

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

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

July 20, 2010

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

EXCUSED: Alternate: Robin Rousseau

ALSO PRESENT: Principal Planner, Lee Jay Feldman

I. APPROVAL OF MINUTES

A) Board of Adjustment Meeting April 20, 2010

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

B) Board of Adjustment Meeting April 27, 2010 not available for vote.

It was moved, seconded and passed by unanimous voice vote to postpone review of these Minutes until July 27, 2010.

II. OLD BUSINESS

5) Case #6 -5

Petitioners: Houston Holdings, LLC, Daniel Houston, President

Property: 653 Islington Street Assessor Plan 164, Lot 5

Zoning district: Business

Request: Variance: 10.440 Table of Uses 10.18.24 to allow two (2) temporary structures to remain on the premises for not more than 180 days, which is not allowed by Ordinance.

Variance: 10.531 Table of Dimensional Standards, to allow a 4' right side setback where 15' is required

Variance: 10.531 Table of Dimensional Standards, to allow a 4' left side

setback where 15' is required

6) Case #6 -6

Petitioners: Houston Holdings, LLC, Daniel Houston, President

Property: 653 Islington Street Assessor Plan 164, Lot 5

Zoning district: Business

Request: Variance: 10.321 to allow the expansion of a nonconforming structure.

Variance: 10.531 Table of Dimensional Standards, to allow a 25' x 20' addition with a 4' right side setback where 15' is required

Variance: 10.531 Table of Dimensional Standards, to allow a 4' left side setback for the addition where 15' is required

These petitions were postponed from June 15 meeting. Motion was made, seconded and passed by unanimous voice vote to bring them again before the Board. It was requested that Case # 6-6 be discussed in conjunction with the above. Chairman LeBlanc indicated the Board would hear arguments for both cases at the same time, but would vote on them separately.

SPEAKING IN FAVOR OF THE PETITION

Attorney Jack McGee stated he was appearing on behalf of Houston Holdings, LLC, and was there along with the applicants. The lot in question was a tight lot at the intersection of Islington and Bartlett. This has been a subject of a great deal of activity this year because of the City's sewer project. During that project, it had been pointed out to Mr. Houston that the storage trailers that he had been using were not appropriate for the Ordinance and it was suggested that he take remedial action. After discussions with Planning officials, Mr. Houston was attempting to enclose the trailers within a single structure which would be permanent and, within that, would be the removable storage trailers. Attorney McGee furnished a portion of the plan as well as schematics for the proposed building for the Board, stating that the lot was very odd-shaped and tight. The building as it existed was already up against the boundary line on Islington and the old West End Café. Mr. Houston has discussed this with the owners of West End Café property and he advised they do not have any objections, nor had they heard any objections from Gilford Transportation which was the side abutter.

Attorney McGee reiterated that the plan was to legitimize this storage area under the zoning Ordinance by encapsulating the storage trailers into a permanent structure. The setbacks in the area were 15 feet and the structure would be on the property to the back with a side setback of 4'. This area would be up against the drive way of the West end Café property and the 4 feet on the back/side area up against the Gilford Transportation property. They were asking that the storage trailers be allowed to remain there for 180 days which would give Mr. Houston a chance to build this permanent structure, hopefully obtaining a variance from this Board. Approval would also be required from the Historic District Commission and possibly Site Review. These variances would allow a business, which has served the community for quite a while to stay in existence. It needed storage and the trailers have provided that storage and there was no other location to put a storage area in this building. While the trailers had been there for some time, the applicant was unaware that they were contrary to the zoning Ordinance. They hadn't posed a problem to anyone at this point and it was not conceivable that, encased, they would pose a problem in the future.

Addressing the special conditions requirement under the Boccia criteria, Attorney McGee stated that the shape and size of this lot was unique for that particular area of town. It was a lot which had been seriously affected by the City's sewer project, which made it difficult to do anything with the lot due to the easements that the City had taken by eminent domain. He stated that there was no other way to do this. He and the applicant had met with the Planning Department to explore various ideas and this proposal was something that appeared feasible. Hopefully, the Board would view it that way and grant approval. Attorney McGee that granting the variances would be consistent with the spirit of the Ordinance in that nobody wants to see a business shut down for this type of lack of storage. A long-standing business, it served a good number of members of the community and hopefully would be allowed to stay there and operate as it had for a number of years. Substantial justice would be served by allowing the business to be maintained there. Attorney McGee felt the real criteria was whether anyone was going to be hurt by this. As an indication that it was not going to hurt surrounding properties, he noted that the most affected abutters were not there. He stated that the building would look better in appearance, which would be good for the area. It would solve the applicant's problem while being consistent with what the City was attempting to accomplish. For all those reasons, they asked that the Board grant both variances.

Mr. Grasso asked about cars he had observed parked along where the proposed addition was behind the building. The applicant, Mr. Houston, indicated that when the City took the front of their parking lot by eminent domain there was no access to the parking lot. The West End Café had given him temporary right to use their driveway so that the City vehicles could park there during the sewer project. When that project was completed, there would be no vehicles there.

In response to further questions from Chairman LeBlanc, Mr. LeMay and Mr. Jousse, Mr. Houston indicated that the trailers would be where they were during construction. They had been moved for the sewer project but would be moved back after construction. The plans showed the old location of the trailers. The spaces on the plan marked 14 through 16 were parking spaces. He confirmed they had looked into going up for storage rather than out of the building but either way a variance would be needed and this was preferred as it would be more difficult to get to the storage trailers if they were up.

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

For Case # 6-5: Mr. Parrott made a motion to grant the petition as presented and advertised which was seconded by Ms. Eaton.

Mr. Parrott stated that this petition seemed simple and straightforward. The petition asking for a 180-day extension to remain where they were currently was temporary in nature. He stated that there was no serious public interest involved as the trailers had been there for some time without causing any trouble to the public. The spirit of the Ordinance would be observed as this would aid the business to transition in a new expansion and allow a place for temporary storage. Substantial justice would be done and there were no overriding private or public interests that

would be harmed by granting these variances. The value of the surrounding properties would not be diminished or there would be no negative impact on the surrounding properties. The hardship was that the City through their work on the sewer had impacted this lot adversely and in a manner that was out of the control of the owner. The trailers were there because they were needed for storage. Ms. Eaton agreed and had nothing to add.

Mr. Grasso asked the maker and second to add a stipulation that the trailers would be 8' x 20' instead of "two (2) temporary structures" as previously read. Mr. Parrott and Ms. Eaton agreed.

The motion to grant the petition as presented and advertised, with the stipulation that the size of the two temporary structures would be 8' x 20', was passed by a unanimous vote of 7-0.

For Case # 6-6: Mr. Parrott made a motion to grant the petition as presented and advertised which was seconded by Mr. Witham.

Mr. Parrott indicated that the reason for proposing such a small setback in the back was that it went up against an embankment to the railroad track. That land had no productive use and had no impact on neighbors. In the same manner the right side setback was adjacent to a neighboring business' parking lot and also had no impact. Addressing the criteria, similar to the previous discussion on the storage containers, he saw no negative impact on the public interest. In fact, most of the public would not see this addition. The spirit of the Ordinance would be observed as a variance was needed to allow the business to operate. He felt that, in the substantial justice test, the balance tipped to the applicant as there is no public or private interest that would be adversely affected. The value of surrounding properties would not be diminished. The structure would be out of sight, would be more attractive than the current trailers, and would be appropriate to the rest of the building. He stated that literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship. In this case there would be no alternative for this lot. It had been impacted by City work, was an odd-shaped lot and backed up against railroad tracks.

Mr. Witham added that he did not see any way that this variance would have any adverse impact on the two abutters. Further confirming this was the fact that the abutter's property had 24 more feet toward the railroad tracks and a structure could be built nine feet closer than what was being proposed and still be in conformance. He noted that the height of the tracks would be the same height as the roof of this structure so there was no impact on light and air. It was a good solution to a unique problem.

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

III. PUBLIC HEARINGS

- 1) Case # 7-1
Petitioners: Kara L. Hutchins
Property: 40 Mill Pond Way Assessor Plan 143, Lot 6
Zoning district: General Residence A
Requests: Variance from Section 10.321 to allow the expansion of a nonconforming structure
 Variance from Section 10.521 to construct a front porch with a 10' setback

from the front lot line where a 15' front yard is required

Mr. Jousse stepped down and Mr. Durbin sat in on this case.

SPEAKING IN FAVOR OF THE PETITION

Ms. Kara L. Hutchins stated she lived at 40 Mill Pond Way and was there to ask permission to add a porch to the front of her house. Part of the challenge of the house was its location as the street cut diagonally across her property. One corner had a 25-foot setback and the other corner had a 15-foot setback. The porch she wanted to add was in part of the 15-foot setback. This was the next step in renovations to improve the value of her home. She had spoken to her neighbors and she provided to the Board a petition signed by the neighbors saying they did not object to this addition. Ms. Hutchins also indicated that she felt the addition of a porch would not be contrary to the public interest as it would be similar to other homes in the vicinity.

In response to a question from Ms. Eaton as to why she needed the porch to go into that setback area, Ms. Hutchins indicated she was planning a traditional farmer's porch across the whole front of her house and to have the porch stay within the setback, she would have to start the porch half-way in on her house. This would make it start right in front of her front door, which was in the middle of the house.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Grasso stated that about one-third of the house was in the setback area. The applicant wanted a full porch and he didn't feel it made sense to start the porch in front of her front door. There were unique conditions on the property and the house was not parallel to the street. This would not be contrary to public interest as how the porch was set should not affect and the street was not well-traveled. The spirit of the Ordinance would be observed as there was just one end of the porch that fell within the setback. Mr. Grasso stated that, in the justice test, there would be no benefit to the public in denying the variance. The values of surrounding property would not be diminished. Literal enforcement of the provisions of the Ordinance would result in unnecessary hardship as it would not be an attractive design to start the porch in the middle of the door or a window.

Mr. Durbin agreed, adding that where the home was placed on the lot was probably the only place on the lot to build. The property was unique in relation to how the road ran along the lot. It was different from the other homes in vicinity and created a special condition on the property that did, along with the other criteria, justify a variance.

Mr. Witham noted that the area that the public actually used, the road, was an additional 10 feet away from the property line and this was one of those situations where the property owner maintained the property all the way up to the pavement. At the edge of the public right of way the porch was in conformance and an open structure would have no impact on light and air.

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

Mr. Jousse resumed his seat and Mr. Durbin resumed his status as an alternate.

2) Case # 7-2

Petitioner: Kayla Realty, LLC, owner, and Heather Lessard, applicant, dba Tulips

Property: 60-62 Market Street Assessor Plan 117, Lot 34

Zoning district: Central Business B

Request: Variance from Section 10.1253.50 to allow a projecting sign to project 42” from the building where 36” (one-third of the sidewalk width) is the maximum allowed

SPEAKING IN FAVOR OF THE PETITION

Ms. Heather Lessard stated the sign in question was painted by her mother, built by her father and had been hanging in Portsmouth for 30 years. The business had to move because their lease was lost on Bow Street and they were not allowed to grandfather the sign. The applicant felt it was her heritage as the sign had been there for such a long time and been a part of the city that they support.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Witham recalled that when he received the packet and began to read this petition he wondered why these people couldn't just build the sign at 36 inches and felt that the only way he could support it was if the sign were a preexisting sign from another location, which turned out to be the case. He didn't feel the variance would be contrary to the public interest in any way and the spirit of the Ordinance would be still be observed by the granting of this variance. He indicated substantial justice would be done because he felt the harm to the applicant if the petition were denied would not be outweighed by any benefit to the general public. There was no reason to believe that the value of surrounding property would be diminished in any way. Considering the literal enforcement of the provisions of the Ordinance resulting in unnecessary hardship, he gave weight to the fact that this was a sign that was part of a business that was

relocating, a sign that it has been successfully hung in this city for 30 years without any problems and felt it could be done again. Again, if this were a brand new sign, he would probably look at it differently but, in this case, he was willing to give the 6 inches over the sidewalk.

Ms. Eaton indicated she had the same initial reaction that it would not be something that would be supportable, but finding out it was the original Tulips sign that was just moving across the street, she thought it could also be said the essential character of the neighborhood would be altered by removing it.

The motion to grant the petition as presented and advertised was passed 6-1, with chairman LeBlanc voting against the motion.

3) Case # 7-3

Petitioner: 150 Greenleaf Avenue Realty Trust, James G. Boyle Trustee

Property: 150 Greenleaf Avenue Assessor Plan 243, Lot 67

Zoning district: Gateway

Request: Appeal under RSA 676:5(III) of the determination by the Planning Board that the Zoning Ordinance adopted by the City Council on December 21, 2009, and effective January 1, 2010, is applicable to a site plan review application submitted on October 23, 2009

Mr. Jousse stepped down for this petition and Mr. Durbin assumed a voting seat.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard Pelech stated he was appearing on behalf of the applicant 150 Greenleaf Avenue Realty Trust, James G. Boyle Trustee. Mr. Boyle was present with additional counsel, Attorney John Kuzinevich. Mr. Boyle is the owner of 150 Greenleaf Avenue Realty Trust which is the site of Portsmouth Toyota. Citing RSA 676.5, Attorney Pelech stated they were present to appeal the decision of the Planning Board in their determination as to which zoning Ordinance applied to a site plan filed by Mr. Boyle. Under the statute, if the Planning Board made a determination as to the application or interpretation of a zoning Ordinance, remedies must be exhausted before an appeal could be taken to the Superior Court, which placed the burden on the Board of Adjustment to hear that appeal.

Attorney Pelech stated that discussions were had with the City of Portsmouth in the summer of 2009 regarding filing a new site plan. At the time, the City was also in discussion regarding revising the zoning Ordinance. Mr. Boyle's site plan was filed and stamped by the City on October 23, 2009. On November 20, 2009, the clerk in the Planning Department posted notice of their site review application before the Technical Advisory Committee and also sent out notices via certified mail to abutters. On the same day, the City Clerk's office posted a notice of a public hearing of the City Council on zoning amendments. No one knew which was posted first on that day. Attorney Pelech stated that City Attorney Robert Sullivan had indicated in a November 20, 2009 memorandum that on that day the City Council posted a notice on the second reading of the revised zoning Ordinance and therefore, he determined that once the notice of the public hearing had been posted, and before the effective date of the revised Ordinance, one must comply with

the new Ordinance. Attorney Sullivan further stated that the requirement to compliance with the proposed revised Ordinance didn't apply to "...a structure shown on a plan or application for which notice of a public hearing by the Planning Board, such as for site plan approval, was posted prior to November 20." Attorney Pelech stated that the problem was that the City's posting of the proposed public hearing on the revised Ordinance was not sufficient under the City Charter nor was it sufficient under the state statute. NH RSA 675:7 required "notice of each public hearing should be published in a paper of general circulation in a municipality and should be posted in at least two public places." He maintained that the fact that the notice of public hearing was posted on November 20, 2009 was of no consequence because it was not published in the Portsmouth Herald until November 23, 2009. The City Charter, in Section 4.5, also explicitly required publication of the proposed Ordinance in a local newspaper and that did not occur until November 23, 2009.

Attorney Pelech stated that, when the petitioners went before the Planning Board in May, 2010, the Planning Department submitted a memo which dealt with the applicable zoning Ordinance and site plan review regulations. It stated that it was the opinion of both the Planning and Legal Departments that the current zoning Ordinance and site plan review regulations applied to this development proposal. He maintained that this was directly contrary to what Attorney Sullivan, in his memo, stated on November 20, 2009. Attorney Pelech stated that there should be no arguments made that evening regarding the criteria as this was not a legal argument but a fact argument. He reiterated what he and the applicant maintain were the posting dates for the site review application and the legal notice of the public hearing on the revised zoning Ordinance. Attorney Pelech noted that there was also a case pending in the Superior Court regarding the filing.

Mr. Witham commented that the situation was the race to who could get posted first. Attorney Pelech agreed and stated it was beyond the petitioner's control as there were two separate city employees doing the postings and probably neither one looked to see what else had been posted that day. Mr. Witham noted that the City council had first, second and third readings and he could not find anywhere in the NH zoning regulations where it said a petition had to come before a given reading. He asked when the first reading had been posted and Attorney Pelech advised that, unlike the second reading, the first reading of a proposed zoning Ordinance did not require posting of a notice of a public hearing to the public. He had no knowledge of a posted first reading.

Chairman LeBlanc cited a section of the statutes which indicated that once a plan had been accepted by the Planning Board and there was a structure on it, then that became in essence grandfathered. Attorney Pelech confirmed that was correct. Chairman LeBlanc asked if there was a structure proposed on the plans submitted in November. Attorney Pelech corrected that they were submitted in October, and there was a structure.

Attorney John Kuzinevich introduced himself as also representing Mr. Boyle. He stated that plain language of Section 4.5 of the City Charter said, "Notwithstanding any other provisions of law, publication for the purposes of this section shall mean publication of the notice in any daily newspaper in the City of Portsmouth." This whole section outlined how the City was to adopt and amend Ordinances. He felt that, by the terms of the express and unambiguous language of the City Charter, there was no notice of the second reading, the operative reading, until three days after notice of the TAC review. Attorney Kuzinevich stated his reasons for also believing that the

entire 2010 revision of the zoning Ordinance was not adopted validly and was subject to challenge by anyone coming before this Board. Citing RSA 676:12 and a court case regarding interpretation of the zoning statutes and grandfathering, he stated that the legislative history revealed that the statute was intended to prevent municipalities from retroactively amending local land use regulations for the purpose of stopping proposed projects or developments while an application was under consideration. He stated that the petitioner did not control the timing of any of this, other than submitting their site plan application a month before any of the notice issues came to pass. It was something discussed with the City all summer as a form of resolving some of the other outstanding issues. He stated that in a pending lawsuit, they had asked the Court to consider which zoning Ordinance applied as the question of law. While the judge could have decided it, she said perhaps the City was not going to apply the new Ordinance and perhaps would apply the old one. Attorney Kuzinevich felt the Court was giving the City the opportunity to do follow the plain language of the law so that there was not yet another continuing controversy. He maintained that application of the old zoning Ordinance would save the City significant money and narrow the issues in dispute.

Mr. LeMay asked if he was clear on the allegation that this zoning Ordinance that was adopted on January 1, 2010 was not legal and anyone could appeal it. Attorney Kuzinevich confirmed the allegation. When Mr. LeMay asked if it was because of the posting, he stated, “no.” It was due to the failure to follow the City Charter by making copies available free of charge to anyone who wanted them. The Courts strictly construe the process by which you adopt and Attorney Kuzinevich felt the process was not followed. There was a brief discussin about how copies of, or information about, the proposed new Ordinance had been, or should have been, provided.

Mr. LeMay asked if it were Attorney Kuzinevich’s position that the Technical Advisory Committee was one and the same with the Planning Board? Attorney Kuzinevich replied that the statute RSA 676:12 extended the grandfathering to when notices were given for a design review committee, which was not defined but it was clear to him that the entire purpose of the Technical Advisory Committee was to review the design and provide. He felt that TAC clearly qualified under the grandfathering provisions, which made sense because by the time you got to public notice of a TAC hearing, you’ve invested a lot in the plan so that it should not be changed willy-nilly. In the instance of this petition, Attorney Kuzinevich stated that the biggest thing was changing the use buffer for residential zones so that automotive uses were not allowed within 200 feet of a residential zone. The prior version of the zoning Ordinance only prohibited certain types of parking or storage or display, not all uses, so that the applicant could label his building as a chain pharmacy, a non-automotive use, and physically build the exact same building that he was proposing with the same external impact on the neighborhood.

Mr. Parrott asked if it was their position that they were unaware of what the City was doing and were surprised by these changes, or were they informed along the way and treated in a respectful and proper manner by the Planning Dept. In other words, did they feel they were “tricked” into not knowing what was going on? Attorney Kuzinevich indicated that they were tricked in that the rug was pulled out from under them, but they weren’t tricked at the beginning of the process. They kept watching for when the Planning Board made its recommendations for the Ordinance changes and then passed it on to the City Council. So it is relatively easy to predict when an Ordinance was ready for the public hearing and adoption. Mr. Boyle actually paid the engineers overtime to rush during the summer to get the project in and filed before they went to second reading. Mr. Parrott asked if Attorney Kuzinevich would agree that the applicant was well

represented by a very experienced, very knowledgeable land-use counsel who did business in the City on a regular basis and Attorney Kuzinevich answered “yes.”

Mr. Parrott read from a paper prepared by outside counsel, “in order to be exempt from the changes in the zoning Ordinance in the site review process, an applicant needs to have an approved site plan by the Planning Board after a public hearing prior to the adoption of the new zoning Ordinance pursuant to RSA 674:13. In this case, plaintiff did not have an approved site plan by the Planning Board before January 1, 2010, when the zoning Ordinance became effective. Plaintiff’s pending site plan application has not been reviewed by the TAC or the Planning Board due to postponements requested by the applicant. The application has never been accepted, reviewed or denied by the Planning Board at a public hearing. Therefore, how could it have been deemed, vested or approved if it didn’t exist?” Mr. Parrott stated that his understanding was that it didn’t exist until it had been approved and asked for Attorney Kuzinevich’s reaction, which was to cite RSA676:12. Mr. Parrott indicated that every lawyer has their favorite laws and he would like for him to respond to this particular one.

Attorney Kuzinevich stated that he thought outside counsel, Attorney Bower, was wrong on the basis that other sections of the statute expressly allowed it. He stated that Attorney Sullivan had informed the world that it was a matter of posting and, Attorney Kuzinevich stated, there was a municipal estoppel argument there. Attorney Bower did not address the failure to comply with the City Charter when adopting it and whether the zoning Ordinance at all was effective. Mr. Parrott asked if this is confusing a site plan with a building permit. Attorney Pelech responded that they were not confusing it. They were going by Attorney Sullivan’s memo. Regarding Attorney Bower, he was outside counsel and was totally unfamiliar with the procedures of the Portsmouth Planning Board. Mr. Parrott would know as a former Chairman that the Portsmouth Planning Board did not follow the state statute and it never voted to accept a plan which started a 60-day clock running. When Mr. Parrott indicated he did not know that, Attorney Pelech countered that he should. Attorney Pelech indicated that he had appeared before the Portsmouth Planning Board for 30 years and that procedure was never followed as it was done in most other towns. What happened in Portsmouth was you filed a site review application and it went to the Technical Advisory Committee. With a recommendation from that committee, you were automatically put on the Planning Board agenda. They do not vote to accept or not accept the plan as being complete because TAC has already done that. The Planning Board holds a hearing on the merits and you can walk away in one night with your site review approval. In most other towns, it takes at least two meetings. Attorney Pelech stated that he didn’t think Attorney Bower knew that. He also stated that, regarding the timeline, he had been in the hospital and not involved in the application but the applicant was represented by competent counsel. Mr. Parrott noted that the City’s business with regard to the Ordinance was in full view of the public with information on the website and in newspaper articles. The applicant was doing its private business thing, as it should, but the City had no influence whatsoever over the speed with which those plans were developed. To turn around and say that the City was somehow wrong because it proceeded in an orderly fashion and the dates fell as they did, he found a hard argument to buy. Attorney Pelech stated they were not saying the City was wrong. They were saying that they didn’t follow the law, the City Attorney’s memo, or the City Charter.

Mr. Parrott asked if the website and the posting at the library was all irrelevant and Attorney Kuzinevich replied that was correct. He wanted to clarify something, which was that the City was participating with them in developing their plans for the second building. Mr. Boyle and he

hand-sketched them out with Attorney Sullivan over the summer. He stated that Attorney Sullivan was well aware and they talked about getting something filed immediately for consideration and all of this is in the context of trying to settle a pending sewer line case. He maintained that, just as much as they knew the Ordinance was being amended, the City at every step of the way knew what they were doing. Mr. Parrott stated that reinforced his earlier point that the Planning Department was entirely supportive as, to his knowledge, it was with all applicants.

Mr. Witham stated that it seemed to him that the attorneys and Mr. Boyle were well aware within hours of when they needed to submit this application to fall under the previous zoning, by following when the reading was going to happen. Attorney Kuzinevich disagreed that it was within hours, because they submitted in October. Mr. Witham stated that what he was saying was that the petitioner was following this very closely and had the ability to gauge when the second reading was going to happen. Attorney Kuzinevich replied that yes, they projected it out. They knew and they beat it. They accomplished their goal. They got it submitted. Mr. Witham stated that when Mr. Kuzinevich said he accomplished his goal, to him it got to where it was, “We have to get it in now, pencils down, wherever we are, submit it.” Attorney Kuzinevich stated that they followed the regulations in terms of what had to be submitted. Mr. Witham added that it had been stated that Mr. Boyle paid overtime to get these in and get it done. But then if you look at the minutes from some of the TAC meetings where some of the information was missing and incomplete, it was a very long list. Mr. Witham understood that some of those were things that got worked out in the process. But a storm water drainage study was something that was part of a complete application, not something you worked out along the way. Attorney Pelech had talked about the two-step process most towns have with a complete application and the next time they voted on it. As Mr. Witham saw things, this application would have never been deemed complete even with a two-step process because there were some major elements that weren’t part of the application. When the TAC meeting minutes were looked at with the pieces of information that were not submitted with the application and the petitioner kept asking for postponements to put together more information to make it more complete, Mr. Witham felt that the petitioner got to the point of “OK pencils down, submit.” It was submitted incomplete, knowing it was incomplete, in order to stay with the previous zoning Ordinance.

Attorney Kuzinevich stated that Mr. Witham’s statements were incorrect as to completeness and he used drainage calculations as an example. They were still under the old site review regulations and procedures, which did not call for submission of drainage calculations. The regulations said that TAC may require drainage calculations. Therefore a plan without drainage calculations was fully complete in terms of what had to be submitted for a plan. He felt that the City wasn’t following the rules when it said you have to have drainage calculations for a complete application as that was not what the regulations said. It was understood that TAC would then after the fact say they needed certain other information. Attorney Kuzinevich stated that it wasn’t “put down the pencils.” It was when the engineer took the site review regulation and went to where it said what applications should contain. They checked off everything in the regulations and, due to time pressures, they did not put in optional stuff. He referred to a 6-page letter from the Planning Director indicating that there were several things missing. He stated that most of these were under the 2010 amended Site Review Regulations that required things that were never required under the regulations that existed at the time they submitted. He alleged that the City was “seesawing” them between one regulation that they submitted under and then the change of regulations, which was exactly why it was important to say that things were frozen at a point in

time. He stated they were not asking for an unreviewed project or to do anything that was harmful to the City. They were trying to follow the rules and put a second building on the site.

When Mr. Witham asked if during the review process the petitioners were trying to provide 2010 requirements for the 2009 application. Attorney Kuzinevich stated that the whole process disintegrated when an agreement couldn't be had on what version of the zoning applied, because they were talking building what would constitute a second automobile dealership. If that building couldn't go on, it was going to affect how much parking you needed and the drainage calculations. It was radically different if there are two buildings or only one building and a slight expansion. They really were postponing on most of the technical grounds to try and get to the point of determining which Ordinance applied. He stated that it didn't make sense for them to draw up a 2009 plan for a 2010 review or the City to engage in 2009 review when it really meant 2010. That was why they were in front of this Board on the narrow issue of which statute applied. The Planning Board had granted his request to say that what they were doing was a question of law. They decided the question of the 2009 Ordinance, but they basically tabled the rest of the plan review, so that it was currently an open plan. If the 2010 Ordinance applied, they had to go make drastic revisions to it. If 2009 applied, then they went into the normal refinement and the give and take that typically occurs at TAC. Mr. Witham, asked regarding all the minutes from TAC showing the incompleteness of the application based on the 2010 requirements, if they had said at that point, "Time out, we're not playing right now. We have to go see the judge and see what rules we're playing under," but the TAC kept going and produced all these minutes about all the things you were missing?" Attorney Kuzinevich answered yes.

Chairman LeBlanc asked if 675:7 was the statute that sets up the criteria for grandfathering an application. Attorney Kuzinevich confirmed it was. Chairman LeBlanc asked what was the trigger that brought that into action? Was it the mere submittal of the plan to the Planning Board or did the Planning Board have to actually act on the plan that the applicant has given? Attorney Kuzinevich stated that, because the whole notion of acceptance had already been addressed and as he didn't have a copy of the statute in front of him, he was hesitant to answer that question directly. Chairman LeBlanc felt that it was absolutely crucial because the only thing able to be dealt with now was whether or not the Planning Board applied the correct Ordinance to the case. If the petitioner couldn't say that this submittal was what triggered the grandfathering under the pre-2010 zoning Ordinance, then the Planning Board was correct in going with the 2010. Attorney Kuzinevich stated that section of the Ordinance applies to towns and has not been adopted by the City. There was a question of whether that was the trigger or not or that it even applied. They believe the triggering statute was 676:12:6 and also the analysis in the memo from the City Attorney that said the triggering event was notice of the public hearing. Chairman LeBlanc asked then if an application that was submitted before the legal notice of the change of the Ordinance meant that the application submitted prior to that date had to go under the old Ordinance? Attorney Kuzinevich answered, "no." The triggering event was the notice of TAC for the application. It was not the submittal of the application but the notice of the TAC meeting.

Mr. LeMay stated that this was strictly notice by the Planning Board, and not an advisory board that triggered this. Was there any posted meeting by the Planning Board for a hearing for the petitioner? Attorney Kuzinevich stated that, under 676:12, it was the Planning Board or design review committee. Mr. LeMay stated he did not see that in this Ordinance. It didn't say reviewed by anybody except the Planning Board and he thought agreement could be had that TAC and Planning Board were two differently constituted boards, even though he agreed that they both

review the material. Attorney Kuzinevich cited the sentence “the provisions of this paragraph shall also apply to proposals submitted to a Planning Board for design review pursuant to 676:4 provided that formal application filed with the Planning Board within 12 months of the design review process.” He concluded that the statute did tie into design review and that was the sole function of TAC. They don’t submit a separate application for TAC to review a plan. They submit the application for site review, which in Portsmouth’s process was review by TAC and then to the Planning Board.

Mr. LeMay quoted from the legal memo on file, “...On November 20, 2009, a letter was sent to all applicants, including plaintiff, advising them of the likely effective date and application of the new zoning Ordinance.” In that letter it was noted, “It is the approval and recording of the plan, not the mere submission of the plan, to the Planning Board which provides the exemption from regulatory changes.” He stated that was from the affidavit of Mr. Taintor. None of them were under oath tonight, but Mr. Taintor was when he signed it. Mr. LeMay asked if Mr. Taintor, as head of the Planning Dept. was not the expert in that area with respect to the timing and submission of the plan and what constituted a exemption from an Ordinance change. Attorney Kuzinevich replied that he was not in a position to evaluate his expertise. When Mr. LeMay asked if by position. Attorney Kuzinevich replied, “no”, a title didn’t mean somebody had expertise. He cited past cases where, he believed, the Court had found the City’s experts to be wrong. He stated that the Planning Director was contradicting Attorney Sullivan’s memo regarding notice. He stated that the mere submission of a plan accepted by the clerk was acceptance of a plan for review, under the Portsmouth process. He felt that a plan was accepted by the Planning Board, maybe not approved, but accepted upon the date of filing. They agreed with Attorney Sullivan who apparently disagreed with Mr. Taintor about the notice being the triggering the triggering event. Mr. LeMay stated if that were the case, nothing would ever get done because many of these, especially larger projects go through numerous revisions. The Board has sat and been confused with an applicant who was either not straight in his own mind or trying to see what would stick if they threw it. Which of these was the official plan? Anybody who’s been involved in the design process understood that there could be draft upon draft and at some point you have to say “OK. This is the one we’re going with.” Attorney Kuzinevich maintained that the official plan didn’t matter. What mattered was the plan that was submitted for determining which Ordinance applied. There may be revisions but those revisions got measured in the light of whether the 2009 or 2010 Ordinance was applicable. Mr. LeMay asked if Attorney Kuzinevich would say that once a plan was recorded then it achieves a certain status and it has a legal standing? Attorney Kuzinevich answered he didn’t think Portsmouth recorded its approved site plans, so he thought that was an irrelevant question. When Mr. LeMay stated it was a general question. Attorney Kuzinevich stated he hated to answer general questions because he has tried to be prepared on the law for Portsmouth and he wasn’t a general New Hampshire attorney. Mr. LeMay then asked, even though earlier Attorney Kuzinevich stated he was an expert, he didn’t know what recording a plan at Rockingham Courthouse meant? Attorney Kuzinevich answered he knew what recording meant and he also knew that Portsmouth didn’t record plans at Rockingham. Mr. LeMay stated that he personally has recorded plans at Rockingham. Attorney Kuzinevich replied that Mr. LeMay may have voluntarily, but there is no requirement for it.

Mr. Boyle then introduced himself to the Board. He stated he rushed his team to get stuff done because he had a handshake deal with the City Manager to make this stuff go away. He felt the City Manager was aware of mistakes made in the past. He stated that he had made the plans in

question in a hurry to accommodate the City and felt the City had backed out. As the Board was probably aware, a judge in Rockingham would determine what happened. Mr. Boyle outlined his pride in his past accomplishments and the sacrifices made by employees and countless friends who had helped produce them over the past six years. He felt that in Portsmouth well-grounded development was out of style and some people thought growth and development weren't good. Mr. Boyle outlined his vision for his business, which he felt stood as a "beacon of the American dream," and for the City of Portsmouth. He maintained that this roadblock that had brought them to this Board was wrong and unnecessary. He detailed how he felt his business had created jobs, helped the environment and increased the tax base while providing opportunity. He asked the Board to not blindly follow the advice of the Legal and Planning Departments as, he maintained, they had been wrong every time regarding this project. He asked that the Board do the right thing and go forward and keep building Portsmouth as a great city.

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

Chairman LeBlanc addressed the Board and stated there was a question before them. Did the Planning Board make an error when they decided that the 2010 Ordinance was applicable to this project or not?

Mr. LeMay made a motion to support the Planning Board in their recommendation that the 2010 zoning be applied to this property. Chairman LeBlanc then clarified that the motion was that 2010 was the governing statute in this case and asked for a second. Ms. Eaton seconded the motion.

Mr. LeMay stated he understood the arguments about the notice and the postings and so forth and essentially the postings were simultaneous as mentioned by the attorneys. He thought that all participants were probably operating in good faith and that the City was proceeding on its schedule and the applicant was proceeding on his schedule. He also thought there was a distinction between the Technical Advisory Committee and the Planning Board. He wasn't certain that there was a legal obligation of the Advisory Board to post notice. In other words, like the Historical District Commission who had work sessions, one got a notice from them that they are having a work session. There might be discussions but no decisions were made at that time. There was a period of time when an application was in flux and they were trying to get it worked out in a particular way that was acceptable to all parties as a complete application. He thought that was similar in a project of this complexity and probably should have been anticipated by the applicant, although he wasn't saying the applicant should be penalized. When an application was made, certainly that could be voted up or down. But as a practical matter you had a lot of time to work through the details to get to the point where you've got a complete application. With these large projects, there were multiple spins and multiple revisions of a plan as time goes on and it was probably reasonable to the Planning Board that this would only occur at a time down the road when the plan would be finalized. So he felt the right decision was made

Addressing her second, Ms. Eaton thought it was clear that the TAC review committee and the Planning Board were completely separate and had different intent. She viewed the TAC more as a preliminary check to make sure there was a complete application which she thought was very important. Anybody can throw an application up and try to start a clock ticking, and that was the whole basis of deeming an application complete or acknowledging that. In this case, she was clear this was not a complete application and there wasn't a building permit issued or applied for. With all the questions that were there, she thought the Planning Board's decision was valid and she supported it.

Mr. Witham stated he would not be supporting the motion. He couldn't separate the TAC and Planning Board entities in terms of triggering the starting point for all of this. As the petitioner stated, there's one application that you fill out and that's to get the process rolling to go before the Planning Board. He didn't think it was fair to say that because it hadn't gone to TAC yet or TAC hadn't deemed it complete then you weren't before the Planning Board. He thought the petitioner knew what they had to do to get this project to fall under the 2009 guidelines and he thought they did it. He stated that his questions had been answered in terms of the completeness of the application because what he had read was based on completeness in terms of the 2010 requirements. The petitioners know they were under a microscope and he doubted they would haphazardly submit something knowing that it would be shot down. They could split hairs but the bottom line was that the petitioners filled out an application for something to go before the Planning Board. The first notice was published on the 20th, the same day the second reading of the zoning changes was posted. Although it didn't make it to the paper until the 23rd, essentially they got posted on the same day. He didn't think you could say to them you didn't get it in on time. It was the same day and those other parts about building permit or not having Planning Board approval, he personally didn't see that as the triggering point of getting things done. So whether he liked the dealership or not, seeing it expand and the residents' outcry over the years, it was not a factor in this situation. It was merely did they get an application in on time for the 2009 zoning Ordinance and he felt they did.

Chairman LeBlanc agreed with Mr. Witham. He thought that the applicant did due diligence and got the plan in when it was supposed to be in. It was submitted in October and the staff had until the 20th of November to look this over and talk to the applicant and say well you're missing this, that or the other thing. It did or didn't happen, he didn't know, but there was a notice given that TAC was going to look at this and to his mind that implied that the application was complete and he will not support the motion.

Mr. Parrott stated that from everything he has read, he saw ample evidence that the application was not anywhere near complete and he saw no reason to believe that these Minutes and these affidavits they had all seen were in any way inaccurate. The Ordinance revision job was a long, complex, multi-faceted thing done in full view of the public with numerous public hearings, notice in the papers, televised workshops, etc. This applicant nor any other applicant could not conceivably claim that they didn't understand that it was getting near the end road and, if they had a project that they wished to do under the old Ordinance, they needed to speed it up and get it in. Any implication that maybe the City should have slowed up and stretched out its process so that some of these things could be completed and submitted, he thought was just unreasonable. It was unfortunate to come to this point, but he thought the Legal Dept. and the Planning Dept. both acted in good faith and certainly in a most public way. He thought at some point, you have to say this is the cut off. There was substantial knowledge by all parties involved and to say it wasn't in

the newspaper for three days, even though it was on TV and even though it was posted for the public to see and even though anybody could pick up the phone and call the Planning Dept., it was a very thin reed to lean on and say therefore everything was invalid because the local newspaper didn't have it published on a certain day. He thought the Planning Board and the Planning Dept. acted entirely in good faith. They worked with the applicant as demonstrated on numerous occasions. For all those reasons, he took the position that the Planning Board did not err and he would support them.

Mr. Witham stated he wasn't looking at making a rebuttal, but he had brought up a similar point and didn't think it was fair to say that the application was incomplete based on the Minutes, which is what he brought up, because the Minutes were based on the 2010 zoning Ordinance. He thought it was irrelevant to apply that criteria to an application that was assumed to be submitted under the 2009 Ordinance. He also felt that the idea that the applicant should have gotten it in sooner was irrelevant because they knew what was going on. The zoning change/revisions had been in the work for years and how do you arbitrarily pick when it's coming. He stated that bottom line was that it was spelled out clearly what the criteria was to get it in on time and if the criteria said notice in a newspaper, a judge was going to ask a simple question of yes or no. He didn't feel the petitioner dragged their feet or too long. He reiterated his feeling that they knew what they had to do and he felt they did it.

The motion to affirm that the Planning Board applied the proper zoning Ordinance that was effective January 1, 2010 to a site review application submitted on October 23, 2009 failed to pass by a vote of 3 to 4 with Chairman LeBlanc and Messrs Witham, Grasso and Durbin voting against the motion.

Chairman LeBlanc stated this was a positive motion that failed. Mr. Witham offered to make a new motion and Chairman LeBlanc didn't think one was needed because they were done. The pre-2010 Zoning Ordinance was what should apply. Mr. Witham mentioned that, since the petitioner had a request before the Board for an appeal, it seemed to him that it would need a positive motion in that an appeal had been granted.

Mr. Witham then made a motion to grant the appeal as presented, which was seconded by Mr. Durbin.

Mr. Witham requested to carry forward his previous comments. Mr. Durbin added that the Board needed to give a plain reading of the statutes that were particularly involved in this case and the City Ordinance and he thought they clearly read in favor of the applicants. For that reason he was in support of the motion on the table.

Chairman LeBlanc stated this was a motion to grant the appeal and, in effect, establish that the pre-2010 Ordinance applied in this particular case.

Mr. Parrott wanted to go back to when he was reading earlier from the Legal Dept. memo, prepared by outside counsel. He wanted it noted on the record that this outside opinion was endorsed by Suzanne Woodland, Assistant City Attorney who practiced in the City. He was relying on this legal memo prepared by Attorney Charles P. Bower and the law as it was cited, interpreted and explained in there as it was endorsed by one of the City's own assistant City Attorneys. So when an attorney for the plaintiff, who doesn't even practice in the City, says

that's all wrong, it presented him with a major problem. He stated that he believed that what Attorney Bower said was correct and it coincided with his reading of the law, but the important thing, again, was that the opinions in that were endorsed by Attorney Woodland on behalf of the City, so he thought it had a lot of validity and the applicant could not rebut the comments other than saying they were wrong. Mr. Parrott just wanted that on the record.

Mr. Witham had a final comment in that he was disappointed that the City wasn't able to have legal counsel there for the Board. He knew there was a 100-page packet that was supposed to be reviewed and understood by the members but a lot of it was in legal jargon. He could read the same sentence 10 times and still not know what it meant. It would have been advantageous to have some legal counsel there so that layman-type questions could be asked and get an answer that the Board could understand instead of having 100 pages of memo that was really hard to grasp at times. Mr. Parrott seconded that statement and several other members concurred.

Chairman LeBlanc stated this was a motion to grant the appeal of the determination of the Planning Board and, in effect, to establish the applicability of the pre-2010 Ordinance to a site review application for 150 Greenleaf Avenue which was submitted on October 23, 2009. The motion to grant the appeal was passed by a vote of 4 to 3, with Ms. Eaton and Messrs. Grasso and Parrott voting against the motion.

 Mr. Jousse resumed his seat. Mr. Parrott recused himself from the following hearing and Mr. Durbin retained a voting seat

4) Case # 7-4

Petitioners: 75 New Hampshire Avenue, LLC

Property: 75 New Hampshire Avenue Assessor Plan 306, Lot 4

Zoning district: Pease Industrial

Requests: Variance from Section 10.1243 to allow more than 1 freestanding sign per lot
 Variance from Section 10.1253.10 to allow a freestanding sign to be 12'6"
 from a lot line where 20' is the minimum setback allowed
 Variance from Section 306.01(d) of the Pease Development Authority Zoning Ordinance to allow 218.9 square feet of aggregate sign area where 200 square feet is the maximum sign area allowed

SPEAKING IN FAVOR OF THE PETITION

Mr. Tim Sullivan introduced himself as an employee of Barlo Signs and was representing Pixel Media and their location at 75 New Hampshire Avenue in the Pease Industrial Trade Port. He stated that they were seeking 3 variances for this location. The first was Section 10.1243 to allow more than 1 freestanding sign per lot. This property was just under 14 acres with numerous buildings, numerous tenants, and numerous entrances. It was important that each tenant had an identification to the driveway or to the entrance on their part of the property to avoid confusion as one drove around the 14 acre-area. Their intention was to identify the entrance into the Pixel Media part of the property to provide motorists with an easy egress into the facility. With respect to Section 10.1253.10, the setback of 20 feet really could not be maintained where this entrance was. The setback would actually put the sign into the parking spaces. With respect to where it was actually located, they were 12.5' from the property line, but from the sidewalk itself it was

12.5' so they were actually 24' off the sidewalk. Finally, the sign they were proposing would bump them up over the existing 200-square foot aggregate to 218. The proposed sign was 27 s.f. so it wasn't terribly large and was in keeping with the size of the other signs in that area and within the park itself. Their proposals had been approved by the Pease Development Authority, but they needed to come before the Board because they are within the City of Portsmouth.

**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 recommendation to recommend to the Pease Development Authority that the petition be granted as presented and advertised. Mr. Witham seconded the motion.

Mr. Grasso agreed with the applicant that a business needed to be recognized and have its location known. The previous signage on the property took them close to the allowed 200 square feet. The sign was close to 25 s.f., bringing them to 218.9 s.f. Addressing the criteria, he stated that the variance would not be contrary to the public interest. The public interest in this would be in knowing where this business was located. The spirit of the Ordinance was observed as the sign was being located within the setback due to parking and sidewalk constraints in the area. Substantial justice would be done as there was no great benefit to the general public in denying the petition. The values of surrounding property would not be diminished. With regard to unnecessary hardship, Mr. Grasso thought the proposed location was the right place for the sign and, given the layout of the current parking lot and the existing signs on the property, this was the way to go.

Mr. Witham stated there were three variances here. He thought it was very reasonable for a property of 14 acres with numerous entrances and buildings, to have more than one freestanding sign to help people identify it, especially on a corner lot. If you were coming down one street and the sign was on the other street, it made it difficult to find. So for traffic and safety reasons, he felt it was appropriate. With regard to the 20-foot setback along the lot line, the reality was that it was 25' from the sidewalk, so he felt the spirit and intent of the Ordinance was observed. Concerning the square footage of the aggregate sign, he thought on a property of 14 acres with numerous buildings to ask for less than 10% relief for square footage was also reasonable.

The motion to recommend approval of the petition as presented and advertised to the Pease Development Authority was passed unanimously.

Mr. Parrott rejoined the Board. Chairman LeBlanc recused himself from the following hearing and Mr. Durbin retained a voting seat. Vice-Chairman Witham assumed the Chair.

5) Case # 7-5

Petitioners: Gerald W. Howe

Property: 45 Miller Avenue Assessor Plan 129, Lot 33

Zoning district: General Residence A

Request: Variance from Section 10.331 to allow the expansion of a nonconforming use
Variances from Section 10.521, Table of Dimensional Standards, to allow the construction of a new garage with:

- A setback of 3'4" from the right side lot line where a 10' side yard is required
- A setback of 4'8" from the left side lot line where a 10' side yard is required
- A setback of 19'1" from the rear lot line where a 20' rear yard is required
- Building coverage of 28.8% where 25% is the maximum coverage allowed

SPEAKING IN FAVOR OF THE PETITION

Mr. Gerald Howe introduced himself and submitted to the Board an affidavit of support from the abutting neighbors. He felt granting the petition would improve the neighborhood because he would be able to get everything on his property currently outside and place it inside the garage. He did not submit a drawing of the current garage so he then distributed to the Board front and side views of the existing structure he wanted to replace while extending it 1.5' in width and 6' in length. Mr. Witham asked about height and Mr. Howe indicated there was no change in height. It is would stay at 9'. He concluded that that he needed a variance because it was a pre-existing nonconforming use.

Mr. Grasso stated that he had tried to find the property. In the aerial view given, was it on Miller Ave now or is it on a separate lot? Mr. Howe indicated it was a separate lot and he received two separate tax bills. Mr. Grasso asked if it was connected to 45 Miller? Mr. Howe confirmed it was. He believed the Planning Department called it "0 Miller Ave."

Mr. Parrott indicated the lot was small and the garage that was currently on there took up most of the very small setbacks as it was. Why was the applicant deciding to go bigger? Mr. Howe indicated he wanted to go bigger so that he could get all the stuff that was outside inside so that he can improve the streetscape for the neighbors.

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

Mr. Parrott's concerns were simple in that this was an extremely small lot. Whether it was a separate lot without frontage or it was landlocked or it was merely an appendage to the other lot didn't matter. It had boundaries. The present garage was 4'8" on one side and 6'2" on the other

side. It provided very minimal clearances, much less than the Ordinance these days required. He stated that not only was there a request to replace it, but also to enlarge it by a fairly substantial amount and cut down the already small 6' 2" setback on the side toward the 129-34 lot to 3' 6". The same applied off the back and the 4' 8" was retained on the other side. The Board's concerns were supposed to be with light and air and overcrowding and overbuilding and so forth, and unfortunately, this was a small lot, so the applicant was sort of limited to what he can do with it. This proposal just didn't meet the test of compliance with the Ordinance and there was no hardship inherent in the lot that was claimed and none when you looked at it.

Mr. Grasso agreed with Mr. Parrott. The garage currently was about 20'X20' and the applicant was proposing to go 22' X 26'. With the size and the existing setbacks, he couldn't support this as it stood right now. He could perhaps support replacement with the existing size, but definitely not the enlargement.

Mr. Jousse also supported the motion. If it was just to replace the garage on the existing footprint or maybe extending the length of the garage by a few feet and still be able to meet the setback requirement behind the garage, he would go along with it, but this was too much more of an encroachment than what existed in the side yard.

Ms. Eaton stated that the Board could not grant a variance on "this is what I want to have" unfortunately. In this case expanding the nonconforming use was not supportable.

The motion to deny the petition as presented and advertised was denied unanimously.

Chairman LeBlanc rejoined the Board as Chair and Mr. Durbin resumed alternate status.

II. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 9:30 p.m.

Respectfully submitted,

Patty Coughlin, Acting Secretary

These minutes were approved at the Board of Adjustment meeting on February 15, 2011.