

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

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

**July 19, 2011 for Old Business and Petitions
1) through 7), To Be Reconvened
July 26, 2011 for Petitions 8) through 15)**

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

EXCUSED: N/A

Messrs. Durbin and Grasso stepped down for this request. Ms. Rousseau assumed a voting seat.

I. OLD BUSINESS

A) Request for Rehearing for property located at 261 Myrtle Avenue.

Chairman Witham referred to the request for rehearing submitted by Attorney Pelech in which a note was made of new evidence regarding the survey which the Board members had not seen. He then opened the meeting to a public hearing. With no one rising to speak, the public hearing was closed.

DECISION OF THE BOARD

Mr. Jousse made a motion to deny the request, which was seconded by Ms. Eaton.

Mr. Jousse stated that there were only two reasons to grant a rehearing. One was that new evidence had been presented that was not available at the time of the original meeting. He stated that, while a new survey might have been done, it was no fault of the Board's if the applicant had not chosen to do so earlier. Noting that the second reason would be that the Board made an error on the application of the law, he stated that did not apply.

Ms. Eaton stated that she read Attorney Pelech's memo and she did not agree with his assessment. She further stated that she would never have agreed to an 80' variance when 100' is required. Finally, she stated that the survey was a question but was not a basis for the denial. She, consequently, supported the denial.

Ms. Rousseau stated that no evidence had been submitted of a material change and therefore there was no basis to grant a rehearing.

Chairman Witham also supported the motion to deny. He stated that Attorney Pelech made some points in his letter that he did not agree with and that he was expecting a survey to show 98' rather than 80'.

The motion to deny the rehearing was passed by a unanimous vote of 6 to 0.

Mr. Durbin resumed his seat. Mr. Grasso remained recused and Ms. Rousseau remained in a voting capacity.

B) Case # 6-10

Petitioner: Ricci Supply Company, Inc.

Property: 105 Bartlett Street

Assessor Plan 164, Lot 1

Zoning district: Office Research

Description: To demolish portions of existing building and replace with new building on same footprint.

Requests: Variance from Section 10.321 to allow a lawful nonconforming structure to be reconstructed in a district where it does not meet the dimensional requirements. Variance from Section 10.440, Use #8.31, Use #13.11 and Use #14.10 to allow non-marine-related retail and wholesale sales and light industry in a district where such uses are not allowed.

Variance from Section 10.532.10 to allow a 3'± front yard setback where 70' is required.

Variance from Section 10.532.10 to allow a 4'± left side yard setback where 50' is required.

Variance from Section 10.532.10 to allow a right side yard setback of 13'± where 50' is required.

Variance from Section 10.531 to allow building coverage of 37.6%± where 30% is the maximum allowed.

(This petition was postponed from the June 28, 2011 meeting.)

SPEAKING IN FAVOR OF THE PETITION

Mr. Ed Hayes introduced himself as the President of Ricci Supply Company and stated that Ricci was the legal owner of the property. He also introduced Mr. Zeke Morrell as a member of the Ricci staff.

Mr. Hayes commented that it seemed like a lot being asked for in the variances requested but asked the Board to keep in mind that they were staying on the same footprint. Mr. Hayes provided a brief history of the property, noting that the owners had bought the building in 1984. He stated that the main request for the variance was that the "bones" of the building were not good. The building was constructed with concrete blocks that were porous and broke easily. He stated that they could get a much better building if they tore it down and rebuilt in the same footprint. Mr.

Hayes stated that the property was unusual because on one side of the property they were bordered by private businesses and on the other side by the Mill Pond. He noted that among the reasons they needed a new building was that they needed a second floor to store old records as well as a structure that could accommodate the dimensions of their manufacturers' displays. Mr. Hayes stated that, with better displays, they could better compete in the marketplace and keep jobs in Portsmouth. He added that a new building would be up to code, aesthetically pleasant and good for the neighborhood. In the public interest, he noted that the current building did not have sprinklers and this would. Regarding denial of the variances creating unnecessary hardship, Mr. Hayes stated that it would put them out of business. He stated that, in the spirit of the Ordinance, they would be maintaining the architectural integrity of the property and would, if anything, increase the value of surrounding properties. He advised that he had letters of support from several abutters, which he submitted to the Board.

In response to questions from Mr. Jousse, Mr. Hayes stated that with the exception of the warehouse at the back the entire building will be razed. The plan was to add trusses to the roof of the warehouse. As far as using the existing foundation, he deferred the question to Mr. Morrell.

Mr. Morrell commented that with the exception of the last 100' where they would be putting the roof trusses, a new foundation would be put under the entire footprint. He further commented that there were several unknowns, one of them being the condition of the existing footings. He stated that there were several different elevations and inconsistencies throughout the building and that it would be wise to tear everything down and start new. Mr. Jousse commented that he hoped they will be using all the free energy available, such as their windmill and possibly geo thermal energy. Mr. Morrell stated that those options had been discussed.

In response to a question from Mr. LeMay, Mr. Hayes confirmed that the variations requested were referring to the existing conditions of the property and they were not requesting an increase in the size. Mr. Parrott asked if there was currently a full basement or if there were plans to build a basement. Mr. Hayes confirmed that there were no plans to build a basement.

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

Ms. Rousseau commented that Ricci Supply Company was an excellent member of the small business community in Portsmouth and one way the Board could help small businesses was to look at the zoning regulations and give them some relief so that they could be successful in the community. She noted that the applicant had represented that without the variances, he would probably have to close his business. Ms. Rousseau further commented that this property should be grandfathered. She stated that Ricci Supply was in the business of building structures and had every motivation to do a great job to represent their business to their customers.

Addressing the criteria, Ms. Rousseau stated that the variance would not be contrary to the public interest. The essential character of the neighborhood would not be changed nor would it affect the public health, safety, or welfare or injure the public rights of the community. She stated that the owner had been in business for some time and all they were doing was improving the structure and making it more stable, which would not change the character in any way, shape or form. She stated that substantial justice would be done as the applicant would benefit without harming the public in any way. Substantial justice is being done as the good to the applicant does not outweigh the benefit to the public in any way. Ms. Rousseau stated that they had seen no evidence that granting the variance would cause the surrounding property values to be diminished in any way. She noted that the neighbors supported the application. She stated that denying the variances would create a hardship to the business owner as they were not asking for anything extreme and she viewed this as a grandfathered structure.

Mr. Parrott added that this was a long established business and they were not asking for a change in the use of the property. With regard to the dimensional variances, he referred to Plans E1 and P1 and noted that, given the long, narrow shape of the lot and the present setbacks, there was virtually no place to build. Therefore, a hardship existed. Finally, Mr. Parrott stated that they were not asking to encroach any further into the setbacks.

Chairman Witham stated that he supported the motion. One of the bigger concerns, he felt, was the impact on North Mill Pond. They had a very active watch dog group and no one was here to speak against it so he assumed they approved the plan. He added that this project had many hurdles in front of it, but the final product would be better to the environment. He stated that, if you looked at the actual buildable area on the lot with the requirements met, it was very small and highly restrictive.

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

Mr. Grasso resumed his seat and Mr. Jousse stepped down. Ms. Rousseau remained in a voting capacity.

C) Case # 6-11

Petitioners: Stephen M. & Kathleen M. Brown

Property: 14 Alder Way

Assessor Plan 142, Lot 18

Zoning district: General Residence A

Description: To allow a 1½ story garage to remain within the front yard setback.

Request: Equitable Waiver as allowed in RSA 674:33-a to allow a previously constructed 1½ story garage with a 0.7'± front yard setback where 15' is required.

(This petition was tabled to this meeting at the June 28, 2011 meeting.)

Mr. Parrott made a motion to remove this petition from the table, which was seconded by Mr. Grasso. The motion was passed by a unanimous voice vote.

Chairman Witham commented that this petition was tabled last month pending more information from the Planning Department regarding evidence of a building permit. He stated that the Planning Director provided the Board with a memo as well as a copy of the site plan that was submitted at the time the building permit application was submitted. Chairman Witham commented that the Planning Director went through a brief history of the property and, in summary, stated that, “The Record does not indicate any evidence of ‘ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation or bad faith’ (RSA 674:33-a)”. Chairman Witham noted that they had received the information requested from the Planning Department and he offered the applicant the opportunity to speak to again speak to the petition.

SPEAKING IN FAVOR OF THE PETITION

Mr. Stephen Brown introduced himself as the owner of the property, along with his wife Kathy. He stated that there were some people present that were not at the last meeting and asked if he should go through the petition. Chairman Witham stated that since it was tabled from a previous meeting, he could just share new information with the Board.

Mr. Brown stated that he had gone to the Planning Department to make sure the building permit had been done. He reiterated that the original meeting was with Mr. Rick Taintor, Mr. Bob Sullivan, Mr. Dave DesFosses, Mr. Rick Hopley and Mr. Roger Clum. Mr. Brown further stated that he had met with Mr. Taintor and essentially recapped what occurred in the original meeting. Mr. Brown indicated that it was his understanding that Mr. Taintor would submit a memo to the Board summarizing the processes followed.

Chairman Witham stated that the crux of the issue was that the previous owner measured from a fence that appeared to be the property line, which was incorrectly assumed. Ms. Rousseau referred to the memo from Mr. Taintor and stated that they were looking at an Ambit Engineering design that basically represented that he was within the property line and there was a Department of Public Works photo in color that stated an edge of the front property line was outside.

Chairman Witham indicated that the applicant was there for a 15’ setback and that everyone agreed the structure was completely on his property and he was there for an “after the fact” variance. Chairman Witham further clarified that the applicant would have needed a variance to build, but that it got built so now he needed an equitable waiver to give it the blessing.

Mr. Brown addressed the color overlay by stating that it was the “best guess” when they discovered the error. He stated that the Ambit Engineering was from when a full survey was done recently to figure out what was going on.

Mr. Grasso stated that the plan from August 17, 2006 that showed 109’ along Maplewood Avenue and 110’ abutting the neighbor, giving a 15’ separation between the garage and the alleged property line. He asked if the lot was smaller than 110’ on one side? Mr. Brown clarified that per the survey by Ambit Engineering, it was a little longer at 111’ along the side property line and a little shorter along the side by the exit. Chairman Witham commented that the plan dated August 2006 showed the property line at 86.7’. He said the property line was out of skew and not drawn to scale. He stated that the next page that appeared to be drawn more to scale.

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

Mr. Jousse, who was an abutter to this property and a member of the Board, asked for permission from the Board to make a statement. Ms. Rousseau encouraged him to make a statement. Mr. Jousse stated that prior to the structure going on the property, there was a fence that was real close to the pavement and it was assumed that the fence was on the property line. Since the building was going up close to his property, he kept a close eye on the progress and believed the fence was on the property. He reiterated that until last month, everyone believed the fence was on the property. As indicated in the memo from the Department, there was a 15' error that was never picked up on. Finally, Mr. Jousse stated that he believes everything was done in good faith.

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Chairman Witham stated that the request was for an Equitable Waiver and that the four criteria set out in statute and included in their packet were the standards that had to be met.

Mr. LeMay made a motion to grant the Equitable Waiver, which was seconded by Mr. Grasso.

Mr. LeMay felt that they had looked about everywhere possible for evidence of any sort of malice and it was not required that they trace the root cause of how the problem happened in order to be able to deal with an Equitable Waiver. He stated that what was required was that they looked at the conditions and reasonably ascertain that they had been met. Mr. LeMay stated that this was such a flagrant sort of thing that anybody intending to do this up front wouldn't stand a chance of getting it through, so it had to be out of sheer incompetence on somebody's part. Fortunately, they did not have to determine whom.

Mr. LeMay stated that the violation was not discovered by any owner, former owner, municipal official, etc until after a structure in violation had been substantially completed. He noted that the violation was just discovered recently and the house was constructed years ago. He stated that the second item of the criteria that had to be met was that the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation. He stated that the City records were complete, the inspections done and the City was involved every step of the way. Therefore, it didn't appear anybody was trying to hide anything or act in bad faith.

Mr. LeMay stated that the physical or dimensional violation did not constitute a public or private nuisance or diminish the value of other properties in the area. While this became a little subjective, he felt the issue was contained within the bounds of the property and he had heard no evidence that this was a public nuisance or that there were abutters aggrieved by it. If there had been, he stated, they probably wouldn't be discovering it years after the fact. Mr. LeMay stated that, due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction far outweighed any public benefit to be gained. He felt it would be inequitable to require the violation to be corrected which, in a practical sense in this case, would mean taking the garage off the building and he didn't see where there was

anybody who would benefit from that. Mr. LeMay believed the criteria were met and the waiver should be granted.

Mr. Grasso agreed with Mr. LeMay's comments supported the motion. He stated he was glad they did the due diligence and extra research to get most of the facts they needed to grant the Equitable Waiver.

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

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

II. PLANNING DEPARTMENT REPORTS

No reports were presented.

III. PUBLIC HEARINGS

- 1) Case # 7-1
Petitioner: Lawrence W. Tacy, Jr.
Property: 7 Clover Lane
Zoning district: Single Residence B
Description: Construct a 20'± x 13'± rear deck .
Requests: The variances and/or special exceptions required for the proposed work.
Assessor Plan 236, Lot 43

SPEAKING IN FAVOR OF THE PETITION

Mr. Lawrence Tacy introduced himself as the owner of 7 Clover Lane. He referred to the picture he had provided and stated that anything would look better than the existing deck. He stated that the lot is narrow and there was little he could do to enjoy the back yard. In response to questions from Chairman Witham, Mr. Tacy indicated that he had spoken to the neighbors, who had seen the plan and they were not opposed to having the deck expanded. He clarified that the deck would be 1 ½' off the ground. Chairman Witham commented that if it was 17' high, he could build a deck and cover the whole yard. Mr. Tacy responded that they would go with the request of 18".

Mr. Tacy referred again to the picture and stated that there was one step off the existing deck and that the land did not slope so the new deck would not go any higher than the existing deck. Chairman Witham commented that the plan showed 12 ½' x 20', but the request was for 13' x 20'. Mr. Tacy stated that the picture didn't show it well, but he wanted to go right up to the asphalt which was 12 ½'.

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. Jousse.

Mr. Grasso stated that the applicant was in front of them for approval to build a deck in the back of the house. He stated that he went by over the weekend and it was really hard to see from Clover although you could get a quick glimpse of it from Meadow Road. He felt granting the variance would not be contrary to the public interest as the only one who would know about it was probably the neighbor on Meadow Road who had no concerns with it. He stated that the spirit of the Ordinance would be observed as there was about 16' to 20' setback on the side so there would be plenty of light. With regard to the substantial justice test, Mr. Grasso stated that there would be no great benefit to the public in denying this application. He felt that the value of surrounding properties would not be diminished and the hardship was this narrow lot where the applicant was basically in-at filling part of the house at the left rear where there was a little jut out. He noted that the left side seemed to be in line with the rest of the house. Mr. Grasso concluded that to allow the applicant to replace a deck that was in disrepair with one up to code so they could enjoy the outside and backyard would be something the Board could approve.

Mr. Jousse stated that he had nothing to add.

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

2) Case # 7-2

Petitioner: Piscataqua Savings Bank

Property: 15 Pleasant Street

Assessor Plan 107, Lot 32

Zoning district: Central Business B

Description: Testing a generator up to 74 dBA located at the property line each Thursday between noon and 1:00 p.m.

Requests: The variances and/or special exceptions required for the proposed work.

SPEAKING IN FAVOR OF THE PETITION

Mr. Richard Johnson from Pinebrook Corporation introduced himself and Mr. Jay Gibson the President of the bank, Mr. Rick Wallace, Executive Vice President and Mr. Tony Cabral, Assistant Vice President. He stated that “they were here last year with a diesel generator thinking that was going to be the best for the bank because of the low pressure gas main in downtown Portsmouth that will not support a normal generator the size that the bank needs.” He commented that in working with the City Manager, the Public Works Department and the City Legal Department they became convinced that it would be in the bank’s best interest to convert to a natural gas generator. In order to do that, they needed to install an expensive pressure booster in the basement, which the bank agreed to do. In addition, he stated, “the Board did grant us approval to

a brick screen wall, which is on page 5 of the application, which has been permitted and built.”¹ He added that the height of the new wall was equal to the height of the proposed generator so it could only be seen from a higher roof level.

Mr. Johnson stated that Piscatagua Savings Bank only had this one bank, so the purpose of the generator was to allow them to provide full service to their customers whether there was a power outage in downtown Portsmouth or not. He stated that they had investigated other locations on the site, but determined that putting it on a rear roof next to the HVAC generator would be best. They hired a sound engineer and through meetings with the City were informed that the current noise ordinance was 60 dba daily downtown. The sound engineer monitored the sound downtown and reported that on Thursday and Friday the sound was in the 74 dba range. He further noted that on noon on Thursday, April 7, 2010 it showed a narrow spike and that reflected the effect their generator would add to the downtown sound. He maintained that sitting next to the generator on the roof was an HVAC condenser which made more noise than the proposed generator would make when it was running. He stated that when the test was performed, they had the HVAC condenser disconnected in order to get a true sound level of downtown Portsmouth without the HVAC running. He stated they were looking at a 20 minute test at noontime, which was consistently the noisiest time downtown. Mr. Johnson stated, in conclusion, that he believed they had done all they could to satisfy the Board.

In response to questions from Mr. Jousse, Mr. Johnson confirmed that the sound test was done at the same height as the exhaust. He further stated that a test was not done at ground level because the sound engineer said there would be less noise in the alley than there would be going vertical. He stated that the purpose in putting up the brick wall was to screen the alley and push the noise vertically as opposed to laterally in any direction. Mr. Johnson stated that the noise level at ground level would be the same as it was now.

¹ Clerk’s note to Minutes: The cited appearance and approvals were before the Historic District Commission, not the Board of Adjustment. The petition before the Board of Adjustment was withdrawn by the applicant without being heard.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Durbin stated that granting the variance would not be contrary to the public interest. It would be quite the opposite because if the bank had a power outage and had not been permitted to test, it would be to the public’s detriment to have the bank out of commission. He stated that to grant the variance would observe the spirit of the Ordinance, which was to protect the public from unnecessary noise. In this case, the generator would be tested during a limited time period and it was unlikely anyone would even notice it was being tested. In the justice balancing test, Mr.

Durbin stated that granting the variance would do substantial justice as the detriment to the owner of the bank if the petition were denied would clearly be greater than any detriment to the public or any individual if it were granted. He added that there was no evidence that granting the variance would diminish the value of the surrounding properties. Mr. Durbin stated that the special conditions resulting in a hardship were that the property was designed for the bank and the other buildings close to it were all commercial.

Mr. LeMay agreed, noting that the bank had done everything reasonable to help limit the sound. He stated that the bank had a state-of-the-art power generator that ran on gas. He felt that the Ordinance should consider what were reasonable levels as generators needed to be tested. Mr. LeMay stated he had no problem with the sound levels at that time in that area and supported the motion.

Chairman Witham stated that the ordinance did allow for emergency generators to run, and the ordinance was basically for the testing.

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

3) Case # 7-3

Petitioner: Todd C. & Caroline Merrill

Property: 238 Lincoln Avenue

Assessor Plan 130, Lot 5

Zoning district: General Residence A

Description: Replace existing rear entryway and deck with a right side 10'± x 8½'± 1-story mudroom addition and 4½' ± x 5'± covered landing/entryway.

Requests: The variances and/or special exceptions required for the proposed work.

SPEAKING IN FAVOR OF THE PETITION

Chairman Witham clarified with the Board that when looking at the site plan where the 12' dimension was noted it looked like a side yard set-back, but because it was a corner lot, there were essentially two rear yard setbacks.

A presenter (who did not identify himself but appeared to be the owner) noted that they had come before the Board in the fall and were granted the variances requested at that time. However, when the plans were completed, it ended up being a little larger than what was originally requested. What they had requested was 8' x 10' and what was finally drawn up was 8 ½' by 10' plus a 4 ½ x 6' covered landing. He stated that because of the shape of the lot, it required a rear setback variance. Further, the nonconforming structure would be altered by removing the rear deck that abutted the neighbor's driveway as it was basically on the neighbor's driveway. They would be removing that deck, closing off that entrance and moving the secondary entrance to the side of the house away from the neighbor's driveway. Referring to the submitted photographs, he stated that it would probably enhance both properties by giving both properties more privacy.

In response to questions from Chairman Witham, the presenter confirmed that the addition was 6" bigger and a landing was added. He further confirmed that the current space is conforming and

that the part that encroached already has an approved variance. Finally he confirmed that because it was being built as a whole, a new variance request was required.

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

Mr. Parrott commented that the net change since the Board last saw this was small. The lot was very narrow and where they were proposing to put the addition was centered on the lot and had the least impact on the neighbors. He stated that granting the variance would not be contrary to the public interest as the total additional building was small and there was damage to the public interest. He stated that granting the variance would be in the spirit of the Ordinance as it would makes the house more useful for the family. In the substantial justice balancing test, he felt that there was no overriding public interest that would be a basis for denial. He continued that granting the variance would not diminish the value of the surrounding properties. As explained, this was a change from a previous proposal and would pull the addition further off the property line, would not affecting the surrounding properties in a negative way. Mr. Parrott stated that the special conditions of the property resulting in unnecessary hardship were the placement of the house on the property close to the back and the applicants were proposing to build away from the property lines. Mr. Parrott concluded that the request was reasonable and would have little impact on the neighbors.

Mr. Grasso stated that the applicants were basically extending the width of their structure by 6". They had been previously approved to build the deck and he didn't see any reason to deny the additional 6".

Chairman Witham commented that in tight neighborhoods, corner lots get hit with a double whammy which significantly restricted the use of the lot.

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

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- 4) Case #7-4
Petitioner: Wayne & Marie Gagnon
Property: 171 Sagamore Avenue Assessor Plan 221, Lot 22
Zoning district: General Residence A
Description: Replace existing rear single story structure, deck and bulkhead with rear 2½ story, 12'± x 22'± addition and stairs.
Request: The variances and/or special exceptions required for the proposed work.

SPEAKING IN FAVOR OF THE PETITION

Chairman Witham asked if the proposed stairs were included in the calculation for the lot coverage. Mr. Brendan McNamara introduced himself as the designer of the project and confirmed that the proposed stairs were included, but only where they exceeded 18". He stated that the proposal was fairly straightforward. It was a substitution with no increase in lot coverage. The existing rear addition was to be removed and a new rear addition was to be built to stay within the existing lot coverage.

Mr. McNamara confirmed that the neighbors had been spoken to and they supported the application. He stated that this was part of a general rehabilitation of the house, which would be returning it to its original appearance, less the aluminum siding currently covering it. It would be totally renovated and the addition was a continuation of the geometric form of the existing house.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Ms. Eaton stated that this was a simple request to tear down certain pieces of the house and replace them with a similar sized footprint in a slightly different configuration. She stated that the only way to come into compliance would be to make the house smaller, which would not be substantial justice. Ms. Eaton stated that granting the variance would not be contrary to the public interest as the replacement in a slightly different configuration would not impact the air or light or otherwise impede the abutters' use of their property. She thought that the spirit of the Ordinance would be observed as they were reconstructing within the same confines as before. Noting that no evidence had been presented that granting the variance would diminish the values of the surrounding properties, Ms. Eaton stated that this improvement to the home would probably increase the values in the neighborhood. Regarding unnecessary hardship, she reiterated that they were simply asking to rebuild and slightly change an existing configuration that was already out of conformance with the lot coverage requirement.

Mr. Durbin commented that the lot was actually becoming more conforming and they were not significantly over the requirements. For those reasons and the reasons already cited, Mr. Durbin supported the motion.

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

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- 5) Case # 7-5
Petitioner: New England Glory, LLC

Property: 525 Maplewood Avenue

Assessor Plan 209, Lot 85

Zoning district: General Residence A

Description: Construct an L-shaped multi-bay garage with one section 70'± x 16'± and one section 86'± x 16'± .

Requests: The variances and/or special exceptions required for the proposed work.

SPEAKING IN FAVOR OF THE PETITION

Mr. Gary Dodds introduced himself as the owner of 525 Maplewood Avenue. Mr. Dodds stated that the size and scope of the actual garage would be 11 bays, located in the rear of the property as he indicated on the site plan. He provided a history of the building and stated that it was a gateway to the City of Portsmouth. He added that the property had a lot of architectural and historical significance to the City and was eligible for the historic registry. He further stated that what he was trying to do on this property was emulate what was at the Rundlett May House as shown in photograph 3.

Mr. Dodds referred to Diagram 2 which showed the location of the 70' and 80' arms. He stated that the two lots closest to the property were lot 64 and lot 63. He noted that, on lot 64, they were 7' from the property line with their garage and he was proposing to be 10'. He further stated that if there were any additional pavement that stuck out beyond that he would remove it to ensure there was a buffer so that water could drain down through. Mr. Dodds commented that lot 63 had a pool and a garage. He reviewed his exhibits and pointed out to the Board where the structures were located on the displayed plan.

Addressing the criteria, Mr. Dodds stated that granting the variance would not be contrary to the public interest. He stated that the abutters were within the setbacks and the proposed garages were isolated and hidden in the corner. He added that the abutter with the pool liked the idea of a better buffer as it isolated them. He stated that the spirit and intent of the Ordinance would be observed because the space between the properties was similar and as it was and, with its "L" shape, noise would be directed back towards the property, away from abutters. He stated that lighting was only proposed on the pavement side and there were no windows on the back side. Mr. Dodds maintained that the use of the property became less intensive as the structure was being converted from 5 units to 4. He stated that substantial justice would be done because it was in a non-intrusive, isolated area which left a good buffer for abutters to enjoy their properties without any noise, light or restrictions of any kind. He indicated on another photo where the green space would be created. Mr. Dodds maintained that building an 11-bay garage as shown was something that would have been done in the 1800's. Mr. Dodds indicated that the value of the properties would not be diminished but would probably be enhanced as they would be more enclosed. He stated that the garages and the areas around them would be maintained well and the green space would be better. He stated that the hardship was that the building was a 206 year old federalist building that was a northern tier gateway to the City of Portsmouth, noting that the tiered landscape made it difficult to do anything to the front side of the property. He stated that the use was a reasonable request in that he was trying to go with historical placement for the structure in what was currently wasted space, while creating additional green area.

Chairman Witham commented that he was very appreciative of the work that had been done on the property in bringing it back to its glory and noted the references to the Rundlett May structure as a model for what they wanted to do. He stated that he was concerned with the scale of the proposed

structure with regards to the variances for setbacks. He pointed out that the Rundlett May House was more of a traditional roof where the applicant was proposing a shed roof. Their structure had a 12' rear wall and a 20' high front wall, which was 2-story structure and Mr. Witham felt they were losing the carriage house feel. Mr. Dodds responded that the second level would be used for storage for the unit owners, kayaks and personal items. He stated that on the drawings he submitted, it showed the windows as squared but he was planning on making them rounded at the top to utilize some of the architectural advantages of the 1800's while still satisfying the needs of the 21st century.

Chairman Witham added that the scale seems large with a story and a half on the back and two stories on the front. He noted that the depth of the garage was less than 16' and a lot of cars would not even fit. Mr. Dodds responded that he hoped to encourage people to downsize their cars so they would fit. In response to questions from Mr. Grasso, Mr. Dodds stated he had to go through Site Review to ensure there would be no runoff onto adjacent properties. He referred to his exhibits and pointed out the lowest point of the property and stated that he would be back-filling that area so that it sloped down. He noted that since they were living in the 21st century, he wanted to capture the water and feed it down the stone wall to the plantings.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Parrott stated that his concerns echoed those of Chairman Witham. It was a fine concept but was too big and too close. He pictured himself standing at the property line of either lot 63 or 64 and looking at a 12' high wall, only 5' off the property line. He commented that he hadn't heard any other design alternatives or an explanation of why the number of garage spaces was appropriate. His other concern was in respect to the depth of the garage where many medium sized cars today were 16' long. He added that the setbacks were too small for such a large structure. Where there was nothing there now, it was a clean slate with an opportunity to make the design conform more closely to the City ordinances. Mr. Parrott stated that the public interest would not be served by this and the public interest was represented in part by the adjacent property owners, present and future. He further stated that variances were permanent and to have a large wall blocking air and light was too much, too close to the property line. He stated that granting the variance would not be in the spirit of the Ordinance, which was to respect the Ordinance to the maximum extent that you could while still being able to do what you wanted with your property. He stated that substantial justice would not be done as the balancing test tipped to the Ordinance regarding light and air. He added that the proposed structure would be right up against the property line which would create a 5'-10' strip against the fences of the adjacent property which would be hard to maintain. Mr. Parrott concluded that the request did not pass the hardship tests so that he could not support granting the variances.

Mr. Grasso agreed with Mr. Parrott. He stated that the petition failed the hardship test. He thought that the applicant could put up a very nice garage structure of a smaller nature which would not need a variance, adding that a variance should be a last resort. He noted that no other plans were presented that were of a smaller scale.

Mr. Jousse commented that he would not support the motion as the area behind the garages was dead space now. The structure wall could be much higher if within the setbacks so he felt the height was a moot point.

Ms. Eaton stated that she would support the motion as the petition did not meet the hardship test. The area was vacant with no existing structure and it was quite a significant structure being proposed, close to two property lines.

Chairman Witham stated that he also supported the motion. He could see a reproduction of the Rundlett May house, but the proposed structure was too big for that. He felt that the building was a lot to impose on the neighbors and would be against the spirit of the Ordinance. He stated it was too much structure along the property line. Something could work there, but it needed to be scaled down.

The motion to deny the petition as presented and advertised passed by a voice vote of 6 to 1 with Mr. Jousse voting against the motion.

6) Case # 7-6

Petitioner: Ghamami Rev. Trust of 2005, Owner, Sheila Grant, Applicant

Property: 369A & 371A Islington Street

Assessor Plan 144, Lot 22

Zoning district: Mixed Residential Business

Description: Convert 2 commercial units to residential use.

Requests: The variances and/or special exceptions required for the proposed work.

SPEAKING IN FAVOR OF THE PETITION

Mr. Thomas Neve introduced himself as a Land Use Planner from Topsfield, MA and stated that he was representing Ms. Sheila Grant, the owner of 369-373 Islington Street. He stated that the property was purchased in 2004 and was a 5-unit building with 7 parking spaces, located in a mixed residential district, as well as the historic district. He stated that it was originally designed as a transitional area to promote business on the first floor and residential on upper floors. In October, 2005 ownership changed to a condominium form of ownership and one of the residential units was subsequently sold. He stated that the petition before the Board was to change units 369A and 371A from business to residential use. He added that the purpose was purely economic because of the difficulty in having the building function in the mixed residential district, as there was not enough mass to promote business and create a transition as originally intended. They had struggled to keep the first floor units rented. Mr. Neve noted that there was a small computer store in one of the units and the other unit had been vacant for several months as there was not enough pedestrian movement in the area to sustain a business on the first floor in this neighborhood.

Mr. Neve stated that the property was near a gas station that was vacant which the City was using as a storage area for sand, gravel and other DPW uses needed around the city. He stated that he believed they needed a special exception for the change of use as the building was in existence before January 1, 1980 and was on a non-conforming lot. When he spoke with the Planning Department, they advised him that he would either need a special exception or a variance with regard to the use of the property. He had presented two requests to the Board and if the Board felt he doesn't need the special exception, that was fine as long as it is noted in the file. Finally, the Planning Department advised him that if the variance was approved, there probably would not be a need for the special exception.

Chairman Witham stated that the variances were advertised but the special exception was not, so they would proceed with the variance request. Mr. Neve then confirmed that through his conversations with the Planning Department it was determined that the variance was the proper route to go.

Mr. Neve stated that the dimensional requirements for the zone were 7,500 s.f. per dwelling unit with a front setback of 5', a side setback of 10' and a rear setback of 15'. Currently they were on a preexisting, non-conforming lot with a 3.8' front setback, a 2.6' and 2.7' left and right side setbacks and a 43' rear setback. Mr. Neve referred to the map and pointed out the property and the parking spaces. He stated that they had an access easement to get to the back of the property. Further, Mr. Neve stated that the parking requirement was 12 spaces and they have 7. However, they were converting from a business use to a residential use which would be a less intensive use and should require less parking. Mr. Neve stated that the units are small, with Unit 367A at 727 s.f. and Unit 371A at 676 s.f. They shared 116 s.f. of common area which would be divided to make them proper residential units at somewhere between 700-800 s.f. which would be one-bedroom units requiring only one parking space per unit.

Addressing the criteria, Mr. Neve stated that the variances requested were not contrary to the public interest and that by converting the units from commercial to residential use they would be more harmonious to the neighborhood as most of the other buildings were residential in nature. He stated that the value of the surrounding properties would not be diminished and in fact, the values would probably increase. He stated that strict enforcement of the Ordinance would result in hardship as they had an existing building in use and they were having difficulty using the building as the City ordinance required. With the difficulty in keeping it occupied, they were defaulting back to a less intensive use of the property, which was a pre-existing, non-conforming building. He noted that the Planning Department had advised them that the site review process would not be needed as there were no exterior changes are proposed to the building or grounds.

In response to questions from Chairman Witham, Mr. Neve stated that he calculated they would need 11.5, or 12 parking spaces rounded up, for the residential uses and he believed they would need more spaces for a commercial use of the property. Through further discussion, it was stated that 8 parking spaces would be required for residential use and they had 7 parking spaces.

Mr. Parrott stated that he couldn't find more than 4 parking spots and the ones shown were not dimensioned. He added that dimensions are required on that type of a plan so the Board can ensure the parking spaces were legal size. Mr. Neve stated that the site plan was prepared in 2005 with a scale of 1" = 10'. He estimated that each parking space appeared to be 10' wide by 20'

long. He also indicated that the two spaces to the right of the building were part of an easement from the abutting property, with an access driveway to get to the rear of the building.

**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, from his best estimate, it looked like the applicant was missing one parking spot from what was required. There could be some argument as to whether or not the parking spots were conforming but he assumed that since the Planning Department made no note about that, and it looked like they reviewed this pretty thoroughly, they were probably grandfathering those spots. He stated that what was being requested was a variance for one parking spot and a variance for lot area per dwelling unit.

Mr. Grasso made a motion to approve the petition as presented and advertised, which was seconded by Ms. Eaton.

Mr. Grasso stated that the applicant was seeking to convert two commercial units to residential in a part of town that had a lot of apartment buildings and much that was residential in nature. He commented that he shared some of Mr. Parrott's concerns about the parking, but where this was advertised as to convert to residential units without the required parking, they weren't considering parking spaces at all for these units and he went forward with the motion to grant.

Mr. Grasso stated that the variance would not be contrary to the public interest and adding a couple of residential units in this part of town might actually benefit the public interest. He stated that the applicant and owner had trouble finding suitable commercial tenants. He stated that the spirit of the Ordinance was observed as there was no change to the exterior of this house. He felt that substantial justice was served as there would be no great benefit to the public in denying the petition. He noted that no evidence had been presented that the value of surrounding properties would be diminished. Mr. Grasso stated that, regarding the hardship test, this property was in the mixed residential business district and was an allowed use. He noted that the applicants were before the Board because the existing size of the building on this small lot didn't allow the square footage required per unit and neither the land or building could be changed which, he felt, supported the hardship test.

Ms. Eaton agreed with Mr. Grasso's comments. She stated that converting two commercial units to residential use actually required less parking and she believed that a conversion in this area would probably be useful for the area and make the building more rentable. Ms. Eaton stated that the two units that were going to be created were very small and the requirements were one and a half parking spaces for each unit, but she felt it was a reasonable assumption that one car space for each would be needed. She added that they were not going to stress the parking requirement in the area by granting this variance.

Chairman Witham stated that he supported the motion, but was somewhat torn. He thought the lot area per dwelling unit was quite low as compared to what was required, but the reality was that additional units were not being created, whether it was residential or commercial. These were two spaces that currently exist. He stated that he passed by the property on a regular basis and was surprised that the computer business had survived. He noted that it had obviously been a struggle to get someone in the other side. Chairman Witham stated that maybe the reality was that commercial was not going to work in this building, which was originally built for a residential unit. Although it was a dense use of this space, the units were there so he doesn't feel they were intensifying the density, just changing the use of the space. Chairman Witham thought the change would add a little more life to the building rather than having vacant storefronts. The size of the units and the location would probably put them in the more affordable category in terms of rental units which is always a public benefit for Portsmouth.

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

Mr. Grasso stepped down for this petition. Ms. Rousseau assumed a voting seat.

7) Case # 7-7

Petitioner: Martingale Wharf Limited Partnership, Owner, Portsmouth Buddhist Center, Inc., Applicant

Property: 99 Bow Street

Assessor Plan 106, Lot 54

Zoning district: Central Business A

Description: Convert an existing vacant space to a religious use.

Requests: The variances and/or special exceptions required for the proposed work.

SPEAKING IN FAVOR OF THE PETITION

Ms. Michelle Racine introduced herself as the President and Chair of the Portsmouth Buddhist Center and indicated that other members of their board were present. She stated that she was requesting a special exception for a religious use at this donated office space at 99 Bow Street and they plan to offer classes in meditation and Buddhism as well as opportunities to practice both in the location.

She stated that the application demonstrated that they met the six criteria for a special exception for a religious use. First, there were no special requirements for religious use. She stated that the activities would not create any special hazards. She noted that there would be no changes to the structure or site and, due to the nature of the activities, there would be no impact to the property values in the surrounding area. With regard to traffic safety and possible impact on traffic, she stated that they anticipate 10-15 people coming to their courses in the evenings and weekends and that many of the participants would be local, either living or working in Portsmouth. In addition, she stated that the use would present no greater parking impact than many of the permitted uses, i.e. restaurants, retail space, yoga centers, etc. Addressing the fifth standard, Ms. Racine stated that there would be no excessive demand on municipal services as their use would be no different from the other cited uses. With no changes to the site, she stated there would be no significant

increase in storm water runoff onto adjacent properties or streets. She concluded that they met all the requirements for a special exception and noted that, while they had provided a floor plan for the suite that had been donated to them, they were requesting the special exception for the whole building as they might be shifted to another available unit, depending on the owner's needs.

In response to questions from Ms. Rousseau, Ms. Racine stated that the owner was granting them a 90-day lease. She explained that he had the option of renting to a commercial renter and if he did so, he would offer them another space. Ms. Racine clarified that they plan to stay indefinitely.

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

Mr. John Gregg who lived at 69 Hunkins Street in Portsmouth stated that he was not a member of the Board of the group but he had been attending the Buddhist Center in Newmarket for several years. He commented that they were a highly ethical and responsible group of people. He maintained that this would be a benign use of the building and provide a real service to the community. He felt that people of all ages were showing interest in Buddhism and that the center would fit well in the City of Portsmouth.

Ms. Mary Ellen Burke of 101 Crescent Way stated that she was in favor of the petition and hoped that the Board would approve the petition. She felt it would be a great enhancement to the downtown community and looked forward to attending classes at the center.

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

DECISION OF THE BOARD

Chairman Witham stated that if a motion were made to grant, it should be worded in a way that it covered the whole building so if they were reassigned another vacant spot as indicated in their presentation, they wouldn't have to come back each time. Mr. LeMay asked if he was referring to 99 Bow Street, the building, or just the few units. Chairman Witham stated that it was listed as the property and that he was comfortable with saying within the premises of 99 Bow Street.

Ms. Rousseau wondered if a stipulation could be added that this variance would last as long as the lease for the Buddhist Center lasts, in case they chose to vacate the building and another religious organization came in of which they were not aware. She stated that the variance would go with the building so she would like to limit it to their lease term while they remained in the building. Chairman Witham asked if she would like to make a motion.

Ms. Rousseau made a motion to grant the special exception with the stipulation that the special exception would last only as long as the Portsmouth Buddhist Center was a lessee in the building so it was limited to their lease term and subsequent lease terms, if they decided to renew their lease. As long as they were there, the special exception would be in place. After that, the owner would have to come back and request another special exception. Mr. Jousse seconded the motion.

Ms. Rousseau stated that the first standard for granting a special exception was that the use was a permitted use in the Central Business District and it was. The next was that there was no hazard to

the public or adjacent property on account of potential fire, explosion, or release of toxic materials. She didn't feel there would be anything explosive at the Buddhist Center. She felt that this particular Central Business District encouraged a multiple of uses and thought it would not in any way change the essential characteristics of that neighborhood or be a detriment to property values in any way.

Ms. Rousseau stated that there would be no creation of a traffic safety hazard or substantial increase in the level of traffic congestion in the vicinity. She felt they would like to attract more than 10 to 15 people at a time but they were well in the range of complying with this standard. She stated that there was no evidence of an excessive demand on municipal services and agreed with the applicant that it would be no different than the permanent uses on that property and in that district. As a use issue, she stated that there would be no significant increase in storm water runoff onto adjacent properties or streets so that she felt all the criteria were met.

Mr. Jousse agreed with Ms. Rousseau's statements.

Chairman Witham stated that they had a motion to grant a special exception with the stipulation that the special exception was strictly to the Portsmouth Buddhist Center as long as their lease was applicable at this property location.

The motion to grant the petition passed with a unanimous vote of 7-0, with the stipulation that the special exception should run with the lease, and any subsequent renewals, of the Portsmouth Buddhist Center.

V. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 9:20 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk