MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m. **September 20, 2011**

MEMBERS PRESENT: Chairman David Witham, Vice-Chairman Arthur Parrott, Susan Chamberlin, Thomas Grasso, Alain Jousse, Charles LeMay and Alternates: Patrick Moretti, Robin Rousseau

EXCUSED: Derek Durbin

In the absence of Mr. Durbin, Ms. Rousseau assumed a voting seat for the meeting.

I. APPROVAL OF MINUTES

A) June 21, 2011 (Excerpt previously approved)

B) June 28, 2011

C) July 19, 2011

D) July 26, 2011

In separate motions, it was moved, seconded and passed by unanimous voice vote to approve the Minutes for June 21, 2011, June 28, 2011, July 19, 2011, and July 26, 2011 with one clerical correction.

II. PLANNING DEPARTMENT REPORTS

The Board acknowledged receipt of a copy of the court decision in the case of 1808 Corporation v. Town of New Ipswich.

III. OLD BUSINESS

A) Request for Rehearing regarding the property located at 165 Dodge Avenue.

Chairman Witham opened up the meeting to comments from the public which, he requested, be limited to whether the request for rehearing should be granted.

Mr. Steven Lee identified himself as a direct abutter and stated that he felt there were factual errors in the request. He noted that, in items 4 and 6, it had been indicated that he agreed with the contents of the document. He had never received the document and did not review it so he could not approve or disapprove.

Mr. Jousse made a motion to grant the motion for rehearing, which was seconded by Mr. LeMay.

Mr. Jousse stated that he felt that new information had been presented that was not available at the time of the original hearing. He noted that the Board had left it open for the applicant to come back with more information and he felt they should give them a fair chance to be heard again.

Mr. LeMay stated that he had nothing to add except to agree that the Board had left the issue open for this purpose.

Ms. Rousseau referenced a memorandum to the Board from the Planning Director in which there was a comment that, based on the City Attorney's opinion, the paper street no longer existed. She felt that the City Attorney had not supported this opinion and she didn't find his opinion on a street's existence relevant. She felt there should be evidence to that effect so she thought that the applicants should have another chance to present their case.

Mr. Grasso noted that the information from Attorney Sullivan had been presented in a memo from 1987 and was reiterated in 2011. He didn't see that as new evidence. He felt the applicants had a fair hearing. At the time of the original presentation he hadn't understood why a new map or plot plan hadn't been drawn up and all deeds changed to reflect the newly acquired land if that was how it would be worded. He didn't see anything substantially different from the original application so would not be supporting the motion.

Ms. Rousseau reiterated her opinion on the City Attorney's memo relative to the existence of streets.
Chairman Witham responded that, unless someone showed up with something different, the Board should rely on the City Attorney's opinion. He suggested that Ms. Rousseau could, if she wished, do some research on her own. He stated that he would support the motion as there had been some confusion as to the paper street and ownership. They did have a memo from 1987 but that was still being questioned. He stated that earlier there was a question of the applicants having zero street frontage and now there appeared to be a site that showed roughly 25' of street frontage. He felt he understood their intention and that a lot line relocation would also be required. The Board had concerns at the last meeting but, he also felt they had left the door open for the applicant to come back with more information.

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B) Case # 8-4
Petitioner: SeaRay Realty, LLC, owner, Archie E. DeFlorio, applicant
Property: 445 Route One Bypass
Assessor Map 234, Lot 3
Zoning district: Office Research
Description: Establish a retail use.
Requests: Variance from Section 10.440, Use #8.31, to allow the proposed use.
(This petition was postponed from the August 16, 2011 meeting.)

SPEAKING IN FAVOR OF THE PETITION

Chairman Witham stated that the Planning Department had categorized this application as a retail use and he felt they should proceed with the request on that basis. Moreover, if the applicants were questioning the use as retail they would have filed an administrative appeal. .

Mr. Jack Kimball stated that he was the owner of both SeaRay Realty, LLC and the property. He stated that he was not going to address the use issue as he could see that was what the Planning Department had decided. He stated that if the Board were kind enough to grant the variance, he and the tenant had agreed it would be to establish a business for the purpose of buying gold with no sales on the premises. Mr. DeFlorio identified himself as the applicant and stated that they would not have any sales on the property. The stipulation was fine with him.

Chairman Witham asked if the owner could address some of the criteria for Board members not there for the first hearing.

Mr. Kimball stated that an Office Research designation was a difficult zoning for the building which was located within a primarily retail area. Although he knew this when he bought the building, it had been difficult to lease with only one curb-cut going in one direction. They had no interest from the medical industry and the property had been vacant for some time. When this tenant appeared he had viewed it as a financial service operation so didn't feel there would be a problem. He noted that the tenant had paid a year in advance so receiving the variance was critical for him. He stated that the impact on traffic volume and safety would be minimal with one or two cars every half hour. He reiterated that the tenants agreed to not sell any products.

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 with the stipulation that this was being granted to allow the establishment of a business buying gold from individuals with no sales on the premises. Mr. Grasso seconded the motion.

Ms. Rousseau outlined the reasons why she disagreed with the Planning Department and felt this business did not meet the definition of a retail business. She felt it was a financial services

business which should be allowed in this location but, in order to surmount this hurdle, was making the motion to approve.

Ms. Rousseau stated, regarding the public interest, that there were quite a few established businesses in that neighborhood so she saw no harm to the public health or safety in any way or change in the character of the neighborhood. She stated that substantial justice would be done as there would be no harm to the general public in granting the variance. She stated that there had been no evidence presented that there would be any issue with the value of surrounding properties. With regard to the hardship test, she stated that the property could not be reasonably used in strict conformance with the ordinance. She was familiar with the location and agreed that the curb cut was an issue and it was not an easy in and out for a regular retail business. She felt that the tenant was a good fit for that site and reiterated that the proposed use did not meet the retail business language of law. She added that the age and layout of the building were unique to this property and also created a hardship.

Mr. Grasso stated that, while he had been hesitant the previous month, he was satisfied with the stipulation that no sales would be conducted on the premises. He agreed with Ms. Rousseau about the building being a difficult location with difficult access and noted that the applicant had represented the difficulties in finding suitable tenants for the uses allowed.

Ms. Chamberlin commented that, while she appreciated the difficult economic conditions, she didn't see it as fitting the Office Research designation. Whether it was retail or not, it certainly wasn't Office Research.

Ms. Rousseau stated that this was not really an Office Research road and the history of the property was construction or an industrial use not traditional office or office research. She noted that there were retail establishments up and down this street so this proposed use actually fit quite nicely. She stated that the Office Research area was up the street on Borthwick Avenue and this particular site was carved out from what was essentially a retail area to be included in that zone. She maintained that it did not even fit the character of an Office Research park area which was also a hardship for the property owner.

Chairman Witham stated that he would support the motion. If the site were among all the medical buildings on Borthwick Avenue, he would take a different view but felt that the essential characteristics of the neighborhood would not be changed taking into account the u-haul rental store, the Frank Jones Center and the car dealerships.

The motion to grant a variance to allow the establishment of a business to buy gold from individuals with no sales on the premises was passed by a vote of 5 to 2, with Ms. Chamberlin and Mr. Parrott voting against the motion.

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Mr. Jousse stepped down for the following request and the first public hearing. Mr. Moretti assumed a voting seat.

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C) Request for Rehearing regarding the property located at 30 Gardner Street

(*This item was postponed from the August 16, 2011 meeting and should be considered with case #9-10 below.)*

SPEAKING IN FAVOR OF THE REQUEST

Attorney Tim Phoenix stated that he was appearing on behalf of the owner and referenced a comprehensive memorandum he had submitted outlining their request. He noted that they had also submitted a request for an Equitable Waiver. He outlined the history of the property, stating that it had been advertised and purchased by the current owner after due diligence as a four-unit building, which also was also the designation on the tax card. When the current owner went to sell the property in the spring, they had learned that there were only supposed to be three units on the property. He stated that Mr. Marshall had come before the Board in early summer for the fourth unit and been denied. He maintained that Mr. Marshall had not been prepared to address all the issues at that time as he had concluded after talking with the Planning Department, and considering the long history of being used and taxed as a four-unit, that this would be pro forma but the Board had ruled differently. Attorney Phoenix again reviewed the ownership and occupancy of the property as provided in detail in their packet. In summary, he stated that there was a notice in 1992 and nothing else until 1999 when the Board denied a variance. Then there was a remand from the Court in 2001 which didn't happen and the tax cards from 2002 to the present showed the property as a four unit. He noted that they had found one tax card for 1999 where it said four units with a notation that said "one unit disregarded." He stated that the current owner had done what was reasonable in 2008 when they purchased the building but he didn't know if all this background was properly presented to this Board when the owner was there previously.

Attorney Phoenix stated that at the time he filed the Motion for Rehearing, the Minutes of the meeting had not been issued but he was able to review the tape. The Minutes have since been issued and, while the owner did not go through the five points of the variance, Ms. Rousseau as the maker of a motion to grant had gone through the five points. The issue he had was that he didn't see any discussion by the Board or any vote on each of the five points as to which, or all, of the five points were granted or denied. Attorney Phoenix noted that there was a concern for hardship but, as he read the law, the Board should vote on each of the five requirements if, for no other reason, that on an appeal basis, everyone knew what was being appealed. He felt that, under the circumstances he had outlined, they should be able to come back and re-present so that at least the Board had a chance to address each point.

Attorney Phoenix stated that he wouldn't go through all the points in detail, but went on to cite all the criteria necessary to grant a variance and the reasons why they were met. He asked that the Board grant a rehearing so that the issue could be discussed in further detail.

Ms. Rousseau stated that she felt he had great arguments but they knew the history and she didn't see any new evidence or anything new except that the applicant now had an attorney, which was not a reason to grant a rehearing. Attorney Phoenix disagreed that the only reason for granting a rehearing was new evidence and stated that it could also be granted if the Board made a mistake or misapprehended the law. He stated that the latter was the case here in that all the facts had not been properly before the Board including the entire history of the tax cards and the like. Ms. Rousseau stated that they had that before and she felt the only point he was making that might be

new was that the Board may not have gone over all the criteria to deny. She asked if it was his position that the Board did not go through all of the criteria for denial. Attorney Phoenix responded that it was. He noted that her motion had been to grant, but he felt that the majority of the Board who voted to deny made a mistake, misapprehended the facts and the law, and misapplied the law to the facts in granting the denial. If he were granted a rehearing, his job would be to convince the majority of the Board members that the variance should be granted.

Mr. Parrott noted for the record that the applicant in the hearing had been given a full opportunity to address the issues and had been invited to address them. He stated that it was not for the Board to make the arguments or put arguments in the mouth of the applicant. He stated that he had invited the applicant to speak on the criteria and he had declined, although the applicant had presented the history well. To say that the information regarding the history of the property had not been presented would be incorrect. Mr. Parrott stated that the Board did have information as to the Ordinances and the history, which had been provided, and when they provided the applicant with an opportunity to address the particulars so the Board could make an honest assessment, he declined to do so. He stated that was not the fault of the Board and he felt that Attorney Phoenix was claiming that because they didn't make the applicant address each of the points, the Board was in error. Attorney Phoenix stated that was not exactly his position, although he respected what Mr. Parrott had said. What he was saying was that the applicant did give the history and Ms. Rousseau went through the five points but, from reviewing the tape and Minutes, there was not an analysis of what the applicant didn't meet and why. Mr. Parrott stated that was correct as they could not react to what had not been presented to them. They couldn't both ask and answer the questions. Attorney Phoenix stated that, respectfully, enough was presented and that the Board misapprehended, did not properly apply the law and made a wrong decision.

Mr. LeMay stated that he agreed in principle that, if the Board felt it had made an error, it could grant a rehearing to correct the record on specific items. He also wanted to point out that there were five pages of Minutes and they had an extensive airing and he had heard nothing new presented that evening that they had not heard at the previous hearing. He understood the technical point but suspected that within the five pages of presentation and discussion, while not assigned to a specific point of criteria, there were indications of why they did not support the petition. He stated that it was up to the applicant to make a case for his variance points, not for the Board to specify why something wasn't needed.

SPEAKING IN OPPOSITION TO THE REQUEST

Mr. Hugh Jenks identified himself as the owner of the property at 25 Hunking Street, a direct abutter sharing 40' of the property line. He stated that he had spoken at the June hearing and urged that the request for rehearing be denied. His understanding was that the applicant was entitled to a rehearing only if new evidence had arisen that was not presented at the June hearing or that the Board made an error in the law. He stated that this year's hearing marked the third time that the owners had petitioned to have a fourth apartment on a lot that by law only had room for three. He stated that each time the request had been denied due in part to the purpose of the Ordinance to avoid overcrowding. Mr. Jenks stated that the applicant's attorney was claiming that a rehearing was justified because only the hardship criteria was discussed. Mr. Jenks felt that the burden for meeting each of the criteria fell on the applicant and failing to find that even one was not met was sufficient to deny. He noted that, despite prodding by the Board, the applicant had

declined to address the criteria and couldn't claim that there was a mistake because the criteria weren't addressed. He concluded that it was hard to believe there was anything new to be discussed and again asked that the rehearing be denied.

With no one further rising, the discussion was closed.

DECISION OF THE BOARD

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

Mr. Grasso stated that a rehearing could only be granted if there were new information that had not been available at the time of the hearing or if there had been an error in the interpretation of the law. He couldn't see that the Board was at fault with either one.

Mr. LeMay reiterated that here had been five pages of Minutes and the Board had actually tried to help the applicant put what he was doing in order. He stated that the information did not justify granting a variance and nothing new had arisen since the meeting.

Chairman Witham stated while he felt that the original presentation was weak in some areas, the factual information was all still consistent. Nothing had changed and he didn't see the outcome changing. He was sympathetic to people who bought property that was misrepresented to them, but there had been no error on the part of the Board.

Ms. Chamberlin stated that she had thoroughly reviewed the Minutes and agreed.

The motion to deny the request for rehearing was passed by a unanimous vote of 7 to 0.

IV. PUBLIC HEARINGS

10) Case # 9-10

Petitioner: Steerpoint Properties LLC
Property: 30 Gardner Street Assessor Plan 103, Lot 43
Zoning district: General Residence B
Request: Equitable Waiver (under RSA 674:33-a) of the required minimum lot area per dwelling unit for the conversion of a dwelling existing on January 1, 1980 to additional dwelling units. The requested waiver is to allow the Special Exception for the conversion to be granted with 2,395.8 s.f. of lot area per dwelling unit rather than 3,000 s.f. per dwelling unit as required in the General Residence B district under Section 10.812.13

Attorney Timothy Phoenix stated that he was appearing on behalf of the applicant to request that the Board grant an Equitable Waiver under RSA 674:33-a. He noted that the Planning Department had submitted a memo to the Board, which he would address, and asked if all the Board members had a copy of the statute. Chairman Witham stated that they should all have that in their packet.

Attorney Phoenix provided a history of the property, noting that all of the relevant exhibits were attached to their request, beginning with an application by the former owner in 1979 for a fourth unit. At that time, the Ordinance required 10,000 s.f. per unit and the request was denied. He stated that in 1982, the owner had built a 4th unit. In 1992, the Chief Building Inspector discovered it on an inspection and the owner notified the tenant he had to move out. He stated that, in 1999, the unit was reoccupied and Attorney Pelech again requested a fourth unit, which the Board denied. Attorney Phoenix stated that the decision had been appealed to the Superior Court which, in 2001, remanded it back to the City due to the Simplex decision changing the analysis for hardship. He stated that hearing never happened and that it was their position that it had been incumbent on the Board to schedule a new hearing at that time.

Addressing their basis for an equitable waiver, Attorney Phoenix stated that the building had been occupied as a four unit from 2001 to 2008 when it had been bought and financed by his client after due diligence. He noted that, from 2002 to 2010, the City's tax cards indicated the property was a four unit. It was when they went to sell the property and the buyer's agent met with the Planning Department that they discovered that the property was only authorized for three units. Referring to RSA 674:33-a(2), he stated that he felt they did not meet the requirement (a) as it referred to any owner or former owner noticing the violation and, in this case, the former owner was aware of the violation. The second requirement, (b) was that the violation was not an outcome of ignorance of the law. He stated that the former owner should have reasonably known the property was only three units so he felt that was also not met.

Attorney Phoenix stated that the statute read that in lieu of findings under (a) and (b), an owner may satisfactorily demonstrate that the violation had existed for ten years or more with no action commenced by the municipality during that time. He referenced a memorandum from the Planning Department disagreeing with his analysis and stating that "City staff is of the opinion that this provision refers to an absence of enforcement action throughout the entire existence of the violation, rather than a sub-period thereof and is thus unavailable in this case." Attorney Phoenix disagreed, noting that the statute cited a violation having existed for ten years or more. He stated that they had discovered the violation in late spring or early summer of 2011 and the last enforcement activity was a letter from the Chief Building Inspector in 1992. He stated the variance attempt in 1999 and remand in early 2001might be considered some kind of notice but from early 2001 to the spring of 2011, there was no enforcement action or attempt at enforcement by the City. He maintained that there was a failure to reschedule a hearing upon remand and issuance of tax cards which continued to show a fourth unit. He stated those were equities (sic) that he was asking the Board to consider in determining what the proper relief would be. Attorney Phoenix added that this was an equitable waiver of dimensional requirements and he felt that the Planning Department agreed because it was the number of square feet needed per dwelling unit as opposed to a use variance.

Attorney Phoenix stated that if the previous owner had built the structure in 1975 with the first enforcement in 1990, they would have the first ten years. From 1982, when it was built, until 1990 when the 1992 memo said that they were first notified, was less than ten years. He stated that it would be inequitable to say the period had to be the first 10 years. He felt the City was held to a higher standard and a plain reading said nothing happened in 10 years.

Attorney Phoenix stated that, under section (c), the violation did not constitute a public or private nuisance or interfere with surrounding properties or future use of this property. He indicated the period of time the property had existed with a fourth unit with no complaints from neighbors and noted that about 50% of multi-family properties did not meet the area per dwelling unit or the parking requirement. Citing section (d) regarding investment made in ignorance of the facts and the cost of correction outweighing any public benefit so that it would be inequitable to require the violation to be corrected, Attorney Phoenix stated that the key was investment made in ignorance of the facts. He stated that all evidence pointed to a four unit. The applicant had paid and financed for a four unit and, if he were only allowed to have three, he would have lost financing and income, which he felt was inequitable to these innocent landowners.

Ms. Rousseau referred to the section he had cited where he had just spoken about ignorance and stated that she didn't think an argument could be made that there was ignorance if they had represented in Superior Court that there was a four family there, and it was remanded back to the ZBA. She felt it was negligent on behalf of the City not to schedule a hearing and argued that the City had waived their rights of enforcement. She noted additionally that he had represented that the property had been taxed for a number of years as a four family with the City getting the benefit of more income. She felt that the City was effectively saying it was a four family in that regard.

Chairman Witham asked Ms. Rousseau to keep to a question and, if she had a position, to put that forward once there was a motion.

Ms. Rousseau stated that she wanted to look at the cost of correction. She speculated that there would probably be a significant financial loss in selling the property as a three family rather than a four family and asked Attorney Phoenix if he would agree. Attorney Phoenix agreed that would be the case, adding that it was just ignorance on the part of the buyers in 2008. He also agreed with her further statement that losing the income from a fourth unit would represent a substantial loss to the owner. Ms. Rousseau asked about the taxes and Attorney Phoenix stated that the fourth unit was missing in 2000 and 2001, but after that the tax cards all indicated a four unit.

Mr. Grasso asked if Attorney Phoenix knew exactly what the 1999 card said. When Attorney Phoenix stated he had a copy with him, Mr. Grasso asked him to read it out loud. Attorney Phoenix stated that in the top left, it said 4 units, 17 rooms, 8 bedrooms. On the lower right quadrant, it said under comments, "4th apartment has been shut down for zoning reasons. Toilet & sink in basement" and then some other wording. Mr. Grasso stated that the wording was "drains are sealed," adding that the City had then taken action in 1999. They shut it down and sealed the drains and the apartment was done away with. Attorney Phoenix stated that this did not tell him that the City took action in 1999. It said that in 1999, the City was saying that something had happened, which he argued could have happened in another year. Attorney Phoenix stated that he was advised by Mr. Pelech, who had represented the former owner, that it was unoccupied as a fourth unit until 1999 when the owner reactivated the fourth unit and then applied for a variance. Mr. Grasso questioned that the owner had reoccupied it as a fourth unit in 1999 with the cited reference on the 1999 tax card. Attorney Phoenix indicated that was the former owner and, when Mr. Grasso stated that it didn't matter which owner, he maintained it mattered regarding the issue of ignorance of the problem. Mr. Grasso stated that action had been taken and there was a violation and an owner reopened the sealed drains and started using it as a fourth unit. When

Attorney Phoenix again said it was not his client, Mr. Grasso stated he wasn't indicating which owner, he was just saying that it had happened.

Mr. Parrott asked if Attorney Phoenix was saying that the 1999 action was not an enforcement action. Attorney Phoenix stated that, in 1992 the fourth tenant was asked to move and, in 1999, the former owner had a new tenant move back in while applying for a variance, which was denied. That was when the owner went to court and the matter was remanded. Mr. Parrott asked if it was his position that the denial in 1999 was not an enforcement action and Attorney Phoenix responded that it might or might not be, but that was still in 1999 and not discovered until 2011. He maintained that it didn't matter if it was an enforcement issue because it was more than 10 years. Mr. Parrott asked when he started the time line and he responded that from 1979 to 1999 there was never a full ten year period when there was no enforcement. He added that, from 1999, or even from January or February of 2001 when it was remanded, to the spring of 2011 it was more than ten years.

Mr. Parrott read from the statute regarding the requirements for an equitable waiver of dimensional requirements, citing various sections which dealt with physical things that could be measured and errors in measurement or calculation such as would be made by a surveyor or builder, something physical in the property itself. He did not see anything close to rules such as the 3,000 s.f. per dwelling unit requirement and stated that he had a problem with seeing how the concept of an equitable waiver even applied. Mr. Parrott indicated that he sat on a number of these requests and it usually was something where you could go out with a ruler and measure, not the size of the property and he had a problem with seeing this as a valid application. He stated it was not a matter of Ordinance interpretation. He was trying to see how an equitable waiver was applicable to this section of the Ordinance.

Attorney Phoenix stated that he disagreed and read a section from the state statute as well as citing the ruling in Harrington v. Warner as supporting their position that so many square feet of lot area per dwelling unit was a physical layout or dimensional requirement.

Ms. Chamberlin asked if it was his position that due diligence for the current owner did not include a review of the Zoning Ordinance. Attorney Phoenix stated that it did not include a review of the zoning history. He didn't know if the owner had looked at the Zoning Ordinance or not, but looking at the Zoning Ordinance would not answer any questions if you went and saw four units, with parking for four and then pulled the tax card and it also said four units. He maintained that this was reasonable due diligence.

Mr. LeMay stated that one of the lynchpins of Attorney Phoenix's argument was that his client as a buyer made due diligence inquiries with the City and didn't discover this violation but in another part of his argument he had stated that another buyer immediately turned up the information and subsequently withdrew his offer. Mr. LeMay stated that he was finding it hard to reconcile this.

Attorney Phoenix stated that each buyer did a different type of due diligence. The recent potential buyers wanted to make significant changes which would require a building permit so they talked to the Planning Department about what would have to be done to make modifications. The current owner, in purchasing, had just looked at the listing agreement and noted that it looked like a four unit, supported by a tax card which said it was a four unit. When Mr. LeMay maintained that the

information was there to be found, Mr. Phoenix replied that it was if you knew the right questions to ask and whom to ask.

Ms. Rousseau referred back to the discussion of RSA 674:33 (a) and (b) regarding good faith error in measurement or calculation. She stated that it also read that the violation was instead caused by either a good faith error in measurement or calculation by the owner or by an error in Ordinance interpretation or applicability made by a municipal official in the process of issuing a permit. She stated there was a good argument to be made, and asked if Attorney Phoenix would agree that when it was remanded back to the City, that was their opportunity to "do enforcement" and, in not doing so, they made an error. The number of units issue could have been rectified with a decision but, she maintained, they made an error in that they did not go forward and pursue the fact that it was a three- versus four-family and so it was left where it was with the Court, a four family versus three family.

Attorney Phoenix agreed with her statements, maintaining that it was incumbent on the City to schedule that hearing. He hadn't phrased his arguments in terms of section (a) because the reference went to a former owner. Mr. LeMay stated that, regarding his claim that the City should have scheduled another hearing, it seemed to him that the law changed and then sent the petition back. He stated that, given that there were probably hundreds of similar cases, you wouldn't expect municipalities to retrieve and reschedule them all. Attorney Phoenix stated that he would. He felt that the Court had remanded the petition and it was incumbent on the City to do it. He stated he was informed that the City Attorney had agreed that it should have happened.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Hugh Jenks stated that he was a direct abutter at 25 Hunking Street. He stated that as he read the statute, it was limited specifically to violation of a physical dimension or requirement of the Zoning Ordinance. As it had been explained to him by the City Attorney, this was to remedy a situation where a contractor inadvertently puts a corner post over the setback line or surveyor measures distance from pins incorrectly. He cited the statute as describing a violation caused by a good faith error in measurement or an error in Ordinance interpretation or application by a municipal official. He asked what good faith error could result in an entire dwelling unit. Mr. Jenks stated there was no error in interpreting the Zoning Ordinance. He stated that the City had been consistent in turning down the request for another unit dating back to 1979 and noted that the City had shut down the unauthorized occupancy in 1992, in 1999, and again this year. Mr. Jenks maintained that to grant an equitable waiver would be to exceed the bounds of relief intended by this section of the statute. He felt the previous owner had intentionally misrepresented the property in a sales transaction and, unfortunately, the applicant's recourse was the court.

Ms. Rousseau stated that fraud was a serious allegation and asked if Mr. Jenks would agree that this particular case was represented in the courts so that was on the table, not under the table. When Mr. Jenks twice attempted to answer, she reiterated the fact of the case being in the courts and then went on to ask if he would agree that the City of Portsmouth continued for ten years to collect taxes as a four family, above board and on the table. She reiterated her statement about lack of enforcement for ten years and her position on the City's awareness and actions, asking where the fraud was.

Chairman Witham stated that he had asked if there were any questions and he would like to treat this as fact finding. He noted that Ms. Rousseau tended to state opinions and ask if others agreed, which he maintained would be called a leading question in court, which the judge would shut off. He requested that she ask a question, keep it simple, and get her information, adding that they would be there all evening if they had to hear her opinions on every point. He noted that, after the public hearing was closed, they had a motion and then she could state her opinion, but this couldn't happen every time he asked for any questions.

Ms. Rousseau stated that she had done as he outlined. She stated there was a serious allegation of fraud by his neighbor and, again addressing Mr. Jenks, she asked if considering the facts he still believed that his neighbor committed fraud and he was representing this as a fraudulent situation.

Mr. Jenks stated that the previous owner of the property was an out of town landlord who consistently violated the law and, when the property was conveyed to his now neighbor across the street from the apartments, he believed that the previous owner had knowingly misrepresented the property, but didn't know if that was fraud.

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

DECISION OF THE BOARD

Chairman Witham stated that the request before the Board was for an equitable waiver regarding the lot area per dwelling unit. While the Board was considering the issue, he commented that he felt the attorney had a job to do and did it well considering the issues but he also felt that there were a lot of holes in his argument. He noted some references to the tax cards indicating four units to justify the Equitable Waiver, but the Planning Department and the Tax Assessors were two separate departments in the City of Portsmouth. He felt that, if the previous owner had been willing to take the matter to court, he should have considered the remand a great victory and been in the next day to restart the process. Instead the owner let it slide. He stated that he didn't know if it was up to the City to reschedule the hearing but it had been his experience that the Board was quite often asked by the applicant's to rehear applications. He noted the continued references to ten years with no action but he felt there was a long history of action. This wasn't something that just got by and was first discovered. While he was sympathetic to the person who had bought the property, they had not found the violation and now had to live with it. He stated that the equitable waiver discussed the violation, which didn't go away when the property was sold and currently existed. Chairman Witham felt that the idea that the equitable waiver should only apply to the new owner's actions was not valid. He added that the crux of the issue fell on 1(b) of the criteria for granting a waiver where it looked at the error being caused by incorrect measurement, calculation mistakes, and interpretation as opposed to bad faith. To him, this was blatantly bad faith, not on this owner but a previous owner, but they were dealing with the violation, which was the four units.

Ms. Rousseau made a motion to grant the equitable waiver, which was seconded for discussion by Mr. Grasso.

Ms. Rousseau stated that the first requirement was that the violation was not noticed. She felt there was a ten year time line from 2001 when it was remanded back from the court to the City.

She stated that the City had decided not to schedule a rehearing relinquishing their right to enforcement. She stated that there was no evidence of enforcement during that time line while the City collected taxes which, she felt, effectively indicated it was fine for the property to go forward as a four family. She stated, regarding the next requirement that it was not an indication of ignorance of the law or bad faith. She stated that the owner had represented himself in a court of law and there was no bad faith or fraud. She maintained that a municipal official committed an error in not scheduling a hearing or following up with some enforcement action.

Ms. Rousseau stated that there was no evidence that the violation created a nuisance or diminished the value of property in the area. She reiterated that this had effectively been a four family for over ten years. Addressing the last requirement, she stated that the cost of correction would be substantial. If the owner exercised their right to sell, the difference between a three family and a four family would be substantially less, creating a financial burden on the owner.

Mr. Grasso stated that he had seconded for discussion and disagreed with the motion. There were four criteria that had to be met and the request failed at least two of them. He felt that there was bad faith as far back as 1979 when the property was denied a fourth apartment, and again in 1999 when it was again denied. With regard to section "d," it was basically buyer beware in real estate. The owner bought an alleged four family that was actually a three family. He stated that when they had heard this petition in June, he had mentioned that he looked at this as a three family property looking for permission for a fourth apartment. He felt that everyone was looking at this as if it were already a four family and it was not.

Mr. LeMay stated that he thought this was one of the saddest cases he had heard before the Board. It was an unfortunate situation and he felt the City had been somewhat complicit in letting the violation go on. He stated, however, that the information was in the city records to be found. He felt that there had been bad faith on the part of the seller which caused trouble for the buyer which, unfortunately, was not their problem to resolve. He stated that it was not in the spirit of an equitable waiver to grant financial relief to someone who had been involved in a business deal that was not to their advantage, or in this case, to their deliberate disadvantage,.

Ms. Chamberlin stated that she didn't believe the request for an equitable waiver met the section dealing with lack of enforcement which could be read as saying that, during the period of the violation, there was no enforcement action. She didn't believe this request met the intent and actual words of the statute. She stated that there were remedies for "bona fide" purposes but waiving the zoning regulations was not one of them, however sympathetic the situation was.

Ms. Rousseau stated that an argument could be made that there was no violation because, when it was remanded back from the court, the City chose not to do anything about it. She maintained that they were making an assumption the former owner was operating in bad faith and they had no evidence to that effect. She reiterated her previous comments about the property being taxed as a four family so that there wasn't necessarily a misrepresentation.

Chairman Witham stated that, if they were going to talk about assumptions, he thought that by saying the request was remanded and the City didn't do anything about it so that there was no violation any more was a huge assumption and he was not willing to go down that road. Ms. Rousseau interrupted to say that a remand was a court order and it was their responsibility.

Chairman Witham continued that an Equitable Waiver was for something that was essentially discovered for the first time. For example, if somebody went in good faith and got a permit to build something and after they built it they then found that they had a dimension wrong and it was perhaps built a foot over. In that case, the Board could grant them relief instead of making them tear down a $10,000 foundation and move it twelve inches. He stated that was why an Equitable Waiver existed, not for a situation like this with a long history of violations, court orders and denials from Boards. He felt that, while he supposed the applicant had to take this course of action as there were few options, he felt it was an abuse of the equitable waiver option.

The motion to grant the equitable waiver failed to pass by a vote of 1 to 6, with Ms. Chamberlin and Messrs. Grasso, LeMay, Moretti, Parrott and Witham voting against the motion.

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Mr. Jousse resumed his seat and Mr. Moretti returned to alternate status.

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1) Case # 9-1

Petitioner: Laurie Ann McCray 2005 Revocable Trust, Laurie Ann McCray, Trustee
Property: 15 Haven Road
Assessor Map 111, Lot 17
Zoning district: Single Residence B
Description: Construct entryway over existing bulkhead.
Requests: Variance from Section 10.321 to allow the alteration of a lawful nonconforming building.
Variance from Section 10.521 to allow a 29'± front yard setback where 30' is required.
Variance from Section 10.521 to allow 25%± building coverage where 20% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

Mr. Tyler Jackson stated that he was the contractor for the owner and provided two letters of support from abutters. Touching on some of the points, he stated that the existing cement staircase represented 30 s.f. of 18" above grade structure and the bulkhead had 40 s.f. of lot coverage. They would be reducing that to 30 s.f. and moving it over. He stated that the proposed new deck would be better hidden from the neighbors, would be more aesthetically in line with the house and provides a decent means of egress from the kitchen.

Chairman Witham noted that they were looking for a 29' front yard setback which just involved one corner with 12" of relief.

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 grant the petition as presented and advertised, which was seconded by Mr. Jousse.

Mr. Parrott stated that the requested relief was minimal, one foot on the setback and the building coverage remaining about the same or a slight reduction.

Addressing the criteria, Mr. Parrott stated that the deck would be built in the middle of the lot in the back yard no closer to the property line for neighbors so it was hard to see any public interest. He felt that it was in the spirit of the Ordinance to allow property owners to improve and make their property more useful without infringing on someone else's rights. He stated that, in the substantial justice balance test, the balance tipped to the applicant and he felt that the proposed change would be an upgrade and that the value of surrounding properties would not be diminished. Mr. Parrott stated that the hardship in the property was the fairly narrow lot and the way the house was situated. He didn't feel the applicants were trying to abuse the system. The lot was what it was and the proposed change was minimal.

Mr. Jousse agreed that the change would not even be seen from the street and noted that there were corners of the house that were closer to the lot line than this addition.

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

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2) Case # 9-2
Petitioner: Industrial Rents-NH, LLC
Property: 124 Bartlett Street
Assessor Map 163, Lot 2
Zoning district: Office Research
Description: Convert 1,000± s.f. of appliance repair space for retail use.
Requests: Variance from Section 10.440, Uses 8.30 to allow retail uses in a specified portion of an existing building.

SPEAKING IN FAVOR OF THE PETITION.

Mr. Chris Franklin stated that the previous time he had appeared before the Board, they had not wanted to grant a variance for the whole building and one neighbor had spoken against the petition. He stated that the building was in the Office Research District but did not lend itself to office space and the Planning Department had suggested that he request to have the property rezoned. He stated that there was a tenant in there on a temporary occupancy for appliance repair and he was back before the Board to ask that they be able to sell some repaired appliances. He stated that the tenant was confined to the front of the building and there was a parking lot. There would be no Sunday hours and only a half day on Saturday. The appliances would be used and there would not be a high volume of traffic or much walk-in traffic.

Mr. Grasso noted the Planning Department's concern about this petition being properly before them and asked if that had been rectified. Mr. Franklin stated that he had previously come for a variance for the whole building with particular reference to this current tenant. That request was denied and the Board had advised him to come back and make a request for a specific tenant and they would then consider it. Chairman Witham asked if Mr. Grasso was actually referencing the signature of the owner and Mr. Grasso stated that was correct. Chairman Witham stated that, if there were any motion to approve, the stipulation could be made that the proper signature be obtained for the Planning Department. He clarified that the owner's signature had to be on the application.

Mr. LeMay asked if the business would be operated completely inside the building and Mr. Franklin confirmed it would. Ms. Rousseau asked if he would agree that there would be traffic coming and going out of there whether or not this was Office Research and Mr. Franklin agreed. In response to further questions, he stated that the past objector felt adding retail would open up Morning Street which ran on one side of the property, but he felt that visitors would use Bartlett Street to go in and out of the parking lot and there was no access to Morning Street. He stated that the proposed hours of operation would be 9:00 a.m. to 5:00 p.m. Monday through Friday and on Saturday from 8:00 a.m. to noon. They would run the repair service five or six days a week but the retail would only be when the office staff was there. He confirmed that an appliance operation had been there previously and this was an opportunity for them to move back.

Ms. Chamberlin noted that the owner still was listed as the uniform rental company. Mr. Franklin stated that the owners of the property had sold it to Industrial Rents under a contract for deed which would be transferred with required performance after five years. He said there was no issue with Alltex and he would ask that they forward a letter to the clerk if the Board wanted to make approval subject to that. Chairman Witham clarified that he felt Ms. Chamberlin's question was whether the uniform company was operating out of the building and Mr. Franklin stated that that they were no longer there. The property was vacant and it had been difficult to obtain tenants.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Lee Gove stated that he lived at 39 Morning Street and his concern was how much of the space would end up being retail. Once they granted 1,000 s.f. for retail, he didn't know if it would end at that point. He didn't know how the use of the back of the building was going to be monitored. He stated now that the former occupant was gone; he was able to get higher rents and would like to not go backwards. He stated that it sounded like the applicant was trying to do the right thing at the front of the building and with the hours of operation, noting that there had been noise issues with the previous owner. When Mr. LeMay asked if he could elaborate on the noise, Mr. Gove described trucks and ten wheelers coming to the back of the building from Morning Street, noting that they had started operation at 5:00 a.m. Chairman Witham noted that enforcement was a separate issue and the Board had to go on what was before them. Mr. Gove stated he just wanted it on the record.

Mr. Jonathan Sandberg, of 160 Bartlett Street, agreed with Mr. Gove and also felt that what was proposed was a fair use of the building during business hours, keeping the noise reasonable. Another resident at 150 Bartlett had an additional concerns with how the rest of the building would be developed. He stated that the appliance truck had been taking material out the side door

and already using the area as a loading zone. When Mr. LeMay asked if the area was an actual loading zone, Mr. Sandberg stated there were three garage doors which had been used by the previous tenant for ventilation.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Franklin stated that they had brought in some appliances to repair because right now an environmental company, that was supposed to remove a radon system sitting in the garage area, had not done so. He stated that, with the fire wall finished, everything was to come in the front door from Bartlett Street and from where the radon equipment was to be removed.

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

DECISION OF THE BOARD

Chairman Witham referenced the Planning Department memorandum and noted that if there were a positive motion, there should be consideration given to the ownership concerns.

Mr. Parrott made a motion to grant the petition as presented and advertised, which was seconded by Mr. Grasso. Mr. Parrott added that he would like the following stipulations attached to his motion:

1. That the retail use would be limited to a maximum of 1,000 s.f. and used solely for the sale of used appliances.
2. That there would be no outside display of products.
3. That the applicant would provide an originally signed document approving this request with whatever signatures or additional documentation that the Planning Department might require so that there would be compliance with the Zoning Ordinance as to ownership.

Mr. Grasso agreed with the stipulations and suggested two more, with which Mr. Parrott agreed:

4. That the appliance repair facility would not be accessed via Morning Street.
5. That the hours of retail operation would be 9:00 a.m. to 5:00 p.m., Monday through Friday and 8:00 a.m. to noon on Saturday.

When Chairman Witham stated that he didn't feel the owner had represented the 9:00 a.m. to 5:00 p.m. hours, Mr. Grasso stated that the owner had done so in response to his question.

Mr. Parrott stated that, with the stipulations added to the approval, the public interest would be protected. He felt that it would be in the spirit of the Ordinance to allow people to use their property provided that it would not detrimentally affect nearby neighbors. In the justice balance test, you needed to look at private gain versus the public interest and decide if one outweighed the other. He noted that there had been an industrial use on the property for a long time and the stipulations were designed to minimize any negative effect. Mr. Parrott stated that the value of surrounding properties would not be diminished as this was a well settled neighborhood. He noted that the previous use had been a commercial laundry which generated noise and was operated for long hours. Addressing the special conditions of the property causing a hardship, he stated that

this was an odd shaped lot in an odd location right on the edge of a residential area but across the street from other commercial uses. He felt that, again with the stipulations, the two types of uses could co-exist.

Mr. Grasso agreed that, with the stipulations in place, the variance could be granted as presented and advertised.

Chairman Witham stated that they also had to look at how the area was zoned Office Research in the first place. It was tucked behind Eldredge Park to promote office research but that building was struggling and the surrounding area was residential, a repair facility and a lumber yard so that the essential characteristics of the neighborhood would not be changed.

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

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3) Case # 9-3
Petitioners: John & Joan Schorsch
Property: 53 Pray Street
Assessor Map 102, Lot 40
Zoning district: Waterfront Business
Description: Install a 24” x 24” x 28” compressor.
Requests: Variance from Section 10.531 to allow building coverage of 32+% where 30% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

Chairman Witham stated that there was a note to the Board from the Planning Department that this property had been previously granted a variance and, after review, the correct lot coverage would mean seeking a variance from 35%± to 36%±. The compressor would add .1%± increase in lot coverage and, if the variance were approved, the discrepancy in lot coverage would be corrected.

Mr. John Schorsch stated that, in the plan for the construction approved earlier in the year by the Board was a description of an air conditioning system, but the architect had omitted putting the compressor on the plan. This was intended to be a correction of that omission. He noted that the compressor would sit against their house and away from the neighbors.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. LeMay stated that this was a simple addition to a plan the Board had reviewed extensively and on which they had granted variances previously. He felt that the compressor was being placed in one of the only possible places and there was a fence on the side that would shield the neighbors. Mr. LeMay stated that granting the variance would not be contrary to the public interest as the compressor would be placed in an area where the Board already had reviewed the layout and setbacks. He felt that substantial justice would be served by allowing appropriate HVAC equipment on the property. Regarding any diminution in the value of surrounding properties, he stated that the improvement in that area has helped increase values. Mr. LeMay added that the special conditions creating a hardship were a small lot with tight setbacks so that only so much could be done in placing modern conveniences to make living comfortable. Mr. Parrott agreed.

The motion to grant the petition as presented and advertised with a building coverage of 36% was passed by a unanimous vote of 7 to 0.

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4) Case # 9-4

Petitioners: Gibson B. Kennedy, Jr. & Patricia A. Kennedy
Property: 267 Marcy Street
Assessor Map 103, Lot 44
Zoning district: General Residence B
Description: Construct side entry porch addition.
Requests: Variance from Section 10.321 to allow the expansion of a lawful nonconforming building.
Variance from Section 10.521 to allow building coverage of 37.1%± where 30% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

Ms. Anne Whitney stated that she was appearing on behalf of the owners and distributed a letter of support from abutters. What they were proposing was to replace an existing side entry on Gardner Street which was in disrepair as could be seen in the first submitted photograph. The photos on the left of the exhibit showed a little bump-out which was in poor condition. They would install new windows and doors and relocate the entry door. The new small addition would provide shelter for the stairs, which would be slightly smaller, and wrap around to provide access to the back yard. She referred to the site plan, noting that the setbacks were met. Ms. Whitney noted that it was not unusual to be over the building as this was a neighborhood of fairly small lots with fairly good sized buildings. This property was currently at 35.2% and adding the 91 s.f. would bring it up to 37.1%.

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. Parrott.

Mr. Grasso stated that a replacement entry porch was in front of the Board for building coverage only, as the setback requirements were met. The building coverage was approximately 37% which he did not feel was that great an increase. Addressing the criteria, Mr. Grasso stated that there would be no public interest in this small addition and he noted that a letter of support had been received from abutters. He stated that the spirit of the Ordinance would be observed as the setback requirements were met and the only relief requested was for coverage. He felt that substantial justice would be done by allowing property owners to enjoy their home without infringing on the rights of the public. Noting that the design was tasteful, he stated that the value of surrounding properties might actually improve. He stated that the hardship was in trying to resolve a problem with the entryway and he reiterated that the only relief requested was for building coverage.

Mr. Parrott agreed that there was only a modest increase in lot coverage. He noted that the addition would be in the center of the lot and would not adversely affect neighbors while making the house work better for the owners. He noted that the applicants had kept the addition in scale with the rest of the home and was only 4.5' in width.

Ms. Rousseau stated that she would not support the motion as she felt the hardship criteria were not met. She stated that, in looking at the photographs and what was damaged, she couldn't see a good argument for expanding lot coverage.

The motion to grant the petition as presented and advertised was passed by a vote of 6-1 with Ms. Rousseau voting against the motion.

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Mr. Parrott stepped down for the following petition and Mr. Moretti assumed a voting seat.

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5) Case # 9-5

Petitioners: Aaron M. & Jocelyn M. Garganta
Property: 423 Colonial Drive
Assessor Map 260, Lot 43
Zoning district: Single Residence B
Description: Construct a 6' x 10' front portico.
Requests: Variance from Section 10.321 to allow the expansion of a lawful nonconforming building.
Variance from Section 10.521 to allow 23.1%± building coverage where 20% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

Mr. Aaron Garganta stated that he lived at 423 Colonial Drive and submitted a letter of support from abutters. Before starting, he wanted to correct the dimensions. The proposed portico was 6' x 12', although the proposed building was correct as advertised.

Mr. Garganta stated that they were seeking to add a 6' x 12' weather protected entry as the existing entry did not provide protection from the elements so that it now needs repair. He stated that the current poured concrete stairs were not conducive for safe entry as the door had to be opened back onto the stairs. Mr. Garganta reviewed the provided packet including photographs, an elevation of the front entry, dimensions of porch and a site plan. He stated that the property met the front and side setbacks and the only element was the lot coverage. He stated that the property was already nonconforming and this would bring it to 23.1%.

Mr. Garganta stated granting the variance would not be contrary to the public interest or the spirit of the Ordinance. It would not change the characteristics of the neighborhood or affect the public health, safety and welfare. He felt that justice would be done by allowing the installation of necessary weather protection and increase enjoyment of the property while the public would not gain if their petition were denied. He pointed out the letter of support as indication that the value of surrounding properties would not be diminished. He stated that the hardship was that a weather protected structure was needed to prevent future damage and allow enjoyment of the property.

Mr. Jousse noted that the Board of Adjustment application mentioned the 6' x 12' portico.

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

With no one rising, the public hearing was closed.

PUBLIC HEARING CLOSED

Mr. Jousse made a motion to grant the petition as advertised and as presented with a 6' x 12' portico, which was seconded by Ms. Rousseau. Mr. Jousse stated that granting the variance would not be contrary to the public interest and the spirit of the Ordinance would be observed. He noted that there were several dwellings in the area with similar porticos and entrances so this would blend in with what was there already. He stated substantial justice would be done and nothing had been presented as to the value of surrounding properties. He stated that the hardship was that these were fairly small lots.

Ms. Rousseau stated that she agreed with the applicant that a weather protecting portico would help to preserve the home.

The motion to grant the petition as advertised and as presented, with a 6' x 12' portico was passed by a unanimous vote of 7 to 0.

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Mr. Parrott resumed his seat and Mr. Moretti returned to alternate status.

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6) Case # 9-6

Petitioners: Brian Short LLC, owner, Chris Kallander, applicant
Property: 2225 Lafayette Road
Assessor Map 272, Lot 2
Zoning district: Gateway
Description: Establish a truck tire sales, service & distribution business.
Requests: Special Exception under Section 10.440, Use #11.30 to allow the proposed use in this district.
Variance from Section 10.581 to allow the sales, distribution and repair of vehicle related equipment on a lot with less than the required 2 acre minimum lot area.

SPEAKING IN FAVOR OF THE PETITION

Mr. Chris Kallander stated that he was representing the service centers that wanted to open shop at this address and had fallen short as far as required lot area for this operation, which had been classified as an auto repair facility. He stated that most of their business was done at the customers' locations or at an emergency road site. Everything was biodegradable and there were no hazardous materials on the site. He stated that they would be servicing about 6 to 8 vehicles a day where the previous glass installation business had about three times that much volume. With only roughly 10% of their business done on-site, he stated that there would be no noise nuisance created. He noted that the business they were replacing was also considered auto repair.

In response to questions from Chairman Witham and Ms. Chamberlin, Mr. Kallander stated that most of the work would be done inside the building and would be basically putting tires on and off. They wouldn't be changing oil or performing anything mechanical. They would be storing materials inside and would have a trailer on site for scrap metal which would then be hauled away. There would not be the unsightly mess seen at some other operations.

Ms. Rousseau asked who was representing the owner, or if Mr. Kallander was going to speak to the criteria.

Attorney Pelech stated that he was representing the owner and referenced a letter that he had written to the Planning Director outlining his position that only a special exception was needed when the previous tenant moved to a new location. He noted that the Director had determined that this was a different use from the previous one although it was considered auto repair. Addressing the criteria, he stated that there would be no change to the neighborhood or any threat made to the public health, safety and welfare. This was relevant in considering whether the spirit of the Ordinance was met and whether the variance would be contrary to the public interest. He stated that the photographs showed that this location was the ideal situation for this type of use. They were at the back of the building and the use would be less intensive than the use for Portland Glass, with most of the work done off-site, so that there would be no diminution in the value of surrounding properties. He added that the work done on-site would mostly be within the building. Attorney Pelech continued that the hardship was the nature of the property which lay in the General Business District although the use had been quasi industrial for many years, most recently an auto repair use. Now, with the change in zoning, a hardship was created, he claimed. He stated

that there was no fair and substantial relationship between the purposes of the Ordinance and this particular piece of property as the use would be less intense. Regarding the justice balance test, he stated that the hardship on the applicant if the petition were denied would not be outweighed by any benefit to the general public. He restated his position that only a special exception was needed, stating that this use would also meet the special exception criteria.

Ms. Rousseau stated that she agreed except for the hardship criteria and she was trying to get to that reason. She asked if the hardship was because the owners had to substantially refit the property, already existing with vehicle bays, to accommodate a retail type business and it would not be cost effective to change. Attorney Pelech stated that was exactly it. It was now ideal for this situation and, if the variance were denied, substantial renovation would be 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

Chairman Witham stated that both requests could be handled in one motion, if the Board wished.

Ms. Rousseau made a motion to grant the special exception and the variance as presented and advertised, which was seconded by Mr. Grasso.

Addressing the standards for granting the special exception, she stated that there would be no hazard to the public on account of fire or explosion as there was no evidence to the contrary. There would be no danger from release of toxic materials as there were none involved as proposed. She stated that there would be no detriment to property values as this business would follow a similar business and was surrounded by similar types of businesses so that the essential characteristics of the neighborhood would not be changed. She noted that the applicant had represented that a majority of the work would be performed off-site so that there would be no creation of a traffic safety hazard or increase in traffic congestion. She stated that there had been no evidence that there would an excessive demand on municipal services and no evidence of any increase in storm water runoff.

Addressing the criteria for granting the variance, Ms. Rousseau stated that granting the variance would not be contrary to the public interest. The essential characteristics of the neighborhood would not be changed, nor would there be any threat to the public health, safety or welfare. She stated that, in the justice test, the benefit to the applicant if the variance were granted would not be outweighed by any negative effect on the general public. Regarding the spirit of the Ordinance, she stated that the property owner needed to fill vacant space in a tough economic environment to allow them the full benefit and use of their property. She stated there was no evidence that the value of surrounding properties would be diminished. She stated that the hardship was that the property could not be reasonably used in strict conformance with the Ordinance and retrofitting the property would mean a substantial expense to the owners. She noted that there had been no issues with the former tenant.

Mr. Grasso stated that this use would have less of an impact that the previous business. He felt the proposed business would be a good fit for the building and involve minimal retrofitting so that he agreed that the special exception and variance should be granted.

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

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Mr. Grasso made a motion to suspend the "ten o'clock rule" and continue the hearing, which was seconded by Mr. Parrott and approved by majority voice vote, with Ms. Rousseau voting against the motion.

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7) Case # 9-7

Petitioners: Timothy J. Andrews & Sarah Ann Raboin
Property: 647 Middle Street
Assessor Map 148, Lot 31
Zoning district: General Residence A
Description: Construct fence & retaining wall.
Request: Variance from Section 10.516.30 to allow a portion of a fence to be closer than 20' from the intersection point of a corner lot.

SPEAKING IN FAVOR OF THE PETTION

Mr. Tim Andrews stated that he had submitted a summary of their five points but would provide a quick review. He stated that granting the variance would not be against the public interest or the spirit of the Ordinance. They had taken photos of the property, included in the supplements, which showed a bush at the very far left that was approximately where the fence would be. He felt that these demonstrated that the fence would in no way obstruct the view. Mr. Andrews stated that justice would be done. They had outlined their concerns for safety and that anything in their front yard was subject to theft. Regarding surrounding property values, he stated that they would also be going to the Historic District Commission and that they were trying to increase, rather than decrease values and make their property fit better into the location. Mr. Andrews concluded by addressing the hardship issue, noting that, if they were to deny the variance, the fence would have to go in the middle of the yard, which would not be aesthetically pleasing and would reduce their enjoyment of their property.

In response to questions from Chairman Witham, Mr. Andrews stated that the grass tapered into their lot and the fence was square.

Chairman Witham and Mr. Andrew discussed the difference between what appeared to be a section of grass tapering from 9' to 3' on the site plan, while the photo seemed to indicate 3' throughout. Chairman Witham stated he was only mentioning it because where he showed the fence was probably obstructing view while the site plan showed it set back quite a bit further. Mr. Andrew stated that the photo was deceptive and he had submitted the site plan to give a more logistical viewpoint.

Mr. Grasso asked how much relief the applicant was actually seeking and Mr. Andrews stated that he had prepared the exhibits originally for the HDC and they could see it highlighted in green on the plan. Mr. Grasso asked if he knew where the property line and whether they were in a negative setback with the house. He stated that he had visited the property and the house was almost right on the sidewalk which was City owned. Mr. Andrews stated that it was very close. Mr. Grasso stated that where they proposed the fence, it looked like it was within an inch of the sidewalk. Mr. Andrews stated that was carrying the design forward from his neighbor's existing fence which was right along the sidewalk. There was a lengthy discussion about the location of the fence, how it was depicted on the various exhibits, and how the measurements should be taken, with Mr. Grasso stating several times his concern that the fence would be on City property. If it were on the applicant's property, he wondered how much of a setback from the 20' was being requested. Mr. Andrews stated that the fence was on his property and it was his understanding that the setback was taken from the street and not from the sidewalk. Mr. Grasso stated that, when they dealt with a setback, it was from the property line.

Chairman Witham stated that if they looked at the additional information in the memorandum it stated, in talking about the location and obstruction that the Zoning Ordinance required that no structure, landscaping or screening which obstructed the visibility should be erected on a corner lot within 20' from the intersection of the lot lines along the street right-of-way. Mr. Grasso stated that, as he read it, that was the applicant's lot lines, not the City road. Chairman Witham stated that he believed you extended the lot lines until they hit the street right-of-way and then you measured 20' from there. Mr. Andrews stated that he believed that was what the Planning Department indicated when he was working with them. He felt that it was a little unclear so he would be happy to work with it. Chairman Witham stated that they had to deal with it as it had been sent to them. Mr. Grasso stated that where he saw the fence proposed was right on the sidewalk and he was thinking that was probably not the applicant's property if it was back from the lot line. Chairman Witham stated that he understood that you extended the lot lines out until they hit the street and then you measured from there.

Mr. Jousse referred to the submitted supplements and asked if the applicant was trying to represent what the line of sight would be from Park Street onto Middle. Mr. Andrews responded that was his intention with supplements 1-a and 1-b where he was addressing the concern of whether or not the variance was contrary to the public interest. His main focus was safety and, in putting the fence there, was he creating a hazard for a driver on Park turning onto Middle Street. He maintained that the supplements demonstrated that the driver at the stop sign had clear visibility up and down Middle Street with or without the proposed fence. Mr. Jousse and Mr. Andrews discussed the white lines and location of the stop sign with Mr. Jousse referring to photograph 3-b, where the stop sign was indicated at the bottom left. His interpretation of the 20' was that, when you were stopped at the stop sign or traffic light, you needed a 20' line of sight to see if something was coming. Chairman Witham noted that, while it could be confusing in the Ordinance, it did seem like the measurement was from the edge of pavement back.

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 petition could be granted as presented and advertised or they could grant less. He threw out a suggestion that, if the Board wanted to table the petition and ask the applicant to put up a mock-up so that the Board could see what was being requested, noting that applicants in the past had put out stakes and it had helped to visualize what the applicants wanted to do. He felt that requesting a mock-up might be better than a denial.

When Mr. LeMay asked if the Board had to take action before the HDC, Chairman Witham stated it was his understanding that either could go first. Mr. Andrews was allowed again to speak and referred back to his Supplement 2 noting that the existing bush was more obstructing than what he was proposing. Chairman Witham clarified that he had thrown it out as an option. Ms. Rousseau agreed.

Mr. Grasso made a motion to table the petition to the following month, during which time the applicant could erect a mock-up on the corner. The motion was seconded by Mr. LeMay. Chairman Witham suggested that the applicant work with the Planning Department and provide a two-day window during which the mock-up would be up and the Board could view it. Mr. Grasso mentioned that information from the Public Works Department would also be helpful and Chairman Witham stated that they could add a request that Public Works make some kind of recommendation to the Planning Department.

The motion to table the petition to the October meeting, so that the applicant could erect a mock-up that the Board could view and the Public Works Department could be requested to provide a recommendation to the Planning Department, was passed by a unanimous vote of 7 to 0.

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8) Case # 9-8

Petitioners: Brian M. Regan & Susan M. Regan
Property: 28-30 Dearborn Street
Assessor Map 140, Lot 1
Zoning district: General Residence A
Description: Divide an existing nonconforming lot containing two, two-family dwellings into two lots each containing one, two-family dwelling.
Requests: Variance from Section 10.331 to allow a lawful nonconforming use to be extended.
Variances from Section 10.521:
Lot 1 To permit a lot with 6,750 of lot area where 7,500 s.f. is required.
To permit a lot with 3,375 s.f. of lot area per dwelling unit where 7,500 s.f. is required.
To permit 55.15’ of continuous street frontage where 100’ is required.
To permit a side yard setback of 3.7’ where 10’ is required.
Lot 1-1 To permit a lot with 6,432 s.f. of lot area where 7,500 s.f. is required.
To permit a lot with 3,216 s.f. of lot area per dwelling unit where

7,500 s.f. per unit is required.
To permit 90'+ of continuous street frontage where 100' is required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard Pelech stated that he was appearing on behalf of Ms. Susan Regan and noted that Mr. Brian Regan was also there, represented by Attorney Jack McGee. He recalled the May meeting of the Board regarding this property, at which time Ms. Regan withdrew the petition and Mr. Regan withdrew his opposition. The parties and their attorneys had since met and were now jointly before the Board with this petition. Attorney Pelech stated that the Regans had divorced 16 years ago but still jointly owned the property. He stated that it was proposed to subdivide the property, which had existed as two duplexes since the mid-80's, so that one or more of the lots could be conveyed. He stated that the effect would be to put an imaginary line on the ground and that nothing that was there would actually be changed. Attorney Pelech stated that they had also filed subdivision and lot line relocation applications, noting that four residential units would continue to exist whether or not the property was subdivided but granting the subdivision would allow each party to own one lot. Attorney Pelech then passed out photographs pointing out the houses and views in each and reviewing the requested variances for each lot.

Addressing the criteria, Attorney Pelech stated that granting the variances would not be contrary to the spirit or intent of the Ordinance or the public interest. Citing the Malachy Glen and Chester Rod & Gun Club cases, he stated that the Board had to look at, first, whether granting the variance would change the essential characteristics of the neighborhood. He reiterated that the houses were there and would continue whether there were one or two lots. They were just talking about an imaginary line on the ground which would not threaten the public health, safety and welfare. Attorney Pelech stated that, with no additional units or parking spaces and no changes to the buildings or site, it would be difficult to argue that the value of surrounding properties would be diminished. He stated that substantial justice would be done by allowing the subdivision of these properties and there would be no benefit to the general public in denying the request. Attorney Pelech stated that there were special conditions of the property creating a hardship. The property was at the end of a dead end street and was unique in having two duplexes on it. He stated that there was no reasonable relationship between the Ordinance and its application to this property. The units were there and to allow subdivision won't increase the density of use, or traffic or demand on municipal services. Noting that these residences had existed for some time, he maintained that this was a reasonable use in a residential district.

Mr. Jousse stated that a variance had been granted in 1984 to construct a second dwelling and asked which lot was involved. Attorney Pelech stated it was #30 where a large barn had been located. When Mr. Jousse noted that the word used was "construct," not "convert" Attorney Pelech stated that he didn't know and deferred to Attorney McGee for help with that. There was a brief discussion of an indicated 8' setback and Mr. Jousse's opinion that the front of the dwelling was on the property line. Attorney Pelech stated that was existing and there was no notice of violation. Chairman Witham commented that he felt this was a classic example of measuring from the curb instead of obtaining a survey. He felt it was advertised and presented where it was, using the street as a property line, similar to what had happened with a recent Equitable Waiver request.

Attorney Jack McGee identified himself as representing Mr. Brian Regan who was in favor of this proposal. He noted that there was another proposal which was the lot line adjustment to the boundary between Regan Electric and the property. He stated that, as part of a divorce decree, a commitment had been made to transfer a 15' strip of land to Regan Electric. He stated that there was a fence put in place many years ago which delineated that land and which Attorney Pelech had shown on the first page of their exhibit. The house in the upper right hand corner was the Regan Electric property. He noted that the property line was right up against the back door and that lot was nonconforming for 100 years or so. Attorney McGee stated that the effect of allowing this boundary line adjustment was to make the Regan Electric lot more conforming and every one of the criteria to support the subdivision would apply to the lot line readjustment.

Ms. Chamberlin asked if the purpose of the lot line adjustment was so that each of the buildings could be separately sold to different people. Attorney McGee stated it was not quite that. Mrs. Regan had lived in her house for a long time and this would give her the chance to remain in the home, while the other house was sold and the proceeds split. Attorney Pelech added that back in May, the Board had been provided with a copy of the divorce decree which allowed Mrs. Regan to seek the relief they were seeking that evening.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. George Dempsey stated that he lived at 42 Dennett Street and passed out a copy of a plan stamped August 31, 2011 by the City. He stated that it had not been signed by an engineer and he felt it should be a legal document for someone asking for a subdivision. He noted that the drawing had been revised with no revision date or indication of who had revised it. He stated that revisions made to the drawing were shown attached to the document and the original drawing was dated March 11, 2011. The drawing which had been provided to the Board had been revised since then. He stated that he had the original drawing, signed and stamped by an engineer. He read a notation regarding property to be conveyed and stated that no legal documentation had been presented with the application which he felt created more nonconformance to the property. He stated that note 3 on the drawing did not reflect the correct square footage or acreage and asked who made the changes because the engineer did not sign off on this drawing.

Mr. Dempsey stated that one reason for granting the request was for hardship and that divorce was not a criteria for a variance. He also didn't see a hardship in the comments relating to the value of the property. He noted that he had back-up which all came out of City files. He read from his exhibits a violation letter citing a third unit in a house listed as a 2-unit wooden structure and mentioning rent receipts. He believed a third unit was still being used. He reiterated that he had backup for everything including setbacks being violated and building on City property. Regarding there being no hazard to the public or adjacent property on account of fire explosion or release of toxic materials, he related a fire at the end of Dearborn Street that he had witnessed. He stated the fire truck was blocked by a retaining wall, which he maintained was on City property, and a car parked parallel to the wall. He felt this was a life safety issue which the City was aware of and which had gone on for years.

Chairman Witham asked that he focus on the variance requests, noting that violations could be brought to the attention of the code enforcement officer. He stated that they were here to discuss the proposed lot line readjustment and the subdivision and asked if the speaker could address his

points on why he opposed these requests. Mr. Dempsey stated that the frontage was City property and there had been building on property the applicants didn't own. When Chairman Witham asked him if he wanted the buildings moved, he reiterated his comments about the retaining wall and safety. Chairman Witham stated that he understood Mr. Dempsey's concerns but wanted to narrow the focus to what was before the Board that evening. Mr. Dempsey stated that, if this were passed that evening, they would be passing on a plan that was not signed and asked if they were going to subdivide on that document when it was not signed by an engineer and without an affidavit backing up the piece of land that was taken out. Chairman Witham asked why he was so opposed and Mr. Dempsey stated that it was illegal. There followed additional discussion between Mr. Dempsey and Chairman Witham about Mr. Dempsey's concerns. Addressing his point about changes to the drawing, Chairman Witham stated that, if approved, there could be a stipulation that a plan be signed by an engineer.

Mr. LeMay asked if Mr. Dempsey could clarify where his property was relative to the applicants' property. When he described it as the third house from the water, Mr. LeMay asked if he had any property which abutted the Dearborn property. Mr. Dempsey, returning to the fire issue, stated that his concern was that with wind a fire could travel from one property to the other. That concern brought him to City Hall to go through the files where he found the items of concern which he detailed.

Mr. Mike Brendzel stated that he lived at 39 Dearborn Street and was also concerned about the retaining wall and also had looked at the files and felt that there had been a violation with nothing done. He felt that dividing things up would change things up front and was concerned that things would not get fixed. Referencing a letter from the City Attorney in August of 1990, he read a section stating that the fence might be on City property. Mr. Brendzel felt that, if the petition were passed that evening and then the property was sold, nothing would be done again. If the Board could pass the variances with stipulations, it would ease some of his concerns.

Chairman Witham stated that it put the Board in a difficult position of putting stipulations on City property and similar issues. He felt that there must be other avenues to correct these concerns other than to come before the Board. Mr. Brendzel stated that he had talked to the Planning Director, the Chief Building Inspector and the Code Enforcement Officer and asked them what they were going to do about this and none had an answer and finally one official suggested that he bring it in front of the Board, so he didn't know what else to do. Chairman Witham stated that he didn't know why they would send him to the Board as it seemed to him like a clear violation. Mr. Brendzel stated that he didn't know why either. He just wanted to be heard.

SPEAKING TO, FOR OR AGAINST THE PETITION

Mr. Regan stated that no one had said anything to him about the mix-up with the retaining wall but it could be addressed and they could go to Public Service and have them move the poles. He noted that he had a fight with PSC and that was where they put the poles; right into the concrete.

Attorney McGee stated that, first of all, the fact that the City Attorney sent a letter in 1990 regarding the retaining wall, if it was felt that it was in violation, something would have been done since then. He stated that it was difficult with the way the street was laid out with owners owning to the center of the road. He stated that this was something for the Regans to work out with the

City Attorney. He noted that the footprint had been there for a long time and, in these small back roads, these problems were not unique. As Attorney Pelech had stated, all they wanted to do was put in line what was already in place. They wanted to split the lot down the middle and make a lot line adjustment. He noted that he hadn't heard anybody say that those were a problem. He felt that the conflict between the two parties would never end until the units were allowed to separate.

Attorney Pelech stated, addressing the plan, that they were not required to submit a stamped engineered plan to this Board. He noted that the engineer had submitted a plan in April and, upon agreement of the parties, he had revised the plan on behalf of Brian Regan, Susan Regan and Regan Electric. He stated that the proposal would next go to the Planning Board which required stamped plans.

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

DECISION OF THE BOARD

Chairman Witham stated that the Board had several variance requests pertaining to dividing a property in two and converting an area off from the rear of one to an abutter, Regan Electric. He noted that the Board did not grant subdivisions and lot line relocations but the variances for the effect on the property if they were granted. He stated that the Planning Board would be receiving stamped, engineered plans as had been mentioned that evening. If the Board wished, they could attach stipulations to any motion to grant which might have arisen from testimony that evening. He felt that the issue of the retaining wall should not have been referred to them by officials and cautioned that any stipulation should be handled carefully.

Ms. Rousseau made a motion to grant the petition as presented and advertised, which was seconded by Mr. Grasso for discussion.

Ms. Rousseau stated that there had been no evidence from the abutters that this variance would in any way affect their property personally. She felt that a lot of the issues they brought up that evening had been code violations, and maybe the Fire Department needed to get involved, but they were not about the variance itself. Those issues needed to be addressed through the City and, while she sympathized with the speakers, this was not the right place for those issues.

Addressing the criteria, Ms. Rousseau stated that granting the variance was not contrary to the public interest. This was basically an adjustment on paper and she agreed with the applicants that nothing was going to change with the property so that the character of the neighborhood would not be changed. For the same reason, there would be no threat the public health, safety or welfare. She stated that the benefit to the applicant would not be outweighed by any harm to the general public. Again, nothing would be changed to affect the general public. She stated that no evidence had been presented that the value of surrounding properties would be diminished and she did not feel that would be true as nothing would change to affect the property values.

Regarding the hardship criteria, Ms. Rousseau stated that there were special conditions of the property which distinguished it from other properties in the area and the property could not be reasonably used in strict conformance with the Ordinance. This was a very narrow street in a historical neighborhood unlike areas outside of the City with many subdivisions. This was a small

lot with essentially two, two-families and splitting it down the middle, on paper, would not increase the nonconformance of the property or affect anyone in the neighborhood.

Mr. Grasso stated that he had seconded for discussion and would not support the motion. The evidence was in front of them to divide a currently nonconforming lot into two nonconforming lots. He didn't feel that was within the spirit of the Ordinance. He also did not see a hardship with the property or the buildings. While there might be a social or economic hardship, that was not a factor on which to grant variances.

Mr. LeMay stated that he was concerned about some of the alleged code violations on the property such as three apartments and whether there was anything else that was outstanding and suggested a condition that anything that was a code violation in the opinion of the Code Enforcement Officer be corrected before this be allowed to go through. He didn't feel they should be in the business of issuing variances on properties with violations.

Chairman Witham asked if Ms. Rousseau was in agreement with the stipulation and she stated that she was not as there had been no evidence presented that evening that there were code violations on the site. She felt it would be a different story if they had evidence and recommended that, if an individual felt that there were violations, they call the Code Enforcement Officer and report it as there was a legal process involved. She stated that allegations could not just be made in public that a property was in violation and she would not agree to a stipulation without any evidence as the Board dealt strictly with facts. Mr. LeMay commented that testimony had been made before them.

Chairman Witham stated that, in some sense, he agreed with Ms. Rousseau because the Board often heard the concerns of abutters and they went above and beyond their duties to try to cover everyone and make them feel good about it. He felt, in this case, that these were issues for which the City had mechanisms in place and didn't know why the Board should take them on. He stated that he would be supporting the motion. He noted that there were a number of variances requested but none of them involved something being built or added on. There was that one dividing line between the two houses and then a piece of the property going over to the Regan Electric lot. Essentially there were fences where those lines were going. Other than those attending the meeting no one would know that anything had changed. He felt that all the criteria for granting the variances was met and to deny them would be limiting the property.

Chairman Witham continued that he felt the property would actually be closer to conformity. He stated that these were lots that were undersized in a neighborhood where that was the norm so that the character of the neighborhood would not be changed. He also felt that, once divided, there might be improvements to the property which would help the neighborhood where otherwise it might remain in a continual state of disrepair and violations. He felt this was an opportunity to make things better.

The motion to grant the petition as presented and advertised was passed by a vote of 5 to 2 with Messrs. Grasso and Jousse voting against the motion.

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9) Case # 9-9
Petitioner: Robert B. Wason III, owner, Thai Huynh, applicant
Property: 100 Albany Street
Assessor Map 146, Lot 24
Zoning district: Mixed Residential Business
Description: Operate a reconditioning and protection service for vehicles and home goods.
Requests: The Variances and/or Special Exceptions required for the use.

SPEAKING IN FAVOR OF THE PETITION

Chairman Witham clarified that the variance would be to allow the services for vehicles and the special exception to allow services for the home goods.

Mr. Robert Wason stated that he was the owner of the property. He stated that the spirit of the Ordinance would be observed as the property would be used as a garage. Regarding the substantial justice test, he felt this was the best use of the property and that the value of surrounding properties would not be diminished. Regarding the hardship, he stated that without relief he would be unable to rent the property to anyone else. In response to questions from Ms. Rousseau he stated that historically the unit had a commercial or retail use and there was a retail use next to it. He stated that a garage was all that it could be used for.

Chairman Witham asked if he had read the stipulations recommended by the City. Mr. Wason stated that apparently there had been a complaint about cars passing over water and he didn't see any difference from rain. He would agree not to wash the cars in front of the building. When Chairman Witham asked how he would contain the water, Mr. Wason stated they just would not wash them there. They would take them to a car wash or wash them out back. He stated that water would be contained within the premises. When Chairman Witham asked if he could operate with all the work conducted inside the building, Mr. Wason stated, "absolutely." He stated that it was a huge garage which could easily fit three cars or a boat which the applicant also detailed. He stated it was not really a motor vehicle operation and he had tried to convince the Planning Director that it was an allowed consumer service.

Mr. Grasso noted that part of the request was for home goods and asked what that would involve. Mr. Thai Huynh identified himself as the applicant and stated that this would be carpet steaming or refurbishing antiques. With regard to the washing aspect, he stated that they were not a car wash facility. They would be hand washing the vehicles using a bucket of soap and then rinsing it off. That was about 5% of what he did. A lot of times the washing aspect was just prep so they could repair paint surfaces. He stated that most of the work was done in the shop and then they would pull the vehicles into the natural light for any touch-up. He saw no negative effect on the community. In response to a question from Mr. Grasso, he stated that they would not be using heavy duty chemicals, only those that anyone would use in their own residence.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Melissa Phipps stated that she lived at 112A Cass Street, part of a condominium association which she was also representing. She stated that they shared a lot with 100 Albany Street and had concerns about the proposed business. The condominium association shared responsibility for

maintenance of the parking lot on the Cass Street side of the property. She stated that the parking on the Albany Street side was what they considered not adequate for a business that would involve moving cars in and out. This was a very short parking area on that side and, while the business was in operation before they had to come before the Board, there were several cars that were parked on the Cass Street lawn, the property they owned. She also believed there were cars parked across the street. She had also observed cars that were parked partly out onto Albany Street causing traffic issues. Ms. Phipps stated Mr. Wason had refused to contribute to a reserve account for the parking area on the Cass Street side which was a shared responsibility per their condominium documents. She noted that he had just testified that cars wouldn't be washed on the property but could be washed on the other side of the property, which would be the Cass Street side. They were concerned that, with him not agreeing to contribute to the reserve account, the overflow from the Albany Street side would come to their side and that would be an issue for them as residents. She asked the Board, if it was considering granting the request, that they have some time to revise their condominium documents to make sure they were covered and protected as far as businesses allowed on the property. Unfortunately, currently, it was a little gray. She also related that there was a lot more noise on the Cass Street side from equipment such as vacuums and sanders and she hoped that would be considered.

Chairman Witham stated that he was trying to understand the relationship with the parking lot and asked if there were a property line going through it and they shared the parking lot? Ms. Phipps responded that their association had 6 spots and Mr. Wason had spots as well and there was the common area in between their spots. There was no official property line and it was 100% shared. She noted that his cars had to drive past their spaces to get to his spaces. She stated that they had issues with the parking, mostly in the winter, and noted that his residents on that side had been excellent in respecting the parking areas but they had never had a business which might have a potential for overflow parking. When Chairman Witham asked if the parking spaces were dedicated for units in Mr. Wason's building, she responded that they were not official marked spots for his residential units. Chairman Witham noted that one of the stipulations suggested by the Planning Department was that all work be performed inside. This was a heavy masonry building and, if passed, he hoped that would contain the noise. He understood her concern for parking but noted that there had been no indication from the Planning Department that a variance was needed for parking.

SPEAKING TO, FOR OR AGAINST THE PETITION

Mr. Wason stated that the condominium documents and parking on Cass Street had nothing to do with this application. Those were for the residential units in back and there was a grandfathered driveway that got them to the back. He stated that the front unit was the commercial unit and it had four or five parking spots for itself off Albany Street. He stated he didn't know what she was talking about regarding parking on her lawn. There was a sign that said no parking from where their property started to the end of the street so you couldn't park there anyway.

Ms. Rousseau asked if he was part of the condominium association and Mr. Wason responded that it was a loosely put together thing that totally separated both units. There was a common area which was only the driveway coming in and the walkway between the two buildings. Everything else, he maintained, was set up as her entire area applicable to her building and his area applicable to his with no other joint usage than what he had described. There was then a brief discussion of

Ms. Phipps representation of the association and the condominium documents as they related to his commercial usage.

Ms. Chamberlin noted that he had represented that the indoor facility could hold up to three cars so that there might be three other cars waiting outside. Mr. Wason stated that the tenant worked on three or four cars a day with very little impact. When Ms. Chamberlin stated that they were then not going in and out, but there might be one or two turnovers a day, he stated, "exactly." She asked if his business would not use that back parking lot and Mr. Wason stated, "no." That was for his residential condos. They faced to the back and didn't even have access from Albany Street. They entered from Cass Street. He stated that the commercial unit up front was totally contained to Albany Street and the parking in front of it. Ms. Chamberlin asked if he would then not be washing cars back there and he stated he would not.

Mr. Huynh stated that he didn't service more than two vehicles a day and, regarding the overflow parking, he had parked across the street with permission from that owner. He stated there were no issues with the business or property owners regarding off street parking. He confirmed that they did not bring vehicles in and out all day long and there were no traffic issues or hazards.

Ms. Phipps stated that she was the President of their association and had been in contact with both of the other owners. She stated that one of the owners had asked her to come with regard to the noise factor and the other owner also had issues with the parking and parking on the lawn.

Mr. Huynh stated, regarding noise, that there were dogs across the street barking constantly. He maintained that the work was done internally so he didn't know about noise they generated.

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

DECISION OF THE BOARD

Mr. LeMay made a motion to grant a variance for the reconditioning and protection services for motor vehicles and a special exception for the same services for home goods, subject to the following stipulations:

- That all work is to be conducted inside the building.
- That all water is to be contained on site and not allowed to drain into the City stormwater system.

The motion was seconded by Mr. Parrott.

Mr. LeMay stated that the special exception had most to do with the cleaning of small rugs, furniture, and antiques. Addressing the standards, he stated that the use was allowed in the district by special exception. He stated that there would be no hazard to the public or adjacent properties on account of potential fire, explosion or release of toxic materials, noting that they had testimony that benign sorts of substances were used in this process rather than paint strippers and that sort of thing. He stated that there would be no detriment to property values in the vicinity or change in the essential characteristics of any area including residential neighborhoods or business and industrial districts on account of odors, gas, heat or other pollutants and irritants or unsightly

outdoor storage. With their stipulation that all work would be done in the building, presumably there would be no danger from any of these types of things. With traffic limited to someone coming to drop off a rug or a chair, he felt there would not be any traffic safety hazard or substantial increase in the level of traffic congestion. He stated that there would be no excessive demand on municipal services as it sounded like there would be a modest consumption of water and disposal of the same. With the stipulation, he felt they had addressed the issue of there being no increase in storm water runoff onto adjacent properties or streets.

Addressing the variance criteria, Mr. LeMay noted that this would be for the detailing of automobiles with the stipulation that the work be done completely inside the building. With this stipulation, he felt that the variance would not be contrary to the public interest. This was not an auto repair facility and there would not be air tools going all day, although there was a tire store around the corner which might have them. He stated that the public health, safety or welfare would not be threatened in any way and the character of the neighborhood would not be changed, especially with the work done internally. In the justice balance test, he stated that the benefit to the applicant in operating his business would not be outweighed by any harm to the general public or individuals. He did not feel that any evidence had been presented to indicate that the value of surrounding properties would be diminished. As part of the hardship test, he stated that literal enforcement of the Ordinance would result in unnecessary hardship and that no fair and substantial relationship existed between the general purposes of the Ordinance provision and its application to the property. He felt that the proposed use was reasonable and asked his second to comment further on the hardship.

Mr. Parrott stated that the property was very much in a mixed use area with both residences and similar businesses close by. Addressing the condominium owners, he stated that it was now on record that the business had to comply with certain requirements, specifically the provisions the Board had imposed that evening.

Before calling for the vote, Chairman Witham stated that the variance and special exception would be for the building identified on the City of Portsmouth tax card as 100 Albany Street #C, Map 146, Lot# 124-003.

The motion to grant the special exception and variance for the building so identified and with the specified stipulations was passed by a unanimous vote of 7 to 0.

V. OTHER BUSINESS

No other business was presented.

VI. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 11:55 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk