanders stated that he didn't believe the variance would be contrary to the public interest or go against the spirit of the ordinance. This proposal would not alter in any way the essential character of the neighborhood nor would it injure any public rights of others. He felt that substantial justice would be done by granting the variance since they had no reason to believe their gain would cause any harm to the public. They did not feel the value of surrounding properties would be diminished. The abutter most affected would be only slightly affected along the driveway which also allowed space for building repairs. More likely, the surrounding property values would increase once this eyesore was restored to the high HDC standards. Mr. Sanders stated that they felt the ordinance as it was written resulted in unnecessary hardship due to the special conditions of the property. The property predated zoning by well over a century and the building was tucked into a corner of the lot. It was reasonable to want to utilize the existing foundation and expand upward in a linear fashion without creating haphazard jogs which would also greatly diminish the use of the proposed space as they were pinched in on the other side by the driveway.

Ms Rousseau asked if he had a home-based business, but Mr. Sanders stated this was a rental property which he owned, nothing to do with the business. He confirmed the age of the home as 18<sup>th</sup> century, surrounded by similar aged properties.

Mr. Grasso asked about the neighbor to the side of the property where the 6" setback was and what his proposal was for construction. Were they o.k. with him bringing in staging or trucks on their property? Mr. Sanders stated that the 6" setback existed now for the one floor and they were proposing a second floor. Mr. Grasso stated they would then need staging in their driveway and Mr. Sanders replied that they would have to get their permission, yes. Chairman LeBlanc asked for confirmation that they were not going to expand the particular part that was 6" away from the property line and Mr. Sanders responded just the second floor above it.

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

With no one rising to speak, the public hearing was closed.

**DECISION OF THE BOARD**

Mr. Parrott stated, first, that they had a letter from 33 South Mill Street, the abutter to the right of the property, who was strongly opposed to the petition. Secondly, he had a question. The required setback was 10' and they were requesting 5' but it looked like there was room to slide the addition to the left and be in compliance. When Mr. Sanders stated they were trying to avoid the jog, Mr. Parrott stated that compliance seemed pretty straightforward. Mr. Celli, who had assisted in the renovation of the property, stated that they would still have the 6" setback. Sliding the addition over would put it smack dab in front of the driveway to the garage or narrow the area by 5' which would not be as desirable. Mr. Parrott stated that he understood how he wanted it.

Mr. Parrott made a motion to deny the petition, which was seconded by Mr. Grasso.

Mr. Parrott stated that his feeling was, if they could redesign a project to comply, it was wise to do so and they could do so by not going to the edge and the addition highlighted in pink could be narrowed a little to be in compliance. On these small lots, small differences really counted and, as he had noted, the next door neighbor was in opposition as she felt the mass would affect her property. On balance, Mr. Parrott stated, it didn't meet the tests. There would be a diminution in the value of perhaps her property and it would fail in the balancing test, with the property next door representing the public interest. Where there was an alternative, he would like to see it taken.

Mr. Grasso stated that the spirit of the ordinance provided for light and air and to have a second story so close to the property line would affect the neighbor's property values.

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

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

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F) Case # 2-8

Petitioners: Sarnia Properties Inc., owner and Thomas Woodard, applicant

Property: 933 Route 1 By-Pass Assessor Plan 142, Lot 37

Zoning district: Business

Request: Special Exception to allow an Auto Dealership in the Business zone

Variance to allow an Auto Dealership within 150' of a Residential or Mixed Residential District where 200' is required

Variance to allow Parking, outdoor storage or display within 40' of the right-of-way

**Table 10.440 use #11.10**

**Section 10.592.20**

**Section 10.843.21**

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard W. Pelech stated that he was appearing on behalf of the applicant who couldn't be there. He described the area of the property in past years with gas stations on both sides, of which three remained. All of the old buildings still were there and contained a number of different uses. The property which they were considering that evening was one of those buildings and in the past it had been used as an auto repair facility. They were proposing that it be a used car sales facility with a limitation that there be no more than 6 used vehicles for sale. He stated that the property was unique with special conditions. It was a large lot, with the former Portsmouth Paper building on it, occupying 75% to 80% of the area. In the front was this former gas station subsequently used for auto repair. He listed other businesses in the area, all of which were in former gas station buildings.

Attorney Pelech stated that they were requesting a Special Exception for automobile sales under Section 10.232.21 which allowed the use by Special Exception. Noting that the standards for a Special Exception hadn't really changed from the old ordinance to the new, he stated that there would be no hazard to the public or adjacent properties from explosion or release of toxic materials. There would be no auto repairs, just a sales office, so there was no potential for explosion and minimal exposure to toxic materials. With no maintenance performed, there would be no storage of oil or hazardous materials. There would be no detriment to property values or change in the character of the neighborhood on account of the items listed in the criteria. They were proposing to have only six vehicles backed in against the building and three other employee spaces.

Attorney Pelech continued that this was a commercial area and this use would be less intense than what was there previously. There would be no odors, noise, smoke, dust or other irritants and the property was of a more attractive nature than auto repair. Attorney Pelech stated that the proposed use would result in only a negligible change in traffic and there would be no safety hazard from vehicles entering or exiting with the number of potential customer visits only between 10 and 15 daily. There would be no excessive demand for municipal services. The water and sewer would remain the same. With no proposed external changes to the building, all that would be done was interior fit-up and the existing hardtop would remain so there would be no significant increase in storm water runoff. As indicated in the packet, there would be no washing of vehicles.

Attorney Pelech stated that two variances would also be required. The first was to allow the use within 200' of a residentially zoned area. The corner of this property was approximately 150' from a Single Residence B zone and, while it was within the 200' required, they could see that there were two buildings between this structure and the zone. The most immediate building to the left completely obscured this building and from the two closest residences in the SRB, you couldn't even see this building.

The second variance was to allow parking within 40' of the Route One By-Pass right-of-way. Attorney Pelech stated that granting these variances would not be contrary to the public interest. The property was in a Business zone and the use was allowed by Special Exception for which the applicant met the requirements. He reiterated that the building would be screened from residences. He cited the Malachy v. Glen and the Chester Rod &

Gun Club court cases, which stated that, in order to be contrary to the public interest, the variance must conflict with the ordinance so that basic zoning objectives were violated. The first test was whether granting the variance would alter the essential character of the neighborhood. Noting that this was an old, very commercial neighborhood, he listed again the various uses in the area and stated that allowing a used vehicle facility with limited sales would not alter the essential character. The second test was whether there would be a threat to the public safety or welfare. Attorney Pelech maintained there would be none and the use would be much cleaner and environmentally friendly than many there now. Parking vehicles 14' from the bypass would also pose no threat. If they looked at the plans, there were curbs and curb cuts. While within 14' of the right-of-way, they were actually 30' from the travelway and separated by concrete islands, posing no safety issue.

In the justice balance test, Attorney Pelech stated that the hardship on the owner and applicant were the petition to be denied would not be outweighed by some benefit to the general public. The use was allowed and it would be screened from residences. He noted that the two tests in Malachy v. Glen that he had outlined were also used to determine if granting the variance would be within the spirit of the ordinance. If the essential character of the area was not altered and safety and welfare of the general public were not threatened then it was not contrary to the spirit. He again listed the business which he stated were more intense than that proposed. The value of surrounding properties would not be diminished. All were in the same business district and all were commercial. Currently, the building sat vacant and sprucing it up would not diminish values but might bring some life to that section of the by-pass.

Attorney Pelech stated that, regarding hardship, there was no fair and substantial relationship between the general purposes of the ordinance and its application to this property. He stated the property was unique, with Portsmouth Paper occupying 80% of the lot. If the Board looked at the tax maps he had submitted or the actual survey/plot plan that was done several years, they could see how Portsmouth Paper fit the contours of the lot. It was a larger lot than most in the vicinity but had limited frontage on the bypass. He stated there was a 100' easement along the back of the property which put restraints on the property so that there were special conditions which rendered the property unique from others along the bypass. In this case, talking about the 200' limitation, the purpose of the ordinance was to separate automobile dealerships from residential districts. He felt the intent of the ordinance was met due to the screening and the intervening buildings, the fact that the proposed location was 150' away from the residential district and the fact that it could not be seen from there. He added that the location of the existing structure within 37' of the bypass was mitigated by the fact that any vehicles parked in front of the structure would actually be 30' from the travel lane and would be parked as display vehicles, not be coming and going. He maintained that the proposed use was a reasonable use and one allowed by special exception and he felt they met the requirements for granting a special exception.

In response to a question from Ms. Rousseau, Attorney Pelech stated that the property had last been rented for commercial use about a year and a half previously, long enough



so that the previous use had lapsed. When she commented that the lapse might be an issue in current economic conditions and this would be an acceptable use rather than waiting around which would create a financial hardship, he responded, “absolutely.” He added that they would be refurbishing one of the vacant buildings and making it more attractive. At Mr. Grasso’s request, Attorney Pelech confirmed that there would be no more than 6 used vehicles for sale at one time and that no repairs or washing of vehicles would take place on site.

Mr. Jousse noted that the special exception and variances were being requested for the site which included this little building and the former Portsmouth Paper and asked what there was to ensure that the concrete block building would not be converted into a used car lot. Attorney Pelech responded that they should have in their packet a letter from the owner and a plan showing a cross-hatched 75’ x 87’ area cut out of lot. They would be happy to have a stipulation that only that area, 75’ x 87’ be used for this purpose and the remainder of the lot not be subject to the variance and special exception.

### **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, subject to the conditions presented that there would be a maximum of 6 vehicles for sale on the site, that there be no repair or washing of vehicles, and that the business be conducted within the 75’ x 87’ area shown on the plan. The motion was seconded by Mr. Grasso.

Mr. LeMay stated that the proposal met the standards proposed by the ordinance for a Special Exception. There would be no hazard to the public or adjacent properties by fire or explosion. With no repairs conducted, he felt there would be no hazards created. There would be no detriment to property values or change in the essential character of the area due to smoke, dust and so forth as there would primarily be a display of parked cars with an occasional test drive, a less intense use than those surrounding it. He stated that no traffic hazard would be created or increase in traffic congestion. This was probably not the kind of business with a continuous turnover of traffic, such as a convenience store. There would probably be one of two people on the site most of the time so no excessive demand would be made on municipal services. The building had been there for decades so he saw no increase in storm water runoff.

With respect to the variance requests, Mr. LeMay stated that granting them would not be contrary to the public interest. This building had been used for auto repair which would also have involved some storage of vehicles. The cars would be of resale quality so there were no potential environmental issues. The nature of the business would not cause a nuisance to abutters by noise, odors, or other irritants. He stated that it would be in the spirit of the ordinance to allow a commercial use appropriate to this commercial area.

In the justice balance test, a hardship would be created for the applicant if the petition were denied without any possible benefit to the public. It was clear that the value of surrounding properties would not be diminished by this similar but less intense use and there was no proposal to change the building. He felt that enforcement of the setback requirement for parking would probably result in an unnecessary hardship as that was common in the area and had existed on that property in the past. It wasn't a major problem as cars would be parked as opposed to coming and going.

Mr. Grasso stated that the property had been used for automobile related businesses in the past and had been vacant for awhile. There would be no new construction and, concerning the proximity to a residential area, there were existing buildings shielding this property from the residences.

The motion to grant the petition was passed by a unanimous vote of 7 to 0, with the following stipulations:

- That no more than six vehicles would be on the lot for sale at any one time.
- That the approved use would be conducted within the 75' x 87' area as shown on the plan submitted with the application.
- That there would be no repair or washing of vehicles.

Messrs. Grasso and Parrott announced that they would be stepping down for the following petition. Ms. Rousseau assumed a voting seat.

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#### IV. PUBLIC HEARINGS

1) Case # 3-1

Petitioners: Robert A. Ricci Revocable Trust & Elizabeth Batick-Ricci Revocable Trust

Property: 31 Richards Ave Assessor Plan 128, Lot 2

Zoning district: General Residence A & Historic District Overlay

Request: **Appeal** from the Historic District Commission regarding the placement of a fence

**Section 10.636.50** Appeal of Historic District Commission Decision

Mr. Witham stated that, when they receive over 100 pages of documents and photographs, they knew something more was going on. They know there was more than a fence and hoped the parties could be brief and concise. They were there to make a decision as if they were the Historic District Commission and he would like the proceedings to be concise and respectful without dragging in other issues.

Attorney Douglas Macdonald stated that he represented the applicant/appellant and wanted to address why there was so much paper. They had a situation where the Historic District Commission granted an application and issued a Certificate of Appropriateness for a fence and a railing. He stated that the railing was never appealed and was a non-

issue, but because the HDC revoked its earlier decision, the railing was somewhat in limbo. He would hope that, if they voted in favor of granting a Certificate of Approval that evening they would also grant the railing. He stated that the certificate issued by the HDC had been challenged by an abutter. The document filed with the city was an appeal and the Board should look at the issue that evening as a “de novo” hearing as the Historic District Commission. He referenced the submitted photographs and apologized for any duplication. He noted the sections in the Zoning Ordinance outlining the review factors and criteria that the Historic District Commission had to consider.

Attorney Macdonald stated that the issue was the location of a fence which was effectively at the intersection of Richards and Middle. The historic district actually bisected the lot at issue. Surrounding the property were other similar properties, many of them modernized, with an apartment building across the street. He stated that the fence that was constructed in the historic district was the subject of some disrepair and there was some unfortunate friction between the neighbors. The owner had presented at the HDC meeting that when she bought the property in roughly in 1972, she used to walk up the driveway onto the sidewalk and come back around onto the abutting lot to speak with the prior owner. So the fence shown in the pictures existed from the rear of the lot through to the street side of the lot, all the way up the property line. He stated that over time the fence fell into some disrepair and there was misinformation between the neighbors as to ownership and a survey was ultimately done by the applicant. It was established that they did own the fence line and the fence was replaced in kind. Certain sections had fallen apart but he felt the photographs clearly depicted that the fence line for the stockade style fence came further up than the existing photographs would depict. It was difficult to find a photo of the entire fence and he had tried to establish through the two aerial photographs that there was a common shadow type fence that appeared between the two properties. He acknowledged that the pictures were from high in the air and were not conclusive but he felt that a close look at the photographs was indicative that there was a fence along that entire property line. He reiterated that the fence was replaced in kind at the same height with the exception that, as it approached the street, it set back a little bit and the last section was scalloped for visibility reasons.

Addressing the review factors, Attorney Macdonald stated that they had to consider the historic context. He didn't know when it was originally erected. It was a stockade fence and replaced as such. The property was turn-of-the-century and the fence was probably installed some time after that. There were many different fence styles in the neighborhood, some stockade and some chain link. He stated that they also had to review the structure's architecture, its mass and design elements. There was not any particular design element other than what you would expect from a fence. The third review factor was construction materials. There was nothing to state that the fence was different from what was there previously. It was a wooden fence and the materials were the same. Addressing the fourth element, its importance relative to historically recognized events, Attorney Macdonald stated that one issue was a painting by an artist at the turn of the century. As indicated in his packet, he felt the painting was highly susceptible to challenge as he felt it was an artists rendition of the property with a number of different

elements. He stated that he didn't feel this constituted a historically recognized individual or event. The fence was what it was, a stockade fence.

Ms. Rousseau noted that the review criteria referenced factors in the site which were architecturally or historically significant and asked if he was going to get to the background of the age of the property so they could put it in context with the surrounding properties. Attorney Macdonald stated it was turn of the century and, when challenged as to whether he knew that for a fact, stated it was late 1800's or early 1900's

Mr. Feldman stated that, based on the property record card from the assessors office, the house was built in 1830. When Ms. Rousseau asked about the age of the surrounding properties, Mr. Feldman stated that a neighborhood was usually developed about the same time and he would say the whole neighborhood would be mid-1800's. Ms. Rousseau stated that those in the historic district would probably be captured around that time period at least and Mr. Feldman agreed.

Attorney Macdonald stated, in that context, that many of the properties including the house to the left had an added dormer. This property had been renovated and there was an apartment building across the street. Many of the houses had been updated with different appearances, different sidings. The street in itself had been modernized. When you looked at the site, they would see that some of the houses seemed to have a more historical appearance but it was a blended neighborhood with all types of fencing. You don't think that you're in Strawberry Banke when you're on the property. When Ms. Rousseau added but they were in the historic district, he stated that he had gone through all corners of the historic district to obtain the 22 pictures he had included and found these types of fences throughout the district. There was a brief discussion between the two of particular photographs and the fences they depicted. Attorney stated, in response to a question from Ms. Rousseau, that he did not know if they received HDC approval or were illegal, just that they were in the historic district and were of all different types.

Attorney Macdonald read from the Zoning Ordinance each of the criteria necessary to reach the Findings of Fact. Under the first, he stated that for scale and mass, etc, again this was a typical blended neighborhood where all types of features could be seen. In considering factors such as height, width materials and architectural details under criteria two, he stated that they had touched on the property and its surroundings. With respect to new construction when considering the fence, it was the same materials, the same height, the same fence. He stated that the third criteria, that the existing structure was compatible with surrounding structures, was met as it would be replaced in kind. He didn't believe that there was any aspect of the fence that was less compatible with the property or surroundings than it was previously. With regard to the fourth criteria, Attorney Macdonald stated that there was really no use of innovative technologies or materials. It was simply the replacement of a fence. He believed, from an appeal perspective, that the decision of the HDC was unlawful and unreasonable but that was not what was before them that evening. He also believed that the application met the criteria and the cleanest way to fix this was to grant the Certificate of Approval with reference to what was granted on October 7 by the Historic District Commission.

Mr. LeMay asked if he could represent when the front half of the fence was still standing and Attorney Macdonald stated that, in the abutter's pictures from 2004, you could see that at least in part it was still standing, although that might not be entirely accurate. He pointed out from which point to the back was standing but noted that ultimately the entire fence line needed repair. The reason the survey was done by his client was that the neighbor had informed the owner that it was his fence. When she learned that it was her fence, it was immediately replaced. When Mr. LeMay noted that it was not replaced within a year, Attorney Macdonald stated not necessarily in its entirety but within a year of the controversy, yes. Mr. Jousse referred to the abutter's page 19 taken in 2008 and stated that he presumed that was the remnants of the old fence as it was the same wheelbarrow leaning against the fence in one of the petitioners photographs. Attorney Macdonald stated that was page 25 and they could see how the fence came halfway up the property line and the post holes and, at the end of the fence, was a post with no pre-drilled hole. He had pictures in the packet showing where the property line was and they could see in 2004 how far up the fence went and, but for the dispute about ownership, the fence would have been replaced. When Mr. Jousse stated that at least part of the fence was there in 2008 and the HDC rendered its decision in 2009, Attorney Macdonald stated that the HDC's concern was the section coming forward from that based on the painting that had been presented, which he did not feel was an appropriately persuasive piece of evidence but the HDC felt differently.

Mr. Witham asked for clarification that the owners did not put up the fence until after they found out they owned it and Attorney Macdonald stated that was correct. Mr. Witham stated that he couldn't find anything in the ordinance but felt it was an unwritten rule that, when you put up a fence, you put up the finished side toward your neighbors. He asked why this was treated differently and Attorney Macdonald stated it was replaced exactly as it was. Mr. Witham stated that made him think that maybe there was some confusion at some point where the previous abutter may have thought they owned the fence and put it up with the finished side out and then the survey showed the current abutter didn't own it and it belonged to somebody else. Attorney Macdonald restated that the survey was done and it was replaced exactly as it had stood before, although he was not sure that the scalloped piece was there, but essentially in kind.

### **SPEAKING IN OPPOSITION TO THE PETITION**

Mr. Tom Morgan stated that he lived at 39 Richards Avenue. He felt that the dates the assessing department had for the buildings were incorrect and the neighborhood was quite a bit older. He showed a book about the neighborhoods of Portsmouth and referenced two sections of the book which he felt demonstrated that the neighborhood was laid out in 1805 and completed in 1813. He submitted the book for the Board to look at pgs. 30 and 117. Ms. Rousseau asked if he was saying his house was built in 1813 and he stated, "yes," that his house was the last one into this federal era neighborhood. There followed a brief discussion of the dates of various buildings and the age of the neighborhood. Mr. Morgan stated that he had submitted in his written comments his take

on stockade fences which was that you wouldn't find a stockade fence in Portsmouth in the 19<sup>th</sup> century. They didn't come in until the middle of the 20<sup>th</sup>.

Mr. Morgan read from Section 10.631 of the Zoning Ordinance, stating that the fence would not contribute to the historic district's sense of place and economic well being as this fence would detract from his property values. He stated he would not go through all the criteria but one of the review factors was the historical time period. He reiterated that the time period was the federal era and you never saw a stockade fence until the mid 20<sup>th</sup> century. He stated that one of the review criteria was defining the character of the surrounding properties, which would be his property. They had worked to restore their house and the fence was from a different century. You could walk around Portsmouth and not see fences that were 6' tall. When Ms. Rousseau asked how he would answer the petitioner's assertion that there were stockade fences in the district, Mr. Morgan stated that Attorney Macdonald could have gone down to the Inspection Department to see if they were legally installed but instead took pictures. He stated that, in his 25-year tenure, there had never been a fence in the historic district on the petitioner's property. He stated they couldn't prove that the fence existed.

Chairman LeBlanc asked, then, if he had owned his property since 1985 and there was no fence there when he bought it? Mr. Morgan responded only in the rear, which was outside the historic district. They should be concentrating on the 20' which was now inside the historic district. He stated he had a painting which he found to be accurate in many details and which showed a fence about 3' tall. He had submitted a portion of a 2002 survey which showed that the closest the fence came to the sidewalk was 36' and the historic district went back 25' from the sidewalk. Mr. Witham asked Mr. Feldman if, when the historic district bisected a property it threw the whole structure into its purview, Mr. Feldman stated that he believed that was the case. When asked about the time period for replacing a fence, he stated that with nonconforming structures, there was a provision that a damaged or destroyed structure could be restored as long as it was not enlarged or made more nonconforming if applied for within 18 months.

Mr. LeMay stated that he wanted to be clear about the remedy Mr. Morgan was seeking. Was he just looking for them to deny this certificate? Mr. Morgan stated that he had made it clear from the get go that the fence was 3' too tall and his reasons had nothing to do with the historic district ordinance and he had made that clear as well. It was the line of sight between cars and children on the sidewalk. The HDC drew the same conclusion, not based on any public safety issues, but due to the fact that 19<sup>th</sup> century fences were shorter in scale than the petitioners fence.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

Attorney Macdonald stated for the record that he had not received a packet from the abutter relative to this meeting that evening which was why he didn't realize the page they were on earlier when the picture was referred to. With respect to the comment about the federal period, they had no real proof that the fences in the historic district throughout

Strawbery Banke, Prescott Park, Islington Street corridor or anywhere else where he had photographs were illegal fences and they were all roughly 6' tall and of the same quality. If there was a survey done in 2002 by the abutter, no notice was given to them and it was not until they did their own survey that they, within a very short time, replaced the fence in kind. With regard to the line of sight issue, they could see from his pictures that the fence was off the sidewalk and, with a scalloped end, he did not believe there was a visibility issue. He briefly drew their attention to his submission of a picture with a ruler on it. The reason for that was that under the old ordinance which was in effect when this was appearing before the HDC, they could see that there was consideration of a district 20' on either side of the district boundary. In that circumstance, the historic district would go 20' into what wasn't required and the general district would go 20' into the historic district. He put the ruler on there because they could see that, if that was the measure under the ordinance, a portion of the fence had always been in the historic district or none of it had been in the historic district because if you ran it up the other way there was maybe a few inches that would qualify under the old ordinance as being within the historic district. If the argument was that none of the fence was in the historic district, he didn't believe that was accurate based on the prior language of the zoning ordinance. The picture, the ruler and the old zoning ordinance language were in his packet.

Ms. Rousseau asked Mr. Feldman when the Historic District Commission came into being, maybe this existing fence predated the actual forming of the HDC and that's why it was there because at the time there were no rules. Mr. Feldman stated, with his short history, he didn't know. Mr. Morgan interjected that he believed it was approximately 1975. Ms. Rousseau stated that the fence could have existed prior to 1975.

Mr. Jousse stated to Mr. Morgan that he understood that he had an objection to a 6' stockade fence and Mr. Morgan stated that was correct. A discussion followed between Mr. Jousse and Mr. Morgan about the possibility of removing a section of the fence that was in the historic district, with Mr. Morgan reiterating that his concern was for the children. They discussed line of sight and what might be a sufficient height, as well as a curb cut on another property which would also pose the same issue if it were opened up. Ms. Rousseau interjected that the discussion had nothing to do with the criteria. They were dealing with whether the site was historically significant and whether the fence met the period and was in character with the neighborhood. Mr. Morgan stated he agreed and noted that he believed Mr. Feldman was just going to remind everyone about that.

Mr. Butch Ricci stated that he was the manager of the property. He asked, if he was willing in the spirit of cooperation to take the fence and go back three sections and bring the fence down to 3' and make a nice cap, would that be something that would be amicable to all parties so they could bring the line of sight down and make a compromise. Chairman LeBlanc stated that was for the Board to decide and Mr. Ricci replied that he was just putting that option out. Mr. Morgan stated that he appreciated Mr. Ricci's offer and they only needed to go back 2 sections, which would be 20' and that would restore the line of sight that was there.

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

## **DECISION OF THE BOARD**

Mr. Witham made a motion to grant the Certificate of Appropriateness (Approval) with regard to the fence and the railing with the following stipulations: That the last two sections of the fence closest to the street be cut down to a height of 36” and that a traditional style fence cap profile be put on top of the cut ends. The motion was seconded by Mr. LeMay. After the clerk read back the motion at the request of the Chairman, Mr. Witham asked to amend his motion to read “36 inches plus or minus 4 inches” as there was a mid-rail in that fence and, if that was right at 36 inches, it would be impossible and he wanted to give them the ability to get just above that. You can’t cut a mid-rail as it supports all the slats. Mr. LeMay agreed.

Addressing the review factors and criteria of the Historic District Commission, Mr. Witham stated that scaling down the fence in height made it more consistent with the historical characteristics of fences from that time period. Removing the scallops along the top of the fence and adding a more traditional fence cap would also be more appropriate architecturally with fences of the period. He agreed that a stockade fence was more of a mid-1900’s style fence than a historical style. Mr. Witham stated that a lot of the other criteria had more to do with buildings and windows and eave details than a fence, but he thought that they had addressed the safety issue which wasn’t part of the HDC purview but was part of the compromise. The fact that they scaled down the fence and removed the scallops and added a cap did make the fence historically correct.

Mr. LeMay stated that he believed both parties got involved originally with this in good faith and it probably just deteriorated somehow. His questions, when he first looked at the petition, were more to do with the jurisdiction of the HDC with respect to this. He felt this fence was clearly gone, at least the part in the historic district was gone for at least 18 months, probably several years and they certainly had jurisdiction in terms of saying what went on there. The items in the list of the criteria which stuck out for him were the factors such as height, architectural detail and compatibility with surrounding properties. The compromise was a good practical solution and the fence could be made compatible enough with the surrounding properties for the Board to approve this.

Ms. Rousseau stated that she would vote against the motion. This was an 1830’s home and these were national treasures which needed to be preserved. That was why the Historic District Commission was in existence in this town and she did not believe this Board should be deciding this as it was not their expertise ordinarily. Chairman LeBlanc interjected that it was their expertise when they took on a case from the HDC. Ms. Rousseau continued that the HDC was probably in a better position to take a look at maybe the applicant reapplied and gave them fencing options that were historically more period that they could approve rather than this Board piecemealing this. She was in favor of not approving this motion and kicking it back to the HDC for a new application to keep these neighborhoods historically appropriate with fencing. She stated this was a very important case.



The motion to grant the Certificate of Appropriateness (Approval) for the fence and railing, with the stipulations that the two sections nearest the street be removed and replaced with a fence that was cut down to a height from the ground of 36” plus or minus 4” with a fence cap profile on the cut ends of the fence, was passed by a vote of 4 to 2, with Mr. Durbin and Ms. Rousseau voting against the motion.

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**V. ADJOURNMENT**

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 10:15 p.m.

Respectfully submitted by,

Mary E. Koepenick  
Administrative Clerk