

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

**September 28, 2010, Reconvened
from September 21, 2010**

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

EXCUSED: Alternate: Derek Durbin

ALSO PRESENT: Lee Jay Feldman, Principal Planner

I. APPROVAL OF MINUTES

A. Excerpt of Minutes – 187 Wentworth House Road – September 21, 2010

Chairman LeBlanc asked why this Excerpt was before them. Mr. Feldman explained that the petition had been in front of them the previous Tuesday and they were looking to make the Board's determination on Fisher v. Dover part of the record for an anticipated court hearing in October. Chairman LeBlanc asked if everyone had had a chance to review the Excerpt. If not, they could take a couple of minutes to review it. With no response, he asked if there were any corrections or changes to the Excerpt and, hearing none, called for a motion.

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

II. PLANNING DEPARTMENT REPORTS

No reports were presented.

III. PUBLIC HEARINGS

- 7) Case # 9-7
Petitioner: Renee A. Heinzen and Joseph H. Gross, Owners, and Ken Wyman, Applicant
Property: 1105 South Street Assessor Map 150, Lot 21
Zoning district: General Residence A
Description: To construct a 12'x12' deck where a 5'x 8' deck currently exists.

Requests: Variance from Section 10.321 to allow a lawful nonconforming building or structure to be extended and enlarged.
Variance from Section 10.521 to allow a building coverage of 27.2% where 25% is allowed and 25.4% currently exists.

SPEAKING IN FAVOR OF THE PETITION

Mr. Joseph Gross stated that he was there with his wife, Renee Heinzen, and his contractor, Ken Wyman. They owned a residence at 1105 South Street and would like to replace an existing 8' x 5' stairway landing with a 12' x 12' deck. He stated that the Board should have photographs of the existing steps and landing.

Mr. Gross stated that granting the variance would not be contrary to the public interest and the spirit of the ordinance would be observed. He didn't think the deck would be markedly different from the steps and landing. He believed the spirit of the ordinance was not to have McMansions on a small lot and to preserve open space. They were looking for a 1.1% increase in lot coverage which wouldn't threaten the health and safety of the public. The deck would only be visible from two residences and not from the street. He stated that the value of surrounding properties would not be diminished for the same reasons, noting that to the west there was a 6' high fence and they were 21' from the property line. In the back, where there was an 8' fence, the neighbor would be no closer than 32' and would not suffer from lack of light or air. He maintained that having a deck would be consistent with the neighborhood.

Regarding the hardship test, Mr. Gross stated that the need for a variance for the deck was due to the slope of the lot. At the front, the living area was the ground level, however, the lot sloped away and they could see from the photographs that the basement was ground level at the back where there was a larger deck. Due to the downward slope, which was different from other lots in the neighborhood, an elevated deck was required so that they would not have to go down two flights to use it. He stated that the justice test allowed them to look at balance. The proposed use was similar to others in the neighborhood and there was already a ground level deck. He asked the Board to consider the totality of the circumstances, including the minimal variance request, the lack of impact on the neighborhood, and the importance to the enjoyment of their home.

Mr. Grasso asked if the existing deck had an egress from the kitchen area. Mr. Gross stated that the doors that entered out onto that deck were out of the laundry and boiler rooms. The living area was one floor above and the doorway above the stairwell went into the kitchen. Mr. Grasso clarified that he was asking about the 5' x 8' area and Mr. Gross confirmed that the 5' x 8' landing went into the kitchen. That was why he was asking to be allowed to build a deck so that he could walk out of his kitchen and sit and have a cup of coffee.

Ms. Rousseau stated that she thought she had heard from him that the difference between his property and the others in the neighborhood was that they needed two flights of stairs for an elevated deck due to the sloping on his property. Mr. Gross confirmed that was the reason and listed houses around him which did not have the sloping. He stated that, if this was just a flat lot, he wouldn't need a variance because he could walk out of his kitchen onto his back deck.

Ms. Rousseau stated she was asking because the City Planners Office had, in their packet, taken a position on the variance criteria stating that (she read) “the applicant has not shown that this property is different than any other properties in the neighborhood and is in need of this particular deck.” She wondered if he was aware of that fact. Mr. Gross stated this was the first he had heard and wished he had been told so that he could have (Ms. Rousseau interjected, “exactly”) marshaled some resources or brought a picture. He added that this was a surprise and Ms. Rousseau commented, “that’s exactly right.” Referring to his tenure as a police officer, Mr. Gross stated that he would take an oath that he had walked around his neighborhood and his was one of the few places that had a slope. As Mr. Gross was continuing, “that they were asking for a minimal,” Ms. Rousseau interrupted, “Yes. We’ve asked the City Planners Office not to give us recommendations and to leave the Board (the Chairman gaveled three times as she was speaking), but they do anyway.” Chairman LeBlanc stated, “excuse me, Ms. Rousseau.” When she continued her comment, Chairman LeBlanc gaveled again and stated that if there was an outburst like that again and she kept talking when he pounded the gavel, he would call for a motion to censure that would be given to the City Council. When he asked if she understood him, she responded, “I heard you.” The Chairman apologized to the applicant and asked if there were any other questions.

Mr. Witham asked if the proposed deck was over an existing deck that was going to remain and there was no additional lot coverage because the lower deck was less than 18” off the ground. Mr. Gross stated that he guessed so. Mr. Witham continued so that the reality was that there was no more ground being covered and Mr. Gross responded that this deck was much smaller than the existing one beneath it. He was not increasing the footprint. Mr. Witham summarized that it fell within the footprint of the one below, which was remaining. He commented that he thought the presentation was well thought out and presented and added that he thought the City took their position because what the applicant had addressed wasn’t in the packet. If it had been written up and in the packet, he would have been fine and he had now covered it.

Chairman LeBlanc stated that the applicant had said that the deck was going to increase the lot coverage by one point. Mr. Gross stated 1.8% and he was using the City’s figures. Chairman LeBlanc asked Mr. Feldman if he had an explanation as, in October of 2006, they had granted a variance to allow 27.1% lot coverage. Mr. Parrot stated that was his question as well and he felt the memo was inconsistent. Mr. Feldman stated that, if they looked at the previously granted variance, the application included a porch on the front of the property that did not show up as part of this application and the assumption was that that porch did not exist. The porch covered by the previous request was just about the same size as the request that was being made with this application so that was why the percentages for the building coverage were fairly close. When Chairman LeBlanc stated that the building coverage would then in fact be 27.2%, he responded, “yes” as far as he could tell from the submitted information.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Paul Wheeler stated that he was there with his wife, Ann Wheeler, and they resided at 110 Ash Street. Their primary concern was lack of privacy, not only from their back yard, but from their kitchen. They distributed some photographs. From the inside of their house, they could see the existing landing, but if that became a larger structure which was used for dining and entertaining, there would be a direct line of sight into their kitchen. He stated that there was an 8’ privacy fence but due to the change in elevation, the applicants’ house sat higher than theirs and there was nothing

else they could do for privacy. The only option would be to put another large tree in the back yard, which would reduce the light. Mr. Jousse asked if he was saying that the increase in the size of the deck was going to reduce their privacy and Mr. Wheeler stated that, right now, it was a landing, but a 12' x 12' deck was more of an entertaining area.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Gross stated that he was sympathetic to the neighbors' concerns but there really wouldn't be any diminution in the existing privacy. Because of the way the house sat, the first floor bathrooms had a better view than the deck, but they were not peepers. They were both retired police officers and didn't have raucous parties.

Mr. Grasso asked if the 5' x 8' deck was in such a condition that they had to replace it and Mr. Gross stated, "no." Mr. Parrott asked if they had removed a structure from the front of the house since 2006 and Mr. Gross stated that they bought it in 2009 and didn't take possession until July of 2010. The porch was small, only 4' x 6'. When Chairman LeBlanc asked how high it was off the ground, he stated it was 6" up from street level. You walked up one step and were on the porch.

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

Ms. Eaton asked if a variance would be needed if the applicant met the building coverage and Mr. Feldman responded that was the only thing. She stated that would not include the basically flat deck and he confirmed it was not included in the building coverage as it was less than 18" high.

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

Mr. Grasso stated that all the criteria had to be met and he had a problem with hardship. The neighbors had presented evidence that going from 40 s.f. to 144 s.f. might impact some of their privacy. He didn't see the need to have a 12' x 12' deck as requested.

Ms. Eaton stated that she agreed. She was also not a fan of increasing lot coverage without a clear case of hardship and she didn't think this met it. She felt things could be juggled a little bit so that a variance would not be needed and that was preferred.

The motion to deny the petition failed to pass by a motion of 3 to 4, with Messrs. Jousse, LeBlanc, LeMay, and Witham voting against the motion.

Mr. LeMay made a motion for discussion to grant the petition, which was seconded by Ms. Eaton.

Mr. LeMay stated, regarding hardship, that he was trying to see what could possibly distinguish this petition and the only apparent thing was that this was a pre-existing nonconforming use. The map showed it was not the only small lot in the area but it was a relatively small lot and that was

obviously one of the two numbers that was used to come up with the percentage of lot coverage. He noted that there was already a downstairs deck that was covering land even though it was presumably below the height needed to count and the total encroachment of the additional 1.8% of lot coverage was small enough that it was not a big deal. He thought he could find some hardship.

Mr. LeMay stated that the public interest would not be affected in general because light and air and things of that nature were not going to be affected. He stated that the spirit of the Ordinance would be observed. With respect to the abutters who felt it would encroach on privacy, he thought the encroachment was small and it was not like there was nothing there before or they were adding on a second story. Substantial justice would be done by allowing this owner to make a modest use of the property and surrounding property values would not be diminished. He thought it would be difficult to indicate in a neighborhood like this that a 5' x 8' deck had much less impact on a neighbor than a 12' x 12' one.

Ms. Eaton stated that she had seconded for discussion.

Mr. Parrott stated that there was already a handsome deck on the property and having to go down a few steps was not a major hardship or concern. He felt the neighbors had a valid point in expressing their concerns. This was a fairly tight neighborhood with relatively short distances and this would be like someone perched on a pole. He noted that variances were permanent and, while these owners might respect privacy, future ones might not. While not ideal, the small landing was enough for a chair.

Mr. Witham stated that he agreed with Mr. LeMay's comments. If this were a variance request for a setback, he would not support it, but this met the setback by quite a bit. There would only be a 2% increase in lot coverage and, considering the density of the area, that was probably the case with quite a few properties so there would be no change in the essential characteristics of the neighborhood. Due to the slope of the land and the elevation, it might have some impact to the rear but he didn't feel it was enough to keep them from granting the variance.

Mr. Jousse stated that there was a deck beneath that at ground level and the ground was covered already. As far as privacy infringement, he appreciated the concerns but felt that people had to remember that they were living in a city and someone was going to be able to look into their windows at one time or another.

The motion to grant the petition as presented and advertised was passed by a vote of 4 to 3, with Ms. Eaton and Messrs Grasso and Parrott voting against the motion.

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- 8) Case # 9-8
Petitioners: Maureen A. Gallagher and Dennis M. Moulton
Property: 190 Hillside Drive Assessor Map 231, Lot 38
Zoning district: Single Residence B
Description: To construct a 28'x24', 672 sq. ft. free standing garage on the property
Requests: Variance from Section 10.572 to allow a 5' rear yard where 13'
is required.

Variance from Section 10.572 to allow a 5' side yard where 13' is required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard Pelech distributed some material and stated he was appearing on behalf of the applicants. The property at 190 Hillside Drive was created years ago as part of a group of lots approximately 75' wide by 115', all of which were nonconforming to today's zoning ordinance. As originally built, these were small capes with single car garages, in this case an attached garage with an exterior dimension of 10' x 20'. A full size car couldn't be put in without hitting walls. The applicants proposed to demolish this garage, leave the driveway in place and add a two story, 28' x 24' two car garage. There would be some storage above, but no plumbing or electricity. The applicant had met with abutters and had changed the plans to reduce the height of the garage by over 5' from what was in front of them. As the setbacks for accessory structures were tied to structure height, they were now talking about a 10' rear and side yard setback requirement.

Attorney Pelech stated that he did not believe that there would be any diminution in the value of surrounding properties. The applicant had photographs of numerous properties with two car garages on Hillside Drive, most of which had received variances for side yard setbacks. The proposed garage would be tucked into the back corner of the property with no buildings in proximity and screened by vegetation. Citing the tests from the Malachy Glen and Chester Rod & Gun Club cases, Attorney Pelech stated that granting the variance would not be contrary to the public interest. It would not harm the public health, safety and welfare nor change the essential characteristics of the neighborhood. The tests were met as there was a 50/50 mix of two car garages in the neighborhood and there was more than adequate light, air, and access.

Attorney Pelech stated that given the special conditions of the property, an unnecessary hardship would be created if the provisions of the Zoning Ordinance were applied. These lots, which predated zoning, were narrow and substandard in size and frontage. He indicated that the applicant had a handout which showed that 90% of the lots were substandard, a good number of those with regard to side setbacks. There was no fair and substantial relationship between the purposes of the Zoning Ordinance as they applied to this property. The general purpose as to setbacks was to avoid overcrowding of the land and allow adequate light and air and access around buildings. He stated that, in this location, there was no structure in close proximity. The abutter to the left had a large lot and, to the rear, the back yard was totally free of structures so the proposed garage would be 20' to 30' away from the nearest structure. There would be no overcrowding of the land. The third part of the hardship test was whether the proposed use was a reasonable one. This was an allowed use in this residential district and would be permitted except for the setback variances. He reiterated that there were similar two car garages in the neighborhood so this was a reasonable use for that area. In the justice balance test, he stated that there would be no benefit to the general public in denying a variance that had been granted many times in that neighborhood while there would be a substantial hardship if the petition were denied. Stating that granting the variances would not be contrary to the spirit and intent of the Ordinance, he again cited the court cases and reiterated that the public health safety and welfare would not be threatened nor the essential characteristics of the neighborhood changed.

Ms. Rousseau asked if he was aware that the City Planners Office on three of the five variance criteria had taken a position against this application. Attorney Pelech stated that he had read the memo and they thought the garage could be located alternatively on the lot. Mr. Moulton could explain why that was not practical. Ms. Rousseau read a particular section from the memorandum dealing with the criteria in which the department had stated that it appeared that the applicant could construct the proposed garage in conformance with the Ordinance. That was the position. Attorney Pelech stated that Mr. Moulton could show why that wouldn't work given the location of the existing driveway and his inability, if he were to comply, to get into that new garage.

Chairman LeBlanc asked if the height, after the 5' reduction, would be 11'11" and Mr. Dennis Moulton replied that the reduction would actually be 2½'. The height to the midpoint of the rise would go from 16'11" to 13'10". When he asked if that qualified for the 10' setback, Mr. Feldman responded that it would be a little over. Mr. Witham asked if there were still dormers and Mr. Moulton stated there were.

Mr. Moulton distributed some materials, noting that they had provided a description of the variances requested and why they felt they should be granted. He noted that they had around 9,000 s.f. of the required lot size of 15,000 s.f. and would need a variance for any expansion. He stated that they wanted to work with their neighbors and had changed their application after discussions with them. He detailed the various exhibits provided, including photographs of various views of the house and a site plan with arrows corresponding to the photographs. The photographs illustrated the small size of the existing garage, the natural screening they had and the location of the garage. After talking to an abutter, they would consider adding a privacy fence along the rear line. Mr. Moulton pointed out the revised elevations of the garage showing the reduced height, the exhibit showing the number of nonconforming lots in the area and those with two or more garages on the property. He particularly noted photograph #3 which showed the structure to the right of their house which was close to the property line and screened by vegetation. They had no issues of privacy or peaceful enjoyment with it being there and felt it was a good illustration of how structures could fit on lots of their dimension.

In response to Ms. Rousseau's previous question about why they could not meet the setbacks, Mr. Moulton pointed out the exhibit on display. If they took the existing plan the way it was intended to face front and moved it forward, it would result in what was outlined in red on the exhibit. He outlined the various improvements they had done in the nine years they had owned the property and noted that they would in the future like to build a modern kitchen with an attached dining area and above that a master bedroom. He felt it was an appropriate size for that construction. If they moved the garage forward, it would impinge on that proposed future construction. Mr. Moulton stated that their alternative would be to turn the garage so that it faced the side which created this long driveway to the side and pushed the garage way into what he called the nice part of the property. He felt that was quite a bit more of an imposition into the rear yard than their proposal, which he felt left a nice area to the side. On a personal note, he stated that his wife was a physician who worked long hours which was difficult in the winter when the car was outside and it would be improvement to have a usable garage.

Mr. Grasso asked why moving the garage toward the street 5'9" was not doable. Mr. Moulton referred to the exhibit and indicated that the driveway would go through the planned expansion if

the garage were moved. He also indicated the impact of shortening the planned turnaround. In order to preserve an area for future expansion, the garage needed to be where proposed.

Mr. Jousse asked what they were going to do with the gas line that was being piped to the garage and Mr. Moulton replied that he would like to have the option of putting a heater in the garage. When Mr. Jousse commented that that was the first step to a living space, Mr. Moulton stated that was not his intention and there would be no plumbing to the structure. He might like to have a wood shop as a hobby on the second floor. Ms. Eaton asked if he had considered removing the “man door” into the garage to meet the setback and he responded that they would still need space for the stairway to the second floor. The access to the second floor space was really why the structure was 28’ wide rather than 24’.

Mr. Parrott asked what the other underground utilities were and Mr. Moulton stated it would be just electrical. He was an engineer and it was standard on a site plan to show the underground electrical. If there were also a water or sewer line it would show. If they wanted to make it a stipulation that there would be no attached water or sewer, he would be fine with that. Mr. Parrott noted he was working on a 75’ lot which was pretty small and this 24’ x 28’ garage was one of the largest he had seen. It seemed they could ask for less and get closer to the requirements by a redesign. Mr. Moulton stated that they had looked at reducing the depth to 22’ but then they would have to increase the height of the roof to maintain useful space above the garage and that was the concern of the abutter. Mr. Parrott commented that a garage was primarily to park so they might have to give up something to get closer to compliance. Mr. Moulton responded that he felt it was an appropriate size. They had kayaks and lawn equipment and did not want the garage to become a glorified storage area on the first floor so that they couldn’t park vehicles.

Mr. Witham stated that he wanted to compliment the applicant on the well put together application. He did have a few concerns, first of which was what type of foundation there would be. Mr. Moulton related a discussion he had with an abutter regarding how a poured foundation would impact the trees and a technique which would minimize damage. Mr. Witham stated that the gist of his concern was that a foundation would have to be dug 2’ from the property line and there were mature trees along that line on the abutters side. He felt that they would not survive that kind of digging. As he looked at the site map, this was going to be one of the few, if not the only, structure built in the back corner of the lot and he was just concerned as to how those trees were going to survive. Mr. Moulton stated that he shared those concerns and they did actually want to bring that side of the garage further toward the middle of the property away from the large pine tree. They would still like to keep it 5’ from the rear property line for the reasons he had previously mentioned regarding the future plans for the house but they would be willing to provide additional 7’ or 8’ setback on that side if the Board wished.

Mr. Witham stated that his other comment was regarding the criteria concerning a reasonably feasible alternative. The applicant was one of the few who had actually shown them two other locations and for one the argument was that it wouldn’t work because it would infringe on a future addition. Mr. Moulton stated, “yes.” Mr. Witham stated that it put him in a tough spot where, if he were going to support this, he would have to support the potential loss of quite a few trees and encroachment on a property line because a future addition couldn’t be made 2’ or 3’ smaller.

Mr. Moulton stated that this was something they had been planning over the years and they had looked hard at the space requirements for what they wanted to do. Right now the kitchen in that corner, built in the 50's, was small, archaic and difficult to work in. They would like to have the dining area adjacent to the kitchen and they would also like to construct the master suite above so that was the minimum size that they would need to accomplish those goals.

Ms. Rousseau read from the hardship criteria necessary to grant a variance, including the special conditions of the property so that the property could not be used in strict conformance with the Ordinance. She had heard from the applicant in terms of hardship that they didn't want to put it in the middle of the yard because they liked the yard and open space and it would infringe on a future addition. She stated that their future addition could not be used as an argument because it was not an existing piece of the property and they needed a better hardship argument. Otherwise everyone would come in talking about their future addition. She encouraged him to think through his position and see if there were a special condition that would meet the hardship criteria.

Mr. Moulton stated that it was almost as if she was asking him to come in with an application to do both at the same time. Ms. Rousseau stated she could not advise him what to do but she was trying to tell him that he was not making a very strong argument as far as special conditions for the hardship criteria and that the Board could not consider a future addition if it did not now exist on the property. Mr. Moulton stated that Mr. Pelech had also spoken to the hardship of the property and the reasons that the lot itself presented a hardship in terms of its width and size. If the property were 100' wide and had 16,000 s.f. of area he wouldn't be there. Ms. Rousseau stated she understood but it seemed that there were alternatives but he didn't like them.

Mr. Moulton stated that he had shown the alternative and felt that it presented a hardship with enjoyment of the property. Ms. Rousseau concluded so then enjoyment was his argument.

Ms. Eaton stated that the hardship arguments were made on the basis of a two car garage with dormers and loft space. It was not considered a hardship in Portsmouth not to have a two car garage and not to have upstairs space in the garage for storage of materials. She felt it did not meet the hardship criteria. She noted that not having a garage, in itself, was not a hardship.

Mr. Charles Griffin stated that he and his wife owned the properties at 210 Hillside Drive, which abutted to the right and rear. They had felt it was too massive and the applicant had submitted that night a plan which reduced the height so that they found it acceptable. He stated that he would like to add a bit to the consideration of the criteria and detailed how he felt the request met all of the five criteria. He passed out a copy of the assessors map with the applicant's house highlighted in yellow. The front of the main house was a little wider than the houses surrounding it which explained why the garages in the area were to the side. In this case they couldn't put it to the side so that even tearing down the existing garage, they couldn't replace it. He concluded that, without a variance, the property couldn't be used in strict conformance with the Ordinance and stated that a two car garage was a reasonable use. He urged them to grant the petition.

**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 asked what the new side yard setback would be and Mr. Feldman stated it would be 10.75’ based on the design just submitted.

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

Mr. Parrott stated that the key point was the unnecessary hardship. The requirement was for special conditions which distinguished the property from others in the area when, in fact, the argument had been made that it did not vary in terms of the other properties. The plan showed lot after lot 75’ wide and 125’ to 150’ deep so it was hard to find the demonstrated and proven special condition that was required. The other aspect was that there was space in the back yard to build a reasonably sized double garage and still respect the setback. The proposed setback was 5’ and the requirement was 10.75’ so there would be only another 5’. His final point was one he had made earlier about the size of the garage where most people would find a double garage, typically 22’ square, adequate. He felt they could have a smaller upstairs space with still some overhead storage. Mr. Parrott stated that this cried out for rethinking so that an acceptable design could be produced which respected the side and back setbacks

Ms. Eaton stated that she agreed with his summary and had nothing to add.

Mr. Jousse stated that there were 34 lots on this street and only 14 had a two car garage so the predominance of the properties in that neighborhood only had a one car garage. He felt it had been demonstrated that the garage could be placed in other locations on the lot and still meet the setbacks. He would recommend that, or a smaller garage.

Mr. Witham stated that it was a well thought out presentation and a lot of thought had gone into the design but this was too close to the property line. From what he could tell, this was the only two car garage infringing on the rear setback. Most of the yards were open with a nice tree separating them and this would alter that pattern. He reiterated his concern with digging so close to the trees. The applicant had presented two scenarios of what would happen if the setbacks were met, but the garage could go to 22’. He understood that they might want a wood shop but that also went to the impact of a wood shop 5’ from somebody’s back yard. While there were a lot of good aspects to the proposal, it did not meet the five criteria necessary to grant a variance.

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

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- 9) Case # 9-9
 - Petitioner: Deborah Campbell
 - Property: 295 Maplewood Avenue Assessor Map 141, Lot 35-1
 - Zoning district: Mixed Residential Office
 - Description: To allow a use on the property with no off-street parking spaces.
 - Request: Variance from Section 10.1112.30 to allow the first floor space to be used by a use permitted in the zoning district (“P” in the Table of Uses) with no off-street parking spaces.

SPEAKING IN FAVOR OF THE PETITION

Mr. Bill Scott stated that he was representing the applicant. This was a unique piece of property, triangular in shape, which predated zoning. Any use on the first floor would require a variance as there was no parking available due to the configuration. He stated that this had been commercial space as long as he could remember, most recently a retail curtain shop, which was more intense than the proposed use as an insurance agency. He maintained that the parking situation had functioned for the curtain shop and the other preceding commercial uses. In looking at the Table of Uses and the parking table, he felt that this was one of the lightest uses that would be permitted in that zone. The requirement was to have four parking spaces. He stated that the owner of the agency and his wife rode together so there would only be one vehicle and none on the days they walked to work. There were two part-time employees-time employees and adequate street parking in the area. Even a residential use on the first floor would create more of an impact from a parking perspective as vehicles would be there at night when people in the area returned from work.

Mr. Scott stated that this was a quintessential hardship. Nothing could be done absent a variance because of the unusual configuration. Granting the variance would not be contrary to the public interest as the proposed use would be changing back to a permitted use after years of a use permitted only by variance. He noted that the property had been vacant for 8 months prior to this application. He stated that the spirit and intent of the Ordinance would be preserved as this was a low impact, permitted use which would not change the characteristics of the neighborhood. In looking at the parking table in the Zoning Ordinance, it could be seen that business offices required the same as a medical office and it seemed to him the number of vehicles associated with the latter would make an insurance office pale by comparison. Due to computers, few people stop by, except to drop off the occasional application or payment. On average, there might be 8 people a day and it was not uncommon to have no one. Mr. Scott noted that there would be no external changes and stated that a permitted use with minimal parking and traffic would not diminish the value of surrounding properties. He stated that the hardship was in the configuration of the property which distinguished it from others in the area.

Mr. Grasso asked where, on the rare occasions when clients visited, would Mr. Scott imagine they would park. Mr. Scott stated there were two spots on the street and two on the street to the left of the building before the residential parking. When Mr. Grasso asked if all four of the spaces were on public streets, he confirmed they were. Mr. Jousse asked if there was space for two parking spots or two marked spaces and Mr. Scott stated there was room but they were not marked.

Chairman LeBlanc stated that, in 1998, the Board had granted Portsmouth Curtain Call permission to move and the upstairs was to be converted to residences. Mr. Scott stated that it had been as condominiums, with both units sold. In response to a further question from Chairman LeBlanc, he stated that the downstairs part was leased with an option to purchase if the owner decided to sell. When Mr. Witham stated it was then a three unit condominium, he stated, "yes." Mr. Witham asked if the other units got one of the two spots to the rear as part of their deeds and Mr. Scott stated that he didn't know if it was a part of the deed but he thought it might be part of the by-laws. They were sold with a parking space. Mr. Witham asked if he was aware that the lease for the storefront did not include either of the two spaces and Mr. Scott stated, "yes." He agreed when Mr. Witham

stated that one could assume they would each get one spot. Chairman LeBlanc stated that he believed that it was part of the packet, that it had been registered with the court.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Peter Geramia stated that he lived at 315 Maplewood Avenue and was opposed to the petition mostly for traffic safety issues. He detailed the packet he had provided for the Board. He noted that there was a fire hydrant and a crosswalk in front of 295 Maplewood Avenue so that only one car could be fit in front of the building. He added that snow accumulation in the winter made parking difficult and dangerous. He also showed the parking on Marsh Lane, indicating that his driveway was off that street. According to his calculations only one or two cars could fit. If one car came down the narrow street it was brought to a one-lane and made backing out difficult. He was also concerned about access for safety vehicles. He listed all the additional pages in his submittal and what was on each to support his concerns which included a copy of relevant ordinances and regulations and photographs taken from various vantage points in the neighborhood. He summarized his concern as being Marsh Lane and the dangerous parking due to the intersection and the City Ordinance which prevented parking in a lot of places.

Ms. Rousseau asked if it was his position that there were not two legal public parking spaces in front of that particular commercial space. Mr. Geramia stated that, according to his approximate measurements, you could not get two cars into that space. Ms. Rousseau asked if he had checked with the City to see if they were legal parking spaces and Mr. Geramia stated that he had not but had talked with the parking people and they gave him the rules. Ms. Rousseau asked if, based on his experience with the previous commercial business, they parked in those spaces. Mr. Geramia responded that when she was infrequently there, she parked one car in the front. Very rarely did he see other cars parked so it was extremely low traffic. Ms. Rousseau asked if there had been any issues with emergency vehicles getting in and out. Mr. Geramia stated that they had not parked on Marsh Lane but, if there were a number of part-time employees and customers, it sounded like more traffic than the curtain shop and he felt that Marsh Lane would be their choice. She noted that he had stated that there was a crosswalk and she didn't realize it was a high foot traffic area. Was that what he was representing it to be – that there was a lot of foot traffic going over that crosswalk every day? Mr. Geramia stated that he was just going by town ordinances as to parking distances from a crosswalk. It was not super high traffic like downtown but there were a number of people who did cross there. He noted that he had forgotten to mention other factors. People brought boats down Marsh Lane to the launch and they could be affected if a lot of people were parked. Also, one of the condominium residents had two cars for their one space. When Ms. Rousseau stated that you couldn't control that, he agreed. Ms. Rousseau stated that it seemed that, based on his experience with the previous commercial tenant, he had no issues and Mr. Geramia stated that was because Marsh Lane was not used.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Scott stated that the applicant was a resident of Portsmouth and his goal was to work with any issues. If the city came along and prohibited all parking, the premises could still be used. They would just have to find parking in the garage and walk over. He stated that to the extent there were 3 or 4 available spaces this was a commercial piece of property which the owner had a right to use. He reiterated that it was a permitted use with less impact than other uses permitted in that zone.

Agencies were not like they used to be and this was some 900 s.f. including the bathroom. This was an opportunity to have something in there with minimal impact. They were mindful of the neighbor's concerns and were willing to work to be a good neighbor.

Mr. Jousse stated that he was very familiar with that part of the City and asked how long it had been since the curtain shop vacated the premises. Ms. Scott stated he didn't know but thought it was more than 8 months. Mr. Joseph Cunningham stated that he was the manager of the agency and it had been represented in the early part of September that it had been 8 months. Even if the owner of the curtain shop had wanted to reopen at that time, they could not do so. This variance was geared to his business and no other. They had always been good neighbors in their previous buildings and left things better than they found them.

Mr. Geramia stated that he was not aiming for business. His major concern was the safety factor for Marsh Lane. He asked if the variance would be granted to this business or any other business. Chairman LeBlanc stated it would be to the owner and the office use on the first floor. He asked if another company could come in with more employees with no variance required. Chairman LeBlanc stated they could but they would be limited by the size of the space. Mr. Witham asked if, in a building which had been converted to condominiums there was any process where the City would sign off, or could this owner make three units. Mr. Feldman stated that, in the previous Ordinance, they could have up to 5 units, he believed. Three or more units were subject to site plan review and there was also a provision for waiving that review. When Mr. Witham asked if he thought this had gone before any City Board, Mr. Feldman stated not for the question he was asking. Ms. Eaton asked what the parking requirement was for the previous tenant and Mr. Feldman responded that there was quite a history, as had been outlined in the memorandum.

With no one further rising to speak, 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 Mr. Parrott.

Mr. Witham stated that, as he saw this condominium unit, there was a legally nonconforming use, nonconforming as to the aspect of not having a parking space. He felt that denying the variance would be essentially taking away the use of the property. He was sympathetic to the concerns of the abutter but they could be backed up by law and a phone call could have them enforced. He felt this applicant would ensure that employees followed the rules. He was making an assumption that they would leave the best parking for their customers as good business practice.

Addressing the criteria, Mr. Witham stated that granting the variance would not be contrary to the public interest as a commercial use had been in that location since at least 1994. When he had visited the property several years ago, there had been no problem with parking. He stated that it would be in the spirit of the Ordinance to allow the legal nonconforming use of this property to continue. Regarding substantial justice, to not grant the variance would be a great negative to the applicant while not benefiting surrounding property owners. He felt there was no reason to believe that the value of surrounding properties would be diminished and noted that even the abutter who had spoken in opposition had bought his property knowing he was next to a commercial entity.

Regarding the special conditions, Mr. Witham noted that there were two parking spaces designated to the other condominium units and there was no space for another. This was a triangular lot set back from the crosswalk with a fire hydrant taking up potential parking space so there was no reasonable alternative way to meet the requirements of the Ordinance. With the previous commercial use, there was no indication that there had been a lot of calls for parking in front of the hydrant or a problem for emergency vehicles.

Mr. Parrott stated that it would be in the public interest to have this space occupied as opposed to a vacant storefront. This proposed use was benign and would have a low impact on the area due to the small size of the office. In the balance test, he felt the approval should tip to the owner of the building and the proposed tenant. He stated that the special conditions of the property were its odd size and shape and the fact that there was no room to provide off street parking for this building which, he expected, predated any parking regulations.

Mr. LeMay asked if the maker and second of the motion would be amenable to a stipulation such as that made in 1998 that the maximum personnel on the site be the owner and two employees. Mr. Jousse commented that there had been difficulty in putting a similar restriction on a business up the street and Mr. Witham stated that his problem was enforcement. Chairman LeBlanc asked if he would like to make that a motion, Mr. LeMay stated that he would withdraw his suggestion.

Mr. Jousse stated that there had been a business on that property for years, which had to be taken into consideration. He had travelled in front of the previous business on a daily basis and the previous tenant would park in front. He had found it advantageous because it slowed traffic to the speed limit. While he realized that Marsh Lane was quite narrow in spots, it was a dead end street with a limited amount of traffic. Any sensible person would not drive more than 15 mph on that particular street. He agreed that any place of business needed relief for parking spaces, otherwise it placed an unnecessary burden on the property.

Ms. Eaton noted that this variance they were granting was for a business to operate in that space. It was not for them to be allowed to park on the street and they did not have the power to change the rules for parking on the street in that area.

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

10) Case # 9-10

Petitioners: Bradford C. Duncan and Alyssa A. Duncan

Property: 36 Rogers Street Assessor Map 116, Lot 46

Zoning district: Mixed Residential Office

Description: To expand a nonconforming residential structure by adding a second story with less than the minimum required side yard and less than the minimum required open space.

Requests: Variance from Section 10.521 to allow a 2.7' side yard where 10' is required.

Variance from Section 10.521 to allow a minimum open space of 24.8% where 25% is required and 26.6% currently exists.

Variance from Section 10.321 to allow the expansion of a nonconforming structure.

SPEAKING IN FAVOR OF THE PETITION

Mr. Jousse asked, first, for an explanation of why the footprint was being changed on the vertical expansion. Mr. Feldman stated that he had been about to mention that it was a vertical expansion and the open space minimum requirement was not impacted, as noted in the advertisement, so they would not have to take action on that portion of the variance request.

Mr. Joe Almeida stated that he was the project planner speaking for the owners. To elaborate on what Mr. Feldman had said, there was only one variance to Section 10.521. The foundation as it currently existed would be expanded vertically. There would be no lateral expansion. The only piece that would affect the setbacks was shown on page two in the packet, in the upper portion of the proposed lot plan. The portion they were seeking relief on measured 6.5' x 8.4' and was required for passage into what would be a third bedroom over the existing one story addition. They did explore all alternatives to not requiring this piece but in the existing structure of the house, the bearing wall was very close to the setback line. Without this passage piece, you'd be basically passing through one bedroom to get to the other, which defeated the purpose. Ms. Eaton asked if they were then missing a variance that used to be in there, the coverage and Mr. Feldman responded that they did not have to act on it.

Mr. Almeida reiterated that the purpose of the expansion was to add a third bedroom to the only two bedroom home on the street, on a very small lot. Addressing the criteria, he stated that the variance would not be contrary to the public interest. Because the expansion abutted a very large parking lot, light and air Ordinance issues would be protected. There was no public opposition to this application and they had verbal support from several neighbors. The spirit of the Ordinance would be observed because it was a very small expansion on a lot where any expansion was difficult. Substantial justice would be done as this was a modest change and expansion was necessary for this family of four. The value of surrounding properties would not be diminished. The expansion was in keeping with the architecture of the neighborhood and there were several homes on the street that had expanded in this same fashion. Those homes had similar setback and lot coverage issues. Mr. Almeida stated that literal enforcement of the Ordinance provision would result in unnecessary hardship because it would result in a substandard and cramped living condition that would worsen as the family grew. He reiterated they were the only two bedroom home on the street and other properties had come before the Board for relief. This would be a minimal expansion.

Mr. Witham stated that, from what he could see from going by there, where the variance relief was required on the addition was up against a large parking lot and there was substantial distance to the nearest structure. Mr. Almeida stated that the immediate abutter to this property was a law firm with a large parking lot. Mr. Witham asked if that was all one lot and Mr. Almeida stated that it was broken into two which might be shown on a graphic in the packet. Mr. Witham stated he saw it and added that it looked like the abutting space was used for a drive into the parking lot so they probably wouldn't be giving that up anytime soon and Mr. Almeida stated, "yes." Mr. Brad Duncan stated that he was the owner of the property. He stated that they had also spoken to the lawyers and they had no issue with the proposal.

**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 noted that the request before them was for two variances, not three.

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

Mr. Grasso stated that the applicant was trying to make the home more family friendly and to do this went within 2.7' of the side yard setback. He stated that granting the variance would not be contrary to the public interest, with the side most impacted an open parking lot. He stated that the light and air protected by the Ordinance would not be affected and there would be no hazard to the public safety. Substantial justice would be served by allowing a minimal expansion in a family neighborhood and the value of surrounding properties would not be diminished. The special condition resulting in a hardship was that this was a very small lot and anything that they might wish to do would require coming before the Board. He felt that this was a reasonable request.

Mr. Parrott stated that he agreed. What the applicants proposed was the only logical way to expand. It would make the property more usable with no detriment to the neighbors or the general public.

Mr. Witham stated that the area of the addition was surrounded by pavement, the parking lot and the street. There were protections in the Ordinance for light and air and there was no reason to believe that either would be adversely affected.

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

IV. OTHER BUSINESS

No business was presented.

V. ADJOURNMENT

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

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk