

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

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

**December 21, 2010, Reconvened
from December 20, 2010**

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

EXCUSED: Alternate: Robin Rousseau

ALSO PRESENT: Lee Jay Feldman, Principal Planner

I. APPROVAL OF MINUTES

A) Planning Board Minutes of Joint Work Session, Pages 1 through 5, October 21, 2010

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

B) Planning Board Minutes of Joint Work Session, Pages 1 through 5, November 18, 2010

It was moved, seconded and passed by unanimous voice to approve the Minutes as presented, with the notation that Arthur Parrott had not been present at the Joint Work Session.

II. PUBLIC HEARINGS

7) Case #12-7

Petitioners: Helen T. Steele and Huldah Lashar, Owners

Property: 53 Pray Street

Assessor Plan 102, Lot 40

Zoning district: Waterfront Business

Description: To allow the expansion of a nonconforming residential use and structure in the Waterfront Business zone by constructing three additions.

Requests: Variance from Section 10.321 to allow the expansion of a nonconforming building.

Variance from Section 10.331 to allow the expansion of a nonconforming use.

Variance from Section 10.334 to allow a nonconforming use of land to expand into any part of the remaining land.

Variance from Section 10.531 to allow a 7' rear yard where 20' is required.

Variance from Section 10.531 to allow a 6' left side yard where 30' is required for the expansion of a shed dormer.

Variance from Section 10.531 to allow a 0' front yard where 30' is required for the vertical expansion of the garage.

Variance from Section 10.531 to allow an 18' right side yard where 30' is required or the expansion of the garage.

Variance from Section 10.531 to allow a building coverage of 32% where 31% currently exists and 30% is the maximum coverage allowed.

SPEAKING IN FAVOR OF THE PETITION

Attorney Jack McGee stated that he was representing Joan and John Schorsch, the proposed buyers of the property, although technically the applicant was the architect who was also there. Mr. Telfer would give the overview, Mr. Schorsch would speak to issues, and he would point out the rationale from a legal standpoint. To help outline the variance requests, Attorney McGee distributed a sketch of 53 Pray Street. There was an overlap on variances due to general conditions which had to be met in the Waterfront Business District and dealing with the residential uses in that district.

Attorney McGee stated that the first variance dealt with the main building, expanding the kitchen and living room areas and leveling off the garage, bringing the walls up to match the walls and roof line of the shed. The next variance was for expansion of a nonconforming use which would apply to anything they were seeking to do. The next variance, allowing an expansion of a nonconforming use of land to any part of the remaining land dealt with the proposed shed dormer, extension on the kitchen and living room, the rehabilitation of the boathouse and the garage realignment. The 7' rear setback was for the expansion of the kitchen and living room which would be within the 30' setback. The 6' right side setback variance dealt with the dormer where the plane of the wall, but not the footprint, was 6' from the property line. The 0' front yard setback was due to changing the lean-to so that it became a part of the garage. Attorney McGee continued that the 18' right side setback dealt with the setback from the river to the garage and the final variance was for lot coverage using approximations they had developed worked with the Planning Department.

Mr. Dean Telfer, architect for the project, took the Board through the presented material, outlining what was depicted on each page of their exhibits and the purpose behind their design choices. In response to questions from Messrs Jousse and LeBlanc, he confirmed that they were going to use the existing foundation for the addition to the waterfront side and stated that the back part of the garage was not over the water.

Mr. John Schorsch stated that he was one of the proposed purchasers, noting that they had won awards for their involvement in the restoration of historical properties. They were going to become permanent residents and wanted to maintain the character of the house, making minimal adjustments. The lap pool was for his wife, who had a medical condition for which swimming was therapeutic.

Mr. Parrott noted that the plans for the boathouse showed a reestablished bathroom, including a shower, which Mr. Schorsch stated was merely a convenience as it was mainly a private place for him to work. There followed a brief discussion with Messrs Jousse, LeMay, Parrott, and Witham expressing concern about water and sewer coming to the boathouse, raising the possibility of a

second residence and the storage of the pool equipment. Mr. Schorsch stated that they had no intention of creating a second unit and a shower was not absolutely necessary, but he would like a toilet facility. The pool equipment could be stored in a basement of another building.

Attorney McGee stated that while this was a Waterfront Business District, the only business in the area was Sanders Lobster and most of the buildings on Pray and Salter Streets were residences so each was a nonconforming use. They understood the concern about the Waterfront Business District and the need to preserve a working waterfront, but this was not part of that waterfront. He noted that the variance requests would not result in doubling the footprint or increasing noncommercial structures. The property had been noncommercial for many years. Attorney McGee stated that three expansions were needed to bring the house to current needs and expectations. The dormer needed to be expanded, which would not expand the footprint, although the edge nearest to the Weston property was 6'. He maintained that the whole area was special and screamed hardship as nothing could be done without variances. He noted that the kitchen expansion would be away from the Weston property and the footprint of the garage would not be expanded.

Attorney McGee stated that the variances dealing with the dormers, the expansion of the kitchen and moving to the back lot line, as well as evening off the garage, were all needed and all met the criteria. The two variances that were a little different were for the pool in the back yard, which was not a structure but affected coverage, and the boathouse. The pool was for a medical reason and could be considered under Simplex. This was a reasonable use and not overly large. Regarding the boathouse, he stated they would have no objection to a requirement that there be no shower but they would hope for a privy and a sink. This was technically not a use in the Waterfront Business District and refurbishing the boathouse for use as a study would require a variance. They would also have to deal with the State on the bathroom as well as a number of other issues.

Attorney McGee stated that there would be no diminution in the value of surrounding properties and he didn't believe there were any neighbors claiming that. If anything, the property would be more attractive. He stated that it would be beneficial to the public interest to rehabilitate the property and use the boathouse for more than storage, particularly as the applicant would accept a stipulation that it could not be used as a second dwelling unit. He maintained that justice would be served by allowing the owners a reasonable use of their property. Granting the variances would not be contrary to the spirit of the Ordinance as this area was residential and the property would be consistent with others in the area. Attorney McGee stated that, under Simplex, if someone needed a variance for a reasonable use and it didn't hurt anybody, then there was a hardship. Here the house was outdated and needed to be expanded. It made sense to make the garage neater and allowing the boathouse as a study was a reasonable use. The pool was something that was needed by one of the applicants. Attorney McGee concluded that, from a technical standpoint, some of the variances covered more than one item and, if the Board had any problem with a particular request, that variance could be excepted out so that the total request would not be affected.

Mr. Jousse asked him to explain the shaded area on the property sketch, under the deck to the west of the boathouse and Attorney McGee stated that most of the deck was over water as well as most of the boathouse and that was not technically part of the lot. Ms. Eaton asked about the deck shown as deck "c" and the reference on the other side saying "omit decks." Attorney McGee stated that it was thought that they were somehow a part of coverage and an attempt was made to differentiate

various sections of the deck in case they had to remove some of it. The deck was as shown in the plan he had given them. Ms. Eaton noted a discrepancy in the references to the bathroom in the boathouse, one saying “add” and one saying “reestablish”. Attorney McGee stated that there had been a primitive bathroom but the toilet had been eliminated when the floor was redone by previous owners. Mr. LeBlanc referenced the elevation on page 9 where it appeared that the roof of the dormer was not going beyond the current roofline and Attorney McGee stated that he understood that the pitch would stay the same.

SPEAKING IN OPPOSITON 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 Witham reminded the Board that the attorney had mentioned that, if there were something with which the Board members were uncomfortable in this request for 7 variances, they could pull out that variance. He felt it might be easier to take it as a whole and, if there were a certain element of the design they wanted to eliminate, they could do it in their motion and make it a stipulation.

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

Mr. LeBlanc stated that the presentation was for a lot of variances but fairly little relief was actually being proposed. This was a unique property which, although small, looked out onto the back channel of the river. He stated that he would like to add the stipulation that the boathouse not be used as a residence. Addressing the criteria, he stated that the public interest was not going to be crossed. The amount of increase in the property was fairly small. He noted that the abutters to the back were not there to voice objections, nor was anyone there from the Weston property. He stated that he had a little trouble with the spirit of the Ordinance which is to reduce nonconformity, however he felt that what was actually being requested was fairly small, despite the large number of variances involved. Justice would be served because it would allow upgrading the property to a more livable standard. Mr. LeBlanc noted that the property to the right was a lobster pound and he didn't see how improving this property would diminish its value. The special conditions were that this was a very tight lot and the amount being requested was small.

Chairman Witham asked for clarification on his stipulation and if he would be comfortable with a study with a shower, not a separate unit. Mr. LeBlanc stated that he was comfortable as long as it was not going to be used as a dwelling unit with a kitchen. He accepted Mr. LeMay's suggestion that part of the stipulation be that the pool equipment would be stored inside one of the buildings.

Mr. LeMay stated that this was an existing nonconforming use and the expansions were basically infill which he didn't see as encroaching on neighbors.

Chairman Witham stated that the proposal seemed well thought out and he felt there would be minimal impact on abutters, the area to the rear being a swatch of land for access to the water.

The motion to grant the petition as presented and advertised, with two stipulations, was passed by a unanimous vote of 7 to 0. The stipulations were the following: 1) That the boathouse will not be used as a dwelling unit and no kitchen will be installed; and 2) That the pool equipment will be stored inside one of the buildings.

An Excerpt of Minutes for the following petition was approved as presented at the January 25, 2011 meeting of the Board of Adjustment.

8) Case # 12-8

Petitioners: Theta Realty, LLC, Owner & Theodore Mouzakis, Applicant

Property: 1150 Woodbury Avenue Assessor Plan 237, Lot 13

Zoning district: Single Residence B

Description: Expansion of a nonconforming residential multi-family use from 8 unit to 10 units where the existing lot area is 30,000 s.f. and the minimum lot area required for 10 units is 150,000 s.f.

Request: Variance from Section 10.331 to allow the expansion of a nonconforming use.
Variance from Section 10.440 Use# 1.50 to allow the conversion of a building existing on January 1, 1980 with less than the required minimum lot area per dwelling unit as specified in section 10.521.
Variance from Section 10.1112.30 to permit 15 parking spaces as shown on the plan where 16 parking spaces are required.

SPEAKING IN FAVOR OF THE PETITION

Ms. Cynthia Mouzakis stated that she was speaking on behalf of her father and wanted to make a correction. Their request was for 16 parking spaces instead of 15, as shown on the plan where 16 parking spaces were required and she cited Section 10.112.3. When Chairman Witham asked if the site plan would show 16 parking spaces, she stated, “yes,” and she deferred to a member in the public area who did not identify himself but stated that they had proposed two extra parking spaces on the plot plan to meet the 16 parking space requirement. Chairman Witham stated that they should go ahead with the presentation and, when they got to the site plan, they could show where those spots would be so that it would be in the record.

Ms. Mouzakis stated that the property did have 10 units, but they were only allowed 8 under the zoning so her father only utilized 8 units, which she noted, was providing affordable housing. She stated that granting the variance would not be contrary to the public interest. The use was allowed in the area and already existed. No additional City expenditures would be required. Her father was looking to establish two more units within the confines of the existing structure. The structure would not change except that the top floor space was not now being utilized. Ms. Mouzakis stated that ample parking existed on the site and justice would be done by allowing the property to be used to its fullest potential. The value of surrounding properties would not be diminished as all the work would be inside the building with no exterior renovations. She felt that the current building was of

equal if not more value than the neighboring properties. Addressing the hardship balance test, she stated that there would be no benefit to either side. This was simply space that was not being utilized. It would not encroach on the neighbors and would increase property values and tax revenue.

Jumping ahead with regard to parking, Chairman Witham suggested that, should there be a motion in favor, there be a stipulation that the applicant work with the Planning Department to satisfy the 16 parking space requirement rather than working with the applicant that evening sketching the spot. They could then move forward with considering the variances for the number of units. Ms. Mouzakis stated she would appreciate that.

Mr. Jousse stated, as a question for the City, that he believed it was one and a half parking spaces per unit and 10 units equaled 15 spaces. Mr. Feldman responded that, under the new Ordinance, adopted in January, multi-family dwellings with more than three units were required to have 4 parking spaces plus one and a half over two units. That calculation resulted in 16 spaces that were required.

Mr. Parrott stated with respect to the submitted plan, dated November 17, 2010, it showed lots 13 and 14. The applicant was requesting variances with respect to lot 13 yet the parking spaces went across the boundary line into lot 14 but there was no indication that they owned lot 14 or request for any action with respect to that lot. Chairman LeBlanc referred the question to Mr. Feldman for the Planning Department's interpretation and then the applicant could address the question. Mr. Feldman stated that they didn't include a request for that parcel, also owned by the applicant. Mr. Parrott stated that he had a problem with that lot not being part of the request because some of the parking was shown on that lot. That point aside, his second point was that, on the provided plot plan, it said that the zoning district was General Residence A which was inconsistent with the city map which showed SRB. They had also shown that the minimum setbacks were 15' when they were 30'. Also the number of square feet required per unit was different from General Residence A, which they had indicated and SRB which in fact it was. He asked why they had given incorrect information on the plan, or better, where did they get that incorrect information.

Mr. Mouzakis asked if that information applied to the drawing because the engineer did it and he had no idea. They must research through the City of Portsmouth. Mr. Parrott stated that he didn't know how it got there but the information presented to the Board was incorrect and he reiterated that the plan showed General Residence A as the district, which was not the case, the two zones having different setbacks, lot area requirements, and per unit requirements.

Chairman Witham stated that, while he understood Mr. Parrott's point, obviously this was an engineered site plan and it appeared to be a mistake. Although the surveyor put the wrong information on the plan, which affected the setbacks as drawn, the Planning Department had treated the request with the proper zoning. When Mr. Parrott stated that he also could see no survey mark on the plan, Chairman Witham pointed out that there was a very light surveyors stamp outline and Ms. Mouzakis offered the original for review. Mr. Parrott felt that was even worse if a registered surveyor quoted the wrong zone. Ms. Mouzakis asked if a variance would not still be required if the plan had been set up with the appropriate zone. Chairman Witham stated that if it were written correctly, it would only affect the dashed setback lines indicated on the plan and not change anything done by the Planning Department. Ms. Mouzakis stated that all they could present was that

the building was there and there would be no external changes. Internally, there would be two units which could be utilized to benefit multiple people including the City of Portsmouth.

In response to questions from Mr. LeBlanc, Ms. Mouzakis stated that the two units existed but were not being utilized. If the request were granted, the units would be ready. She stated that the building was constructed in approximately 1890.

Ms. Eaton asked Mr. Feldman if, with the property line showing two separate properties, if they could consider the parking as shown or would they have to join lots. Mr. Feldman responded that, although they were not joined, he believe they were taxed by assessing as one lot. He was not sure why the dashed line had been put on the plan. When Ms. Eaton asked if it affected parking, he stated, “no.” Mr. LeBlanc added that he believed for tax purposes two lots owned by one person were considered one. Ms. Eaton asked if Mr. Feldman had looked at the parking layout for the parking size as it didn’t seem adequate and he responded that he had not as all the spaces were existing. Chairman Witham added that only the new proposed parking spots had to meet the standards. Mr. Jousse commented that there appeared to be ample room on this piece of property to put one more parking space and Chairman Witham stated he believed they would be able to work it out with the Planning Department.

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 Witham noted again that any favorable motion could have the stipulation that the applicant meet the parking criteria and work it out with the Planning Department. He felt that, even though there had been a labeling error on the submitted plan, he felt the Board had the information necessary to move forward with the petition.

Mr. Durbin made a motion to grant the petition as presented and advertised, which was seconded by Mr. Jousse. Mr. LeBlanc noted that Mr. Durbin was not sitting on this petition and Mr. Durbin stated he had not realized that. Mr. Jousse then made a motion to grant the petition as presented and advertised, which was seconded by Mr. Grasso for discussion

Mr. Jousse stated that the granting of this variance would not be contrary to the public interest as it was allowing the applicant to use what he had already. Ten units were in this building when the applicant purchased the property; two of them had to be closed some time later and he now wished to reopen those two units. He believed that the strict observance of the Ordinance would hinder the proper use of the property and that granting this variance would right what he thought was a wrong and allow full use of the piece of property. Mr. Jousse stated that nothing has been presented as to the value of the surrounding properties. Although this looked like a large request, the nearest piece of property was some distance away and there was some distance between the structures in that particular part of the city. The special condition was that the apartments were there and the applicant would like to be able to use them. As far as the parking was concerned, there was ample

room to add a parking space and meet the parking requirement. He believed the applicant should get with the planning department and determine exactly where to locate this parking space.

When Chairman Witham asked if he would like to phrase that as a stipulation, Mr. Jousse stated that he would like to add a stipulation that the applicant get together with the Planning Department to determine the exact location of the one parking space that was required. There was ample room on the property for that parking space and it would alleviate the need for a variance. Mr. Grasso agreed to the stipulation.

Mr. Grasso stated that he had seconded for discussion and would not be supporting the motion. These two units in question were apparently illegally added previously and their own Board several decades ago had denied their use. He thought that the spirit of the Ordinance in this Single Residence B zone, equivalent to Elwyn Park or other residential areas, wouldn't allow such a building. He stated that in going farther away from conformity, the spirit of the ordinance was not being observed so he would not support the motion to grant the use of these two additional units.

Ms. Eaton stated that she agreed with Mr. Grasso. It looked to her from the history that they were built right after they were denied and the City went out quite a bit later and found them. She stated that this would be an expansion of a nonconforming use in a single residence (zone) where multiple units weren't even allowed. She felt it was unfortunate that it had been quite a while but they should hold up what the Board decided then.

Mr. Parrott stated that he agreed with the tenor of the last two comments. This area was zoned Single Residence B, which meant that the lot area had to be in compliance. One unit was allowed per 15,000 s.f. This lot was 30,000 s.f. so, at best, it could legally support two units and there were already eight on it so it was way over. They were proposing to increase the nonconformance by a big step by adding two more units. It seemed illogical to him and was a step backward. The Board was not supposed to be in the business of encouraging nonconformance when it was perfectly obvious that it had apparently been run successfully by this owner since 2003 as it was. Now the request was to make it even more nonconforming. It struck him as contrary to what they were supposed to do which was to help property owners get closer to compliance. Mr. Parrott noted that even if the property were in the zone mistakenly marked on the plan, it still wouldn't be close. They should, for those reasons, leave well enough alone and not grant this variance.

Mr. Jousse noted that there was a multi-family property to the left at 1094 (Woodbury) and he believed 1156 was also a multi-family so this was not an island in the middle of the neighborhood. It was surrounded by multi-family properties.

Chairman Witham stated that he agreed with Mr. Jousse's point. The property to the left was the Frank Jones residence, which he believed had more than 12 units. There were some businesses and some multi-family's in there. The reality for him was that they get projects before the Board which say they are a movement toward affordable housing but you could tell by the structure that they were not affordable. This was affordable housing and the units were in place. He felt that by not allowing this to be small affordable units, they were essentially forcing the applicant's hand to combine units. He had permission for 8 units which could be enlarged so that you would still have the same number of people whether there were two more units or larger units and probably the same number of cars, the same amount of density. He was cognizant of the fact that the previous owner

didn't play by the rules but he didn't see any benefit to the public by leaving an attic with two empty spaces when they were in need of affordable housing. He didn't see any change in the essential character of the neighborhood or detriment to property values in the surrounding area. There was a good buffer so he thought it could work.

The motion to grant the petition as presented and advertised, with the stipulation that the applicant get together with the Planning Department to determine the exact location of the one parking space that was required and alleviate the need for that variance, failed to pass by a vote of 3 to 4. Ms. Eaton and Messrs. Grasso, LeBlanc and Parrott voted against the motion.

9) Case #12-9

Petitioner: Bradford D. Scott and Elizabeth B. Scott, Owners

Property: 94 Mendum Avenue Assessor Plan 149, Lot 55

Zoning district: General Residence A

Description: Construction of a new residential garage on the property at 94 Mendum Avenue

Requests: Variance from Section 10.521 to allow an accessory structure to be constructed with a building coverage of 36 % where 33% currently exists and 25% is the maximum coverage allowed.

Variance from Section 10.521 to allow a right sideyard of 3' where 10' is required.

Variance from Section 10.521 to allow a rearyard of 3' where 20' is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Brad Scott noted that this was their second submission to the Board regarding the existing two bay garage which sat on both 94 and 104 Mendum Avenue. They currently shared a two car garage with their neighbors and were trying to remove the portion on 94 Mendum Ave and deed a right of way back to 104 Mendum Avenue. They would construct a new garage so that there would be a single bay garage on each property with its own driveway. As they had submitted a proposal before, he would like to address Fisher v. Dover and how the application had changed since the last submission.

Chairman Witham asked him to proceed and advised that the Board would then act on whether to hear the application.

Mr. Scott stated that one of the changes was that they had previously proposed a 20' x 20' garage, which they changed to a 14' x 20' single bay. They also pushed it to the back of the property where before they were going to attach it to the house with a breezeway connector. They had reduced the size of the garage and reduced lot coverage. They had also lowered the eave height by 2'. Mr. LeBlanc thought that the garage was formerly going to be to the right of the house, which Mr. Scott stated was correct.

Chairman Witham stated that a motion would be entertained to invoke Fisher v. Dover and not hear the petition. Otherwise, they would allow the applicant to address his petition. With no motion from the Board to invoke Fisher v. Dover, he instructed the applicant to continue.

Mr. Scott stated that he had provided a lot coverage summary in the packet indicating that they were adding 3% or so to the existing lot coverage. The exhibits would also show the existing garage location on 94 and 204 Mendum Avenue with the lot line running through and provide a sense of how much would be removed. The proposed plan would show the existing garage reduced in size and pushed to the side and how their added garage would sit on the lot at 94 Mendum Avenue. The photographs would show how tight it was to get in and out of the garage as well as a rear shot of the existing garage and where they would add a new one. Mr. Grasso asked if he was finishing the work on the 104 Mendum Avenue side by putting up a new wall and Mr. Scott stated that was correct. Ms. Debbie Needleman stated that she lived at 104 Mendum Avenue and they were in complete support of his petition. Mr. Feldman noted that there had also been another letter of support put in front of the Board that evening. Chairman Witham stated, for the record, that the letter of support was from Sarah Cullen who lived at 76 Mendum Avenue, the abutting property on the other side.

**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. LeBlanc.

Mr. Grasso stated that the applicant was in front of them to try and resolve a situation with a shared garage. He believed he had voted against the original proposal as it was attached to the house. This proposal was better, with the garage set back and in line with a driveway.

Addressing the criteria, Mr. Grasso stated that it would be in the public interest to alleviate a difficult situation. The spirit of the Ordinance would be observed by a clean break leaving a one car garage at 104 Mendum Avenue and a new, set back garage, at 94 Mendum Avenue. He felt that substantial justice would be done as having a garage was a reasonable use and the proposed location in the back corner in line with others on the street was the proper place. No one had testified that the value of surrounding properties would be diminished. The unnecessary hardship was that the existing garage was one structure on two separate lots. If this request were not granted, trying to sell either one of these properties in the future would be difficult.

Mr. LeBlanc added that he thought that where the garage would be sited would bring it into conformity with others in the neighborhood. Although it was 3' from the property line, it mirrored what had been in place for a long time.

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

10) Case # 12-10

Petitioner: Roger V. and Susan M. Odoardi, Owners

Property: 179 Lincoln Avenue Assessor Plan 113, Lot 8-1

Zoning district: General Residence A

Description: Expansion of a nonconforming residential structure with a two story addition to the rear of the existing home.

Request: Variance from Section 10.321 to allow a nonconforming residential building to be expanded, enlarged and structurally altered.

Variance from Section 10.521 to allow for a building coverage of 28% where 23% currently exists and 25% is the maximum coverage allowed.

Variance from Section 10.521 to allow a right sideyard of 8' where 10' is required.

Variance from Section 10.521 to allow a left sideyard of 8' where 10' is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Roger Odoardi stated that they were requesting permission to build a two story addition to the back of their house which would result in 28% coverage, 3% over what was allowed. The setbacks would be 8' on the right and left, where 10' was allowed. He stated that the design had been carefully thought out and planned for the least impact on abutters. They wanted to protect the integrity of the surrounding homes and the neighborhood while adding the convenience of more usable floor space in this permanent residence for his family.

Mr. Grasso stated that he had a question for staff. He had driven by the property and read the history which indicated that the property had been granted a one story garage. What was on site and in the presented pictures appeared to be taller and larger than a one story garage. He was wondering if there was a plan in the 1995 variance file. While Mr. Feldman was checking, Mr. Grasso added that even in the applicant's proposal, he had stairs in the back and the second floor was shown as his rec room so it was at least one and a half stories. Mr. Feldman referred to the historical data staff had brought with them and passed down the design of the garage that was put in front of the Board in 1995. Mr. Witham commented that this was advertised as a one story garage but it looked like it had been built the way it was drawn. Mr. Witham stated that there was a time when garages appeared to grow but recently they had kept a closer eye on how a garage was described and what appeared in a picture. Mr. Grasso thanked Mr. Feldman for the clarification.

Ms. Eaton asked if the applicant had looked at configurations which would not have required a variance for lot coverage. Mr. Odoardi stated that they had and the issue was how the first floor would flow. This design and coverage allowed them to efficiently attach the garage which enhanced the value of the property. Any other way would require some sort of jog whereas it seemed more aesthetically pleasing to square it off with clean angles and that's what put them over on the lot coverage. In response to questions from Mr. LeBlanc, Mr. Odoardi stated that the two story addition was not going to encroach on the size of the garage and it was going to end with the sight line of the house. The second floor would just drop. It only touched on the first floor and then the garage pitch of the roof went away.

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 Witham noted that the variance for the right side yard setback had nothing to do with the new construction except in the sense that the existing garage which was 8’ away now fell under the purview of the main house. There was no structure being built on that side that encroached 8’ but they had the 8’ on the other side and the lot coverage.

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

Mr. LeBlanc stated that this was an infill between the addition on the left and the garage. The lot was somewhat smaller than others in the area which spoke to the lot coverage. While they were going from 23% to 28% lot coverage, that was only 3% over what was allowed and the proposal was not going to affect light and air or the visual amenities of any of the surrounding properties. Mr. LeBlanc stated that the entire construction would be behind the house so that no public interest would be involved. The spirit of the Ordinance was to eliminate nonconformity and not increase problems, but he felt this was a small amount being requested. Justice would be served as the property was a bit small and this was a fairly minor addition.

Mr. Parrott agreed, noting that this was a small addition. In this neighborhood, where the addition would be placed would have no adverse effect while making the home more useful and livable.

Mr. Witham stated that he had tried to look at a way where a variance would not be needed but, with the intent of connecting the garage to the house, the plan was reasonable in a lot of ways that other, more expensive alternatives, would not be.

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

 Chairman Witham and Mr. Durbin stepped down for the following petition. Vice-Chairman Parrott assumed the role of Chairman. He advised that there would be six Board members sitting.

11) Case #12-11

Petitioners: C&P Gallagher Properties, Inc.

Property: 801 Islington Street

Assessor Plan 165, Lot 8

Zoning district: Business

Description: To allow a new business establishment in a multi-tenant building with 91 parking spaces where 98 are required.

Request: Variance from Section 10.1112.30 Table of Off-Street Parking Requirements to allow 91 parking spaces in a shopping center where 98 are required.

SPEAKING IN FAVOR OF THE PETITION

Attorney John Lyons stated that he was appearing on behalf of the applicant, with one of the owners of the family business present that evening along with other family members, officers and the property manager. He stated that when the property was purchased in 1989, 135 parking spaces were required. 86 spaces were shown on a plan previously submitted to the Board and granted. They were now asking for 91 parking spaces where 98 were required. He described the property as being meticulously maintained with a good tenant mix, many of whom had been there from the beginning. He stated that parking had always been more than sufficient through several changes in tenants. A restaurant currently operating two other locations wished to open an afternoon and evening facility which would fit in wonderfully with the tenant base and create no parking issue.

Addressing the criteria, Attorney Lyons stated that the request would not be contrary to the public interest as this would fit in well with the efforts to develop the Islington Street corridor as well as generate additional employment. The spirit of the Ordinance would be observed as all of the requirements were met with the exception of the parking. Substantial justice would be done as a business would move in to replace one moving out. It made no sense to have the space vacant. He stated that the value of surrounding properties would not be diminished. They had spoken to the neighbors who were all supportive. They should note that in the back left section of the property there was an easement with the property to the south which had worked well since 1989. This provided space for additional spots but they had only counted 6 into the 91 parking spaces. Attorney Lyons maintained that literal enforcement of the Ordinance would result in unnecessary hardship. Given the size and shape of the lot with its historic buildings, a hardship existed and the variance should be granted. He stated that there was no fair and substantial relationship between the provisions of the Ordinance and their application to this property as the property had existed and been used since 1989 and had even received a much more significant variance for parking.

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

Mr. LeBlanc commented that he had been on the site several times and he had never seen it full of cars. There were always enough parking spaces. Addressing the criteria, he stated that the owners were being scrupulous about allowing businesses into the mall with different time frames for operation so that the lot would always have some open spaces. He felt that doing this was in the spirit of the Ordinance.

Mr. Grasso agreed, adding that they were not expanding any buildings. There was one business left in the front of the building and they had found another business to go in. They couldn't expand parking in the back because of the railroad and other businesses.

Mr. Jousse stated that the applicant usually has a good idea about the parking they needed for their business and he could support the motion.

The motion to grant the petition as presented and advertised was passed by a vote of 6 to 0.

Chairman Witham resumed the Chair and Mr. Durbin resumed his seat.

12) Case # 12-12

Petitioners: Heritage & Lafayette, LLC, Owner and Robert Lee, Lessee

Property: 2800 Lafayette Road Assessor Plan 285, Lot 2

Zoning district: Gateway

Description: To allow a third free standing sign in a shopping center where only two free standing signs are allowed.

- Requests: Variance from Section 10.1243 to allow a third free standing sign in a shopping center where two are allowed at the entrances to the property.
- Variance from Section 10.1251.30 to allow more than the permitted s.f. of freestanding signage allowed in shopping centers.
- Variance from Section 10.1251.10 to allow the applicant to exceed the previous aggregate allocated by variance.

SPEAKING IN FAVOR OF THE PETITION

Mr. Shannon Alther stated that he was representing the owners as the architect for the project which was renovating the former Wendy’s site. Mr. Alther stated that, although what they were proposing might fall under the Ordinance as a sign, they would like to refer to it as a sculpture, 10’ high and 5½’ wide. This would depict a lobster which, he maintained, had become an iconic symbol at the Beach Plum’s Hampton location. Mr. Alther noted that there were two existing pylon signs on the property which came up to 190 s.f. Based on the current zoning, they were allowed 175 s.f. for pylon signs, one at the primary entrance and one at the secondary. If they added this sculpture component, which was approximately 55 s.f., the total square footage on the property in terms of its allowable signage would still give them a surplus of about 250 s.f. He stated that there was a sign variance granted in 1986 and there had been an adjustment to the sign Ordinance this past year.

Addressing the criteria, Mr. Alther stated that he didn’t feel that the sculpture was contrary to the public interest. It was basically adding art and a sculptural element to the property. The spirit of the Ordinance would be observed as they were using the existing lot and putting in a new element, although it was a little different from what the Ordinance said. He stated that justice would be done if the variance were approved because of the ability to add this element that was an interesting and successful component to their business. The value of surrounding properties would not be diminished and might actually be increased by what they were doing. The unnecessary hardship was that basically this had become an icon and they felt it would be a great additive feature, not only to the Route One strip, the Gateway zone of Portsmouth, but also to the business.

Chairman Witham asked Mr. Feldman if a variance would still be required if this did not say Beach Plum on it and Mr. Feldman stated it would still be considered a sign under the Ordinance. Mr.

Jousse asked about the size of the similar sign in Hampton and Mr. Alther stated that location had the same lobster and people took pictures in front of it. It was 5½' to 6' high but they wanted this to be a little larger. Mr. Jousse noted that this would be about 40% larger. Mr. Alther agreed it was an increase but it was proportionate when compared to the buildings to which it was attached. They wanted more of a visual, artistic component, whether you were at the restaurant or driving by. Mr. Jousse commented that you could put an empty bucket at that location and it would be seen. Mr. Alther stated that they were trying to enhance the architecture at the property with what they were doing with the building, this sculpture, and the rest of the signage on the building.

Mr. Grasso asked how else they were identifying the business and Mr. Alther stated that they would reface the existing pylon sign. It was approximately 67 s.f. and they would maintain that same square footage. They also had submitted and received approval from the City for roof signage. Mr. Grasso asked if the roof sign would sit over the little porch area or was it on the main roof. Mr. Alther stated it would be on the main roof and, at Mr. Grasso's request, he passed around a photograph of the sign. Mr. Parrott stated that if this was in scale it was a large roof sign which, with the pylon sign, provided plenty of wording. Their name was known. Why put this out when the name was well covered by existing and approved signs? Mr. Alther stated that they wanted to bring something in at ground level which would be something of a draw. He stated that this was a difficult corner because of the traffic. Mr. Parrott responded that he would think this was a great site and a far from difficult corner. He reiterated that, with a well known and respected name and the signage they had, he didn't understand this purpose of this thing with small lettering. Mr. Alther stated that the lettering was something that the owner wanted. They could discuss it as a stipulation but he would have to ask the owner. Mr. Parrott stated that his main point was that they were trying to make appropriately sized signs which was the purpose of the rework of the Ordinance.

Mr. Jousse asked Mr. Feldman how much signage the business was allowed in total and Mr. Feldman responded that as the granting of the previous variance to the plaza, the owner divvied it up by business and Mr. Alther might have that right at his fingertips. Mr. Alther stated that it would be basically 250 s.f. for the pylon, roof and this one if approved. Mr. Jousse asked if that was their allocation and he stated, "yes."

Mr. Feldman stated that the way the Ordinance was structured relevant to pylon signs at the property was that it was allowed a pylon sign at the main entrance and one at the secondary entrance of no more than 75 s.f. In this case, the second sign they had allowed this plaza to continue to have as a lawfully nonconforming sign was a second pylon which was on Lafayette Road in front of this building because it was attributed to the previous use at the time that it was granted a permit. Then this sign, which Shannon was calling a sculpture, came along and the way they had to allocate square footage, because it was a free-standing structure, was to look at it as a 3-D structure not a two-sided sign. They had to calculate how much would fit within a 3-D cube. As a three-dimensional structure, the square footage went up. He didn't want to confuse this unnecessarily and there was also a table in their memo which showed what was allowed for the plaza for free-standing and aggregate signage under the variance from 1986, allowed by the current Ordinance, and proposed by the applicant.

Mr. Jousse stated that, with the allocation of 250 s.f., he was trying to come up with what was left over for this sign after what was utilized for the pylons and roof. Mr. Alther stated that basically the existing pylon at the main entrance and the second grandfathered in at the front of this property

totaled 190 s.f. The current Ordinance allowed 100 s.f. and up to 75 s.f. for a secondary sign so they were allowed 175 s.f. When Mr. Jousse asked about the roof sign, Mr. Feldman responded that the roof sign was allowed with just a sign permit and was not part of the variance request. Mr. Jousse commented it was still footage with which Mr. Feldman concurred but added that it was within the aggregate allowed. Ms. Eaton felt that this was similar to a recent court case and asked if they were allowed to grant a variance for a sign that was not allowed in the district. Mr. Feldman responded that free-standing signs were allowed in the district. This became an aggregate, square footage issue, not the type of sign that was allowed.

Mr. Jousse stated that, by his calculation from the 256 (sic) s.f. they had used up 190 s.f. so they had 66 s.f. of signage to use up. Mr. Alther stated, "correct." Mr. Jousse asked how many square feet the proposal would use up. Mr. Alther stated that it was a little difficult because of the volume but he had gone on the assumption that this sculpture could fit within a cube that was 5½' wide, 10' high and 1' deep so it was 55 s.f. or 55 cubic feet. Mr. Feldman stated that he believed the cubic calculation was 107 cubic feet. Mr. LeMay stated, to be clear then, the only issue was the fact that it was a third sign and Mr. Feldman stated, "correct." When Mr. Jousse asked if then the square footage didn't come into it, Mr. Feldman stated it did but it was a matter of interpretation because it was a 3-D sign. Mr. LeMay asked if he was saying that with multiple sides it counted as a sign and Mr. Parrott responded, "Sure. It had depth to it." Mr. LeMay asked if it were up against the building and Mr. Feldman stated it was free-standing. When Mr. LeMay stated so then you could get two sides, Mr. Parrott stated you really had four sides.

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

Ms. Eaton stated that this was deemed a sign by the Zoning Ordinance and so advertised. The business was only allowed two free-standing signs and this would be the third which she was hesitant to grant when only two were allowed. She felt that it simply did not meet the requirements for observing the spirit of the Ordinance or the hardship criteria. It failed two of the criteria where only one had to fail in order not to grant the variance. Mr. LeBlanc agreed.

Mr. Grasso stated that he would support the motion, agreeing that the proposed sign didn't meet at least two of the criteria. He believed that the proposed restaurant could easily be identified from the street.

Mr. Witham stated that, although a part of him wanted to support this as a sculpture as he thought it was a creative fit for the property, his personal opinion didn't matter and he was there to uphold the Ordinance which said it was a sign. As a sign, he didn't feel it met 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.

Messrs. Grasso and Durbin stepped down for this petition.

13) Case # 12-13

Petitioners: Portsmouth Ford, Lincoln Mercury, Inc., Owner

Property: 450 Spaulding Turnpike Assessor Plan 238, Lot 1A

Zoning district: General Business

Description: Removal of a one-story building used for automobile sales and leasing and construction of a new two-story building with a similar footprint to be used for automobile sales and leasing.

Requests: Administrative Appeal from Section 10.310 for a Board ruling on the Interpretation of a nonconforming use vs. a nonconforming lot.

Variance from Section 10.234 from a determination of the code official that the expansion of the existing auto dealership use requires a variance.

Variance from Section 10.311 to establish a new building on a lot without the required minimum lot area.

Variance from Section 10.324 to allow a nonconforming building to be added to or enlarged.

Variance from Section 10.331 to allow the expansion of a lawfully nonconforming use.

Variance from Section 10.581 to allow sales, rental, leasing, distribution, and repair of vehicles, recreational vehicles, manufactured housing, marine craft, and related equipment on a lot with less than 2 acres.

Variance from Section 10.843.20 to allow the outdoor storage and outdoor display of vehicles closer than 40' from the street right-of-way.

SPEAKING IN FAVOR OF THE PETITION

As he distributed some photographs, Attorney Peter Loughlin stated that he was there with Mr. John Sawyer, the owner of Portsmouth Lincoln Mercury. He stated that they had filed an Administrative Appeal to protect their rights but they asked that the Board consider the two variances suggested by the Planning Department and, if those were granted, they would withdraw their request for the appeal. He stated that there seemed to be some irreconcilable differences between himself and the planning staff on this matter. He didn't think it was good public policy to say to a landowner that, after using a property for 40 years for a particular use, in this case automotive use, if you wanted to take the building down and put up a new building, you had to get a variance to do on that lot what had been done for 40 years.

Attorney Loughlin stated that Mr. Sawyer had purchased the property in January after renting there for many years. In the same month, the Ordinance also changed and said that the lot now needed to be 2 acres instead of 1. He would not be able to tear the building down and put up another one and a variance would be needed for just the use. He stated that he and the staff also disagreed about nonconforming use versus nonconforming lot but would set that aside. Attorney Loughlin stated that they were not interested in suing the City. They were not interested in cutting down any trees. They were not interested in filling any wetlands or in putting a lighted wall on the front that would

shine brightness into the eyes of the workers in the plant across the street. They were just interested in two variances, one to allow expansion of a nonconforming use and the second to allow automobile sales on a lot that was less than 2 acres.

Addressing the criteria, Attorney Loughlin stated that granting the variance would not be contrary to the public interest. It would allow a reasonable use of the property to continue and the investment of three quarters of a million dollars in the property. He stated that he was not sure what the spirit of the Ordinance was with a two acre requirement for automobile sales but whatever it was it distinguished that use from other uses and he felt they were consistent with the spirit given the way that the property had been used. Referring to the photograph he had submitted, he noted that everyone had driven by the property and, as long as he could remember, it had been used for this purpose. In the justice test, there was no benefit to the public in not allowing this use to continue while it would represent a detriment to the landowner. He stated that an attractive new building would increase the value of surrounding properties and improve the aesthetics of the area. Attorney Loughlin stated that the special conditions of the property were its consistent use over 40 years in a business area. This was not a case of infringing on a residential neighborhood.

Attorney Loughlin stated that he wanted to clarify two points. They had submitted plans based on different assumptions. The parking configuration was grandfathered from many years of use and their intent was to keep it as it was. The second thing was that they had asked to build a building with similar footprint. The Planning Director had suggested that maybe there would be a benefit at Site Review to move the building a little bit one way or the other. There could be some leeway and still meet the dimensional requirements. The location wasn't fixed, only the size of the footprint so they may want to move it around. In summary, Attorney Loughlin stated that all they were there for was approval for two variances so that the existing building, built in the 1960's and was "seasoned" and could be replaced in the general location they had shown.

Mr. Jousse stated that partially answered his questions. He asked if it were structurally feasible to renovate the building and put up a second floor. Attorney Loughlin stated that he had been there recently and he didn't see a lot worth salvaging. Mr. John Sawyer identified himself as the owner of Portsmouth Ford and stated that the building was falling apart at the seams and the base wouldn't withstand a second floor. The best way was to knock it down and rebuild. Mr. LeMay stated that he had read all the application information as to whether this was a nonconforming use or a nonconforming lot. Since the use was permitted in the area, he had a hard time seeing it as a nonconforming use, especially when you read the definitions of what these nonconforming things were and how you got there. However, if the applicant didn't care and no detriment was seen to proceeding one way or the other, he felt in the interest of time they didn't have to beat it to death. It seemed to him that the only problem was that the lot got a little bit smaller. He was sensitive to the fact that there were grandfathered rights to run that business and, while it wasn't unlimited, he did feel that there were rights that went along with that for a natural evolution of a business.

Attorney Loughlin stated that, if they got the variance relief and were allowed to knock the building down and put another one up in more or less that location, they were good with that.

Mr. Jousse mentioned the road that led out of the dealership to Brady Drive and asked who owned it. A discussion followed about the past history and characteristics of the right-of-way, the PSNH easement and whether there were vehicles parked there. Participating in the discussion were

Messrs. Feldman, Jousse, LeBlanc, LeMay, and Witham as well as Attorney Loughlin and Mr. Sawyer. It was decided that if there were parking on the easement, that could be worked out but the variance request before them was not for that issue. Mr. Feldman noted that, if the variance were granted, the applicant would still have to go to the Planning Board for site review and all of those issues would be addressed

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 Witham stated that the Board was looking at two variances, to allow the expansion of a lawfully nonconforming use and to allow sales, rental, leasing, distribution, and repair of vehicles, recreational vehicles, manufactured housing, marine craft, and related equipment on a lot with less than 2 acres.

Mr. Jousse made a motion to grant the two variances as presented and advertised, which was seconded by Mr. Parrott.

Mr. Jousse stated that the this piece of property had been used in the automotive business in one form or another for decades and this business had been there for many years. This was really the continuation of this particular use on this particular property. He stated that granting the variances would not be contrary to the public interest as it would be in the public interest to see a viable business continue in the same location. The spirit of the Ordinance would be observed as the property was purchased just as the Ordinance was changing. He stated that justice would be served for all by allowing the applicant to continue doing business at this location. Nothing had been presented as to the value of surrounding properties, one of which was an automotive business and one was a large box store. To the south was the Spaulding Turnpike and to the north power lines. Putting a two story building on this property would not negatively affect values. Mr. Jousse stated that the special condition was that the Ordinance was changed just as the business evolved.

Mr. Parrott stated that this was simply allowing the same function to continue in the same place as had been done for a long time. Nothing would change in any area that would raise any public interest issues. The property was hemmed in all around and the replacement of a building in poor condition with a better quality structure would be a service to all.

Mr. Witham stated that the variances were required because the property became nonconforming solely to a change in zoning to a two acre requirement while before the lot size was 50% more than what was required. To be respectful of the reasons for the two acre requirement, the lot was large and there was an adequate buffer for the surrounding area. There was a naturally landscaped area with a PSNH easement and Home Depot on one side, the turnpike in front and some other dealers to the side. He felt it would be appropriate to allow this property to pursue this expansion and he didn't see that it was against the spirit or the intent of the Ordinance, even as changed this past year.

The motion to grant the two variances was passed by a unanimous vote of 6 to 0.

Attorney Loughlin stated that they wanted to officially withdraw their request for an Administrative Appeal and the remaining three variances.

III. OTHER BUSINESS

There was no business to present.

IV. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 9:50 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk