

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

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

November 15, 2011

MEMBERS PRESENT: Chairman David Witham, Vice-Chairman Arthur Parrott, Susan Chamberlin, Derek Durbin, Alain Jousse, Charles LeMay, Alternate: Robin Rousseau

EXCUSED: Thomas Grasso, Alternate: Patrick Moretti

Ms. Rousseau assumed a voting seat for the meeting.

Before commencing the meeting, Chairman Witham noted that this would be the last meeting for Mr. Jousse, after 13 years of dedicated service. Mr. Jousse did an excellent job on the Board and often brought a different perspective to their considerations. He announced that this would also be Mr. Grasso's last meeting. Mr. Grasso was not able to be there that evening but Chairman Witham wanted to thank him for his contributions to the Board. They would both be missed.

I. APPROVAL OF MINUTES

A) September 20, 2011

It was moved, seconded and passed by unanimous voice vote to approve the Minutes as corrected by the reinsertion of a small passage that had been omitted.

II. PLANNING DEPARTMENT REPORTS

Receipt was acknowledged of memoranda regarding a recent court case and one concerning testimony during Requests for Rehearing were acknowledged. Chairman Witham stated that they would be following the recommendation, which was a return to the manner in which these requests were previously handled by the Board. The Board would be considering submitted information and there would be no public testimony.

III. REQUEST FOR REHEARING

(This item will be considered by the Board with reference to the written motion for rehearing and to the statutory criteria for granting a rehearing. There will be no public testimony.)

A) Request for Rehearing regarding the property located at 28-30 Dearborn Street.

Chairman Witham asked if the Board would like to discuss this before any motion was made.

Ms. Rousseau stated that the appellant had outlined a number of code violations which they believed were associated with the property citing Section 10.237 Outstanding Violations. She agreed that, if the Board went forward with the variance request and there were violations, they would be in error. She had asked the Planning Office for information as to whether these had been resolved but they had not yet been able to get back to her. Noting that the City Planner was there that evening, she thought he might be able to offer some reassurance that there were no legal outstanding code violations for the property before they went forward with the variance request.

Chairman Witham stated, on the one hand, the Request for Rehearing addressed some issues where it appeared that there might be code violations. On the other hand, the Board was there to do a specific job based on the packet they were given, which was to apply the criteria to a request associated with a lot line subdivision. He believed the Board had acted correctly and wondered if they wanted to take on the role of the code enforcement officer. He felt that, if there were code violations, they should be filtered and corrected if necessary before the application came to them so they were not put in the position of deciding on their legitimacy.

Ms. Rousseau stated that this was a simple yes or no question on the issues raised by the abutter. If no, it was done. If there were violations, then the Board was in error and maybe there was an error with the City in moving forward with this request and they would just deal with it again. Chairman Witham reiterated that, if there were violations, the application shouldn't have made it that far. Mr. LeMay agreed, noting that they would be in a reasonable position on the initial hearing if it were not for Section 10.237 in the Ordinance. It would be wonderful to have these things filtered but he felt the issue before them that evening was whether or not they were going to listen to the allegation on code violations and he felt they needed to do so based on that section in the Ordinance. While he had no interest in hearing every little detail of every alleged violation, he would like a yea or nay from the code enforcement officer and the appropriate venue for that would be at a hearing, if only for that narrow issue.

Chairman Witham suggested that they offer the Planning Department the opportunity to address the Board or they could move forward based solely on what they had. Ms. Rousseau suggested that perhaps the request could be continued until they received a response from the City as to whether there were legal code violations on the books at the time the Board made its decision. If there had been an error in moving forward, they could resolve that in fairness to all the parties.

Ms. Chamberlin stated that she was not particularly concerned about the record of old alleged violations but would be worried about the active potential fire safety violation and would want any approval conditional on that getting fixed. Chairman Witham stated that, right now, they could only act on the rehearing request and couldn't add stipulations to something they had previously granted. He stated that they would have to grant the rehearing and, if violations existed, they

would have to be cleared up before the applicants could come back before the Board. They would need to ask for equitable waivers or whatever was needed to clear up the situation.

Mr. Jousse stated that he had brought out at the initial hearing that the building erected back in 1987 did not meet the front setback and one house appeared to be located on the property line. Nobody had picked up on his statements and he had voted against granting the variance because he felt there were code violations that had not been addressed.

Chairman Witham stated that they could offer the Planning Department a chance to address the issue and there was a brief discussion about whether this constituted someone speaking from the audience. Chairman Witham stated that he felt they could ask someone from the department to speak in counsel as had customarily occurred when there was a planner assigned to attend the Board meetings. When Mr. Jousse commented that he had been on their “side of the table,” Chairman Witham stated that he felt that the Planning Director could speak as easily as the planner and he was going to allow him the opportunity to do so as a source of counsel from the City.

Mr. Rick Taintor identified himself as the Planning Director for the City of Portsmouth. He stated that they were correct in that the variance should not be granted if there are outstanding violations. He stated that Rick Hopley, the Chief Building Inspector, and Jason Page, the Zoning Officer, had received permission to enter on the properties and inspect them for violations, which was the information he had as of two o’clock or three o’clock that afternoon. Mr. Taintor stated that he had received an e-mail from Ms. Chamberlin earlier that day requesting the same information and he had talked to Mr. Hopley around one o’clock who was extremely busy and not able to do the immediate research in the files to determine if there were violations or not. He stated that he regretted that he did not have a yes or no answer, but did not have the information at that point.

Chairman Witham stated that he thought they would have to table the matter until they had the answer they were looking for. Mr. LeMay raised a point of order that the discussion of whether or not there were code violations was the material component of what would be in the public hearing and he didn’t feel it should be discussed just among the Board without giving the applicant a chance to address what had been raised or giving the City a chance to rebut.

Ms. Rousseau stated that, from what she had just heard, there were violations based on something that was reported. They needed to look at whether there were violations reported to the City that were outstanding at the time of the application, not after the application. Chairman Witham stated that he thought it was a matter of whether this was a property in violation. They had a brief discussion of what outstanding violations meant with regard to the timing of the application and its appearance before the Board. Chairman Within concluded that he felt they were all on the same page and would entertain a motion, if one of the members wished to make one.

Mr. LeMay made a motion to approve the rehearing request and when Chairman Witham asked if he wanted to approve it or table it for more information, he stated that his motion was to approve the request. Mr. Parrott stated that he would second it.

Mr. LeMay stated that his motion was restricted to the specific issue of whether the potential Ordinance violations existed, not necessarily all the content. Chairman Witham stated that, if they granted the Request for Rehearing, they had to deal with the whole. Even if the City inspectors

came back and said there were no violations, they still had to rehear the whole petition. Mr. LeMay disagreed but Ms. Rousseau stated that was true. She had just attended a meeting in Concord where the issue was discussed and, if they decided to rehear it, it started from ground zero with a whole new hearing. Mr. LeMay withdrew his motion.

Chairman Witham suggested they table the request until they had received a memorandum from the Legal Department with regard to any outstanding code violations on the property. Mr. Parrott stated that Section 10.327 was crystal clear that no variance or special exception could be granted for premises on which outstanding violations existed. He felt there was enough evidence in front of them to at least raise the question of their existence. He noted the extensive amount of documentation submitted by the appellant, with copies of prior City actions and stated that some of the alleged violations were serious. He felt there was more than enough evidence to support a further look at the issue and, if necessary, he would make a motion.

Ms. Rousseau commented that the outstanding violation should be in accordance with the City's code enforcement officer, not someone off the street who thought there was a violation. Mr. Parrott noted that he had said alleged violation and Ms. Rousseau responded that it (the Ordinance) didn't say "alleged."

Ms. Chamberlin stated that she moved to table this request until information was received from the City. Chairman Witham asked Mr. Parrott if he had been forming a motion and he stated that he wasn't. Ms. Rousseau seconded Ms. Chamberlin's motion. Mr. Parrott questioned if the motion was to a time specific and Ms. Chamberlin stated it was not, although she would imagine that by the next meeting should be plenty of time.

Chairman Witham stated that they had a motion to table the Request for Rehearing until the Board received a memorandum or letter from the Planning Department and/or Legal Department with regard to any outstanding violations on the property. Ms. Rousseau added, at the time of the application when it came before them, which Chairman Witham repeated. Ms. Chamberlin stated that she did not need that in her motion. She didn't feel they were different. The violations were ongoing or not. Ms. Rousseau stated that she didn't feel a court would see it that way.

The motion, to table the Request for Rehearing until the Board received a letter from the Planning Department and/or Legal Department with regard to any outstanding violations on the property, was passed by a vote of 6-1 with Mr. LeMay voting against the motion.

III. OLD BUSINESS

- A) Case # 10-1
Petitioner: Sean C. Evans & Hannah Shea
Property: 165 Dodge Avenue Assessor Plan 258, Lot 41
Zoning district: Single Residence B
Description: Construct a 26'± x 38'± two story home with attached 24'± x 24'± garage
Requests: Variance from Section 10.521 to allow a single-family dwelling on a lot without street frontage, where 100' of continuous street frontage is required.

Variance from Section 10.512 to allow a structure on a lot without access to a public street or an approved private street.

Note: This rehearing was postponed from the October 18, 2011 meeting. An earlier variance application regarding lot area has been determined to be inapplicable.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard Pelech stated that he was appearing on behalf of the applicants who had appeared before the Board in July with the subsequent granting of a rehearing request. He touched on an item that had arisen during the July meeting regarding lot size and noted that the Board now had in front of them a stamped survey to show that the lot exceeded the minimum lot size required so that variance was no longer required. He stated, secondly, that it was clear from Attorney Sullivan's memorandum, plus information from Attorney Loughlin, that the portion of Dodge Avenue in question was never a city street and thus ownership of the paper street reverted to abutters, which meant that the Evans family, Mr. Lee and the other abutters owned 50% of the street in front of their properties.

Addressing a concern of one Board member in July regarding property owners becoming landlocked, Attorney Pelech stated that New Hampshire case law established that anyone who was conveyed a lot of land referencing a plan for an abutting street had an automatic easement over that street whether constructed or not. He stated that Mr. Lee, as well as the Evans family, had a deeded right to pass over the paper street known as Dodge Avenue so no one was going to be landlocked. Attorney Pelech stated that Mr. Lee had come before the Board in 1987 for the same variances now being requested, which were for street frontage of less than 100' and to allow a structure on a lot with no access to a City Street. He referenced several other similar variances granted to other properties throughout the City.

Attorney Pelech stated that the hardship was that this was a buildable lot which would become unusable unless the Board granted relief. The special conditions were that this was a lot of adequate size which had existed as a lot of record in the Registry of Deeds for over 50 years, but nothing could be done without a variance. He stated that this lot would not be merged with the adjacent lot with a house which the Evans' also owned. He stated that Mr. Lee had a driveway which ran down the paper street and the applicants would construct one adjacent to that. Regarding the spirit and intent of the Ordinance, he cited case law which stated that to be contrary to the public interest the health, safety or welfare of the public would have to be threatened or the essential characteristics of the neighborhood changed. He stated that neither would occur. This was a building lot in a residential neighborhood which could be used without affecting anyone else. In the justice balance test, he stated that the hardship on the owners to not utilize a lot which had existed for over 50 years would not be outweighed by any benefit to the general public. He stated that a local realtor would verify that the increase in the lot's value would benefit the public and not diminish the value of surrounding properties.

Attorney Pelech referenced some aerial photographs he had distributed and detailed on each the location of the various houses, driveways and rights of way, as well as indicating where the house would be built and how it would be accessed. He felt these indicated how a home could be built

without creating problems in the neighborhood and reiterated how the request met the criteria. He introduced Mr. Fred Attalla, a local real estate broker.

Mr. Attalla listed the properties he had reviewed which he felt were comparable to that proposed and their valuations and assessments. He felt that, if the variances were granted for this house, the improved lot would be in the \$300,000 to \$325,000 range, while the mean price of a lot alone would be around \$140,000. From comparing the proposed lot to that of Mr. Lee which had a larger lot but a smaller home, he concluded that this improved property would enhance the value of surrounding properties.

In response to questions directed to him, Attorney Pelech stated that they did not have to grant Mr. Lee an easement as he already had one in his deed, over the half of the street that Mr. Evans now owned, for a driveway. He stated that the expanded lot was not yet recorded but would be.

When Ms. Chamberlin asked what Mr. Lee's view was, Attorney Pelech stated that he had written a letter of opposition in October and was there that evening to speak. He noted that Mr. Evans had met with Mr. Lee since the letter and he hoped they would work out an arrangement with regard to the driveway as Mr. Evans could access his property without going over Mr. Lee's roadway. Ms. Chamberlin asked if there was any objection to a maintenance agreement and Attorney Pelech stated that there was not. He added that there was a letter in their packet signed by all the abutters on Dodge Avenue excepting Mr. Lee stating that they had no problem with this proposal.

Mr. Parrott asked about the width of Dodge Avenue and Attorney Pelech stated that the original subdivision plan, which was in their packet, showed a 50' right of way or paper street and a plan of lots dated 1939 showing the 15 lot subdivision as recorded in the registry of deeds. He stated that Public Works had confirmed a 50% paper street which they maintained up to the Evans' present home. Mr. Parrott asked if the right of way coincided with the 50' travelway shown on the plan given to the Board and if it was so deeded as part of the subdivision. Attorney Pelech stated that it was.

Ms. Rousseau asked why it had not become a legal road and Attorney Pelech explained the process culminating in a City Council vote. He felt the Council had not voted on this street because it was never extended all the way down. He wasn't sure if the paved portion of Dodge Avenue had received acceptance but believed the act of maintaining it was a form of acceptance.

Chairman Witham noted that when Mr. Lee had been granted his variance, he needed to show a plan indicating the driveway so that the access was clear. Attorney Pelech stated that they had no problem with a similar condition for their driveway. Chairman Witham asked if they had made an effort to come up with a driveway plan. Attorney Pelech responded by referencing the surveyed plan in front of the Board. He indicated the lots on the plan showing the old lot line, the additional 25' and Mr. Lee's driveway. He indicated the portion of Dodge Avenue and the portion of Mr. Lee's driveway they would be utilizing. Chairman Witham noted that, if a variance were granted, the applicants would access the lot using some of what Mr. Lee had constructed. It also looked to him that a portion of Mr. Lee's driveway was on the Evans' section of the paper street. Attorney Pelech stated that they mutually had legal rights to do so.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Stephen Lee stated that he lived at 174 Dodge Avenue. He wanted to address the question of access and how it was going to be constructed. As had been pointed out, in obtaining his variance, he had to produce a topographical study of the site and show specifically where the driveway was going to be placed. He was expected to comply with those plans and not deviate unless he received permission from the Board. He was concerned, after looking at the surveyed plan, that it unilaterally changed the setbacks so that a house could be built 5' from the paper street. He would like to see the regular setbacks maintained. Chairman Witham clarified that what he would like was to see a 55' front setback to make up for the additional 25'. Mr. Lee replied that setbacks shouldn't be from the middle of the street but from the original lot line.

Mr. Lee stated, with regard to bringing water services to the property, that he had paid the City to extend the water line 170' up the street and then a smaller line a little further. He didn't know how that related to what the applicants planned but it was an issue. He reiterated that he had to submit specifications for the driveway and felt they should also have to submit plans, with which they had to comply, clearly showing what was to be built and where. He was concerned that, if the variances were granted, the lot could be sold and void any promises made by the present applicant unless they were made a condition of granting a variance.

Addressing why the City had not claimed it as a street, Mr. Lee stated this had previously been a gravel pit and the topography became challenging with the considerable grade changes and he concluded that the City had found it too expensive. He reviewed the conditions he would like to see, which included the petitioner submitting drawings for the Board's approval describing any proposed changes as well as construction details on the driveway. He would like to see plans arrived at through some sort of negotiation between Mr. Evans and himself and had no problem with some sort of maintenance agreement. Mr. Lee would also like a provision that, if any part of the existing driveway were destroyed or affected by their construction, it would be returned to a condition as good, or better, than before the work was done. A final condition he would like would be that changes to grade levels that might be required to achieve the construction objectives would not have a negative impact on his property. Other concerns included what would be required for a septic system installation and the zoning provisions for grade changes within certain distances from property lines. Chairman Witham stated that he thought there were provisions in terms of preventing runoff onto adjacent properties. Mr. Lee stated that he believed insufficient plans had been presented to the Board to grant an unconditional variance. He concluded by stating that, while some promises had been made to others, there had been no substantive discussions between the abutters and him regarding the property. He asked that the Board take responsibility for the implementation of those promises by adding them to the variance as stipulations.

Chairman Witham noted that the Board could add as many stipulations as they wanted. He felt that Mr. Lee was asking for these plans before a final decision was made. He felt the easiest course would be to grant a variance, if the Board wished, adding stipulations rather than having everybody come back all over again. He understood Mr. Lee's concerns and agreed that it was a little loose in terms of the location of the driveway and so forth but felt it could be resolved without the applicants repeatedly having to return to the Board. He added that a stipulation meant that what the variance granted could not happen unless it were met. Mr. Lee explained that he wanted to be involved and see what was going to happen so that he could determine if it would directly affect him and, so far, he had not seen what he needed. Chairman Witham stated that, if

there were a stipulation which also required his signature to move forward, it could not happen without him. Noting that Mr. Lee had mentioned water runoff after construction, Mr. Jousse asked if that was a current problem. Mr. Lee stated it was not at present but could be a concern with a septic leach field on a small lot with this topography and needed to be clarified by an engineer doing the septic system design. He added that the reason he only put in a two bedroom home was because the septic for a four bedroom was huge.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Pelech stated that they had no problem with having the same conditions attached that Mr. Lee had on his variance and submitting to either the Board or Public Works their driveway plan showing how the property would be accessed. They would also show their water service on a plan as they didn't anticipate utilizing Mr. Lee's water service. They would probably bring it in over the other lot owned by the Evans' by way of an easement. He added that, were the variances to be granted, they would have to design a state approved sub-surface septic system which he felt could be easily accomplished on that lot.

In response to a question from Ms. Rousseau as to why they would not petition the City to make this a legal road, Attorney Pelech stated that he didn't think the City Council would vote to accept it unless it were brought up to City standards with drainage culverts, which would be cost prohibitive for just these two homes.

DECISION OF THE BOARD

Chairman Witham stated that the applicants were seeking a couple of variances which, granted, might require stipulations with regard to the design and location of a driveway and hopefully some kind of agreement with Mr. Lee. He noted that, the previous time this issue came before the Board, it included a third variance for lot size. That was no longer needed as the new lot size, which needed to be recorded, was conforming.

Ms. Rousseau asked if a list had been made of the stipulations in which the Board was interested. Chairman Witham stated that they included engineered drawings of the driveway which would include grading, location and materials as well as a maintenance agreement. Also wanted was some kind of wording to the effect that any damage to Mr. Lee's driveway would be repaired to existing conditions. Chairman Witham noted that an issue had been also raised regarding the septic and possible runoff but he would be hesitant about that one as it would be going to the State for approval and he felt they were talking about minimal runoff.

Ms. Rousseau raised the question of a sign-off from Mr. Lee. Chairman Witham stated that Mr. Lee would like to see some kind of negotiated location of the driveway where he would agree to the plan. Mr. Parrott stated that he believed the other stipulation was that the setbacks be measured from the original lot line, as opposed to the expanded line resulting from the paper street. Chairman Witham responded that he was not sure he would pursue that but Mr. Parrott was correct. A short discussion ensued among Mr. Jousse, Ms. Rousseau and Chairman Witham about the ownership of paper streets as it related to setbacks, with Chairman Witham citing the solution employed on Walker Bungalow Road where everyone owned to the middle of the road but the front setback was measured from edge of pavement.

Mr. Jousse stated that he had no problem with a stipulation dealing with driveway design. He viewed it as a curb cut which would have to be approved by Public Works so he would structure a stipulation that it had to be approved by Public Works with Mr. Lee being consulted. He did have a problem with stipulating a maintenance agreement. He felt that it was not the Board of Adjustment's position to get in the middle of two private individuals working out a problem and, while he thought it was a good idea, a maintenance agreement was not part of their land use criteria.

Ms. Rousseau stated that she would make a motion but was looking at the original Case #10-1 regarding the size of the dwelling lot and wanted to be sure if she stated "as advertised" that it was correct. Chairman Witham clarified that the two variances now being requested were for less than the required 100' of street frontage and to allow a structure on a lot with no access to a public street.

Ms. Rousseau made a motion to approve the petition as re-advertised for the two variances with the stipulations as the Board had discussed. Chairman Witham stated that he would list them when he called for the vote. Mr. Jousse seconded the motion.

Ms. Rousseau stated that the request was to allow a single family dwelling on a lot where no public street existed. She stated that there was no evidence that the public health, safety, or welfare would be threatened or that there would be any injury to the public rights or alteration of the essential characteristics of the neighborhood. This was a residential neighborhood of single family homes so that granting the variance would not be contrary to the public interest. She stated that the spirit of the Ordinance was to have access from a street and, in this case, there was only a paper street. Regarding substantial justice, she stated that granting the variance would benefit the applicants without causing any harm to the general public. She felt that the issue was just between two parties and they had heard from the abutter that, with stipulations, he would be somewhat satisfied. Ms. Rousseau stated that they had heard evidence that the value of surrounding properties would not be diminished if the applicant were to build on this lot. She stated that the hardship preventing the property from being reasonably used in strict conformance with the Ordinance was that this was a lot of legal size in a residential neighborhood with the oddball situation of its location on a paper street. She felt it was a reasonable request with the Board attaching stipulations so that all parties would be satisfied.

Concerning the variance for allowing a structure on a lot with no street access, she felt she had spoken to this issue as well when she went through the criteria for the street frontage. She stated that the request for the second variance was a reasonable one and, with the included stipulations, met all the criteria. She felt that all parties would be made whole.

Mr. Jousse stated that this was an allowed lot in a residential area and he felt that the hardship was that a piece of property could not be used as it was zoned. Unfortunately, back a number of years ago the street had not been built to the correct standards or no variances would have been needed.

Chairman Witham stated that they had a motion to grant the petition with the following stipulations:

1. That the applicant submit an engineered plan showing details of the location, materials, and grading to be presented to the Public Works Department with a signature of acceptance by Mr. Stephen Lee, abutter to the property;
2. That, if any damage was done to the existing driveway, built by Mr. Lee in 1987, while constructing the new driveway to the Evans property, the driveway would be restored to its existing condition; and
3. That the front yard setback would be measured from the original lot line and not the center line of the paper street.

He added that, while it wouldn't be a stipulation, he felt the Board encouraged the development of a maintenance agreement between the parties.

The motion to grant the petition, with stipulations, was passed by a unanimous vote of 7 to 0

V. PUBLIC HEARINGS

1) Case # 11-1

Petitioner: Christopher A. Shields

Property: 61 Cabot Street

Assessor Plan 136, Lot 36

Zoning district: General Residence C

Description: Replace existing garage with 16' x 24' storage shed.

Requests: Variance from Section 10.521 to allow a 0'± left side yard setback where 10' is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Chris Shields stated that he was the owner of 61-65 Cabot Street and noted that the Board had pictures of the existing structure in front of them. This was originally a 17' x 37' barn, turned into a garage, which was now falling down and unusable. They would like to replace this with a small storage building for tenant use. Mr. Shields stated that, in terms of the public interest, they would be replacing a building which was unsafe and an eyesore with a smaller structure. Regarding substantial justice, he stated that there would now be another off-street parking spot. He showed the two parking spaces in the front on the plan which would be moved so that the parking spaces would not be in the front setback. He felt that the value of surrounding properties would actually be improved by a well constructed replacement structure with a better design. He stated that the hardship was in the lot itself which was narrow so that they couldn't set the structure back without reducing the parking area.

Ms. Rousseau noted that he was asking for a 0' left side yard setback and asked why, as he would be demolishing the structure, he couldn't move it in to create a larger setback. Mr. Shields replied that, if he did, the structure would be in the center of the driveway and parking area. When she asked what his hardship would be with that, he replied that he would lose three parking spaces and not be able to supply the required parking. In response to further questions, he stated that he currently had parking adequate for six cars, but if they were reconfigured to the required size, it

would only be five as the garage was not usable. After the shed was done, he would have six. He advised that he had three units on the property.

Mr. Jousse posed several questions to which Mr. Shields responded by stating that there was no foundation but a poured slab inside the last two bays. Regarding parking, he stated that he had been told by the Planning Department that he needed six parking spaces. When Mr. Jousse mentioned that one and a half per dwelling unit came out to four and a half spaces, Mr. Taintor clarified that the current Zoning Ordinance required four spaces for three or more dwelling units on a lot plus 1.5 spaces for every unit over 2, which rounded up to six required spots. Mr. Parrott asked the exact distance from the proposed shed to the right hand property line as he couldn't read the number. Mr. Shields stated he didn't have a copy of the plan but the width of the lot was 47'5". Mr. Parrott stated that the Board was very reluctant to grant a zero setback because the structure couldn't be maintained without going onto the adjacent property. It would be better if the applicant could move it in a couple of feet. Mr. Shields stated there was a possibility that they could reduce the width of the building to whatever would be 2' less than he had requested. Chairman Witham noted they could grant less than what was advertised.

**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. Jousse made a motion to grant the variance as advertised and presented with a 2' left side yard setback where 10' was required. Mr. Parrott seconded the motion.

Mr. Jousse stated that granting the variance would not be contrary to the public interest. The shed was really a safety hazard now and couldn't be used for anything so that he felt that the spirit of the Ordinance and substantial justice would be observed by allowing the reconstruction. He stated that this would not diminish the value of surrounding properties and the hardship was that this was one of those lots on Cabot Street which were configured when everyone was still walking and properties were built to the lot lines with dwellings as close as possible. He stated that this was trying to apply current standards to a city settled in the 1600's.

Mr. Parrott stated that he agreed. With the few additional feet, the new shed would be more in compliance with the regulations, particularly with regard to the side yard setback, and it was desirable to remove a dilapidated building.

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

Mr. Parrott stepped down for the following petition.

- 2) Case # 11-2

Petitioner: Brian J. Bednarek
Property: 10 Humphrey's Court
Zoning district: General Residence B
Description: Construct rear shed dormer.
Requests: Variance from Section 10.321 to allow a lawful nonconforming building to be enlarged in a manner that is not in conformity with the Zoning Ordinance.
Variance from Section 10.521 to allow construction of a dormer 9'± from the rear lot line where the required rear yard is 25'.

Assessor Map 101, Lot 43

SPEAKING IN FAVOR OF THE PETITION

Ms. Sophie Bednarek identified herself as one of the owners of the property and introduced Mr. Rick Jones, their architect who would outline the proposed project.

Mr. Jones stated that the Board had already received an existing and proposed site plan with before and after depictions, along with a letter from abutters who had no objection to the project. He had also just handed out a short summary and drawings. He stated that they were seeking a variance for a rear setback for a rear shed dormer running the length of the house. As the line of the house was not exactly parallel to the lot line, the requested rear setback varied from 8' to 9' where 25' was required. The new shed dormer would be set back from the side and rear facades as shown in the elevation in the package. He noted that the modifications would not alter the existing footprint and, again referred to the letter of support as an indication that the value of surrounding properties would not be diminished.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Chairman Witham read the request to construct the rear dormer, noting that the dormer was set in a foot or so from the wall below.

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

Mr. Durbin stated that technically this was an expansion of a nonconforming building under the Ordinance. He stated that there was no public issue with the proposal. There would be adequate light and air and all the other items protected under the Ordinance. The dormer would not encroach on neighboring properties or hurt the public in any way. In the justice balance test, the hardship on the applicant if the petition were denied would not be outweighed by any benefit to the public. Regarding the value of surrounding properties, he stated that adding dormers would be unlikely to increase or decrease values and there was no testimony contrary to that conclusion. He stated that the special conditions included the existing structure. While the dormer wasn't exactly an infill, essentially it was remaining within the existing footprint.

Mr. Jousse stated that one of the reasons for the setback was for light and air to circulate and this particular residence had a garage between them and the next property, with a driveway between them and the next property on Marcy Street. He felt there would be adequate light and air and that going vertically was the easiest way to expand the living space. Ms. Rousseau stated that this was a neighborhood with some beautiful old homes. She felt that the property looked like a 1940's cape and that the character of the neighborhood would not be altered by this addition.

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

Mr. Parrott returned to his seat.

- 3) Case # 11-3
 Petitioner: Michael's Realty Trust, Owner, 4 Amigos, LLC, Applicant
 Property: 1390 Lafayette Road Assessor Map 252, Lot 9
 Zoning district: Gateway
 Description: Construct two drive-through lanes in association with construction of a bank.
 Requests: Special Exception under Section 10.440, Use #19.40, and Section 10.836 to allow a two-lane drive-through facility as an accessory use to a 5,200± s.f. bank.

SPEAKING IN FAVOR OF THE PETITION

Attorney Richard Uchida stated that he was with the firm of Orr and Reno representing the 4 Amigos group. He asked if, for the ease of presentation, they could open both matters although two different buildings were involved. Chairman Witham stated that he was comfortable with handling one at a time and, if they wanted, carrying over their comments to the next petition.

Attorney Uchida stated that the 4 Amigos were hoping to develop the former Yokens site, which was currently vacant. He identified the principals of the 4 Amigos along with others in attendance to address various aspects of the proposal as well as to be available for questions. He stated that the property was about a 5 acre site along Route One and Peverly Hill Road surrounded by a number of properties, which he listed. He noted that the parcel did not include the lot with the gas station which sat out front. The concept was to redevelop the site to house a 20,000 retail building, which was the upper building on the plans in front of the Board and on display, and a 5,200 s.f. bank, which was the smaller of the two structures at the bottom. The bank would have two drive-throughs which were the subject of this Special Exception request. He stated that there would also be an approximately 12,000 s.f. pharmacy, with two proposed drive-throughs. He turned the meeting over to Messrs. Montero and Dirk to talk about site and traffic issues.

Mr. Frank Montero indicated the concept plan on display and then a photograph on which he identified the neighboring streets, the location of the former building, the corner gas station and

the Comfort Inn, which was on a separate parcel. He pointed out the three proposed components of the site, noting that the focus that evening was on the drive-throughs. He stated that the site would have four different curb cuts. The motel currently had two, one of which they would relocate and share. There was a second in-and-out driveway proposed on Route One for access to the major parking lot, a third right-in and right-out on Peverly Hill Road, and then a fourth full access further along that road across from West Road. He stated that there would be a common parking lot for the bank and pharmacy, with another to the rear for the retail operation. The drive-through for the pharmacy would be located to the rear under a canopy, with one lane each for drop-off and pick-up of orders. This would be a low volume use, but they had provided queuing for two vehicles and access through the full access driveway.

Mr. Montero then indicated the proposed bank on the plan and the location of the drive-throughs on the left looking from Route One. He pointed out how they would be accessed from different points, adding that they had provided for six vehicles to stack with bypass lanes proposed for both of these uses. Noting that they would be following best management practices in the treatment of storm water, Mr. Montero indicated the catch basins and the point of discharge on the plan. Details of that, as well as their sediment removal plan, would be provided during the Planning Board review process. All other utilities were available to the site, but he felt that there would be much less demand on water and sewer systems than with the prior use.

Mr. Jousse asked what the 5' wide mountable island was by the proposed shared entrance. Mr. Montero responded that came as a result of a comment from the Technical Advisory Committee. He indicated where a truck making deliveries to the pharmacy would enter, circulate around to the loading zone and then exit through that driveway. TAC wanted the exit driveway to be one way and suggested the island to prevent its being used as a two-way.

Mr. Parrott referenced a study by the New Hampshire Department of Transportation which said that future development should be set back 105' from Lafayette Road. Mr. Rick Taintor again identified himself and stated that had been in the previous Zoning Ordinance. In revising it, they met with the DOT in an effort to bring the buildings closer to the street so along that segment of Lafayette, the new standard was a 30' setback, or 80' from the center line. He felt that the 105' requirement had been offered initially before the DOT had defined their needs, which was to provide ultimately for a 94' cross section of Lafayette Road.

Mr. Jeffrey Dirk identified himself as a Vice President of Vanasse & Associates, the traffic engineers for the project, and handed out a summary of a traffic study they had conducted. In response to a question from Chairman Witham, he stated that the study was in relation to the overall project but touched on one of the findings that the Board needed to make, which was that there would be no degradation in operating conditions off-site as a result of the granting of the drive-throughs and the intensity of the uses that would come from that. They had looked at the off-site locations, specifically the signalized intersection of Lafayette and Peverly Hill Roads and found that there was adequate infrastructure to support this development. With this project constructed, there would be no adverse impact so that there would be no change in the levels of service. This intersection operated with a level of service classified as "C," which meant it was operating in very good condition and would remain so with this project in place. He stated that they had worked with the Planning Department and the Department of Transportation and, to follow up on a previous question, the DOT had looked at the plan and determined that the five-

lane cross-section in this area was basically in line with their corridor recommendation. He stated that the DOT was looking to ensure that the buildings were set back far enough to allow sufficient room for what they might want to do in the future. Mr. Dirk stated that the traffic study found that there was adequate transportation infrastructure to support the development, not only for individual vehicular access but also for pedestrians in the area as well as bus service.

Mr. Jousse asked if the traffic study had included analyzing whether the traffic light timing would remain the same or have to be changed. Mr. Dirk stated that the DOT had a signalized improvement program to be implemented the next year, where all signals would be timed and coordinated, so they hadn't included that in their traffic study. Ms. Chamberlin noted that the intersection of West and Peverly Roads was a difficult one and asked if the study had considered it. Mr. Dirk stated that they had. They would only have roughly about 20% of their traffic through that intersection. He noted that there were four access points and they could see from the layout that it was focused on Route One. The City did ask that they look at extending the median along Peverly to discourage u-turns.

Ms. Chamberlin stated that, excepting out the gas station and the hotel, the entire lot was pretty much covered with these two facilities. Mr. Dirk pointed out that the Yokens Restaurant and function facility was around 45,000 s.f. of space and this plan represented around 37,000 sf. The traffic study put the proposal in context with the former use of the site when the infrastructure had handled a much larger facility. The traffic generated represented a slight decrease over what had been there.

Mr. Parrott asked about the exiting traffic coming onto Lafayette Road from the center entrance and exit. He was particularly concerned about customers wanting to go down Elwyn Road having to go across two lanes to get into the queue to go left. He described the current situation as congested, particularly in the summer when that traffic could get considerably backed up with an 8 car queue not uncommon. He wondered how they would deal with that situation, which could only get worse. Mr. Dirk stated that they had looked at the depth of queuing at the signal, the speed of traffic as it approached the driveway, and whether there was adequate sight distance. The driveway actually exceeded state and federal requirements for sight lines at 40 mph. Specifically regarding the queue, he stated that there would be time periods and times of the year when it would be difficult to get across and into that lane. He stated that could be addressed by signage within the site directing motorists to the rear for the best access to Elwyn Road. Regular users would also get to know the best way to exit the site. In response to further questions from Mr. Parrott, Mr. Dirk stated that it was a single car entrance and exit on Lafayette Road due to the sight distance which, for 40 mph, was 305' and they had in excess of 500' at this location.

Ms. Rousseau stated that they were not there to give a variance for the use of the building or setback but to focus on a Special Exception for two drive-through lanes for a 5,000 s.f. bank and she speculated that maybe 10 people would be at the bank at any given time. Mr. Dirk added that only a portion of those would be using the drive-through. Ms. Rousseau stated that would be opposed to Yokens that might have 200 people at a function. She felt this was dramatically different. Mr. Dirk stated that the site represented 200 to 300 less vehicles during the peak hours than with the Yokens facility. Mr. Jousse asked how many vehicles per day were predicted for either or both of the drive-through facilities. Mr. Dirk stated that the total volume for the bank with the drive-through window would be a total of 770 vehicle trips, 385 each entering and exiting

over the total operational day. The drive-up windows would represent 46% or so of that total. The pharmacy's volume was estimated at 527 trips each in and out, with maybe 5% using the drive-through. Mr. concurred with Mr. Jousse that they were then talking about a very small percentage using either of the drive-through. Mr. LeMay asked why, then, two lanes were needed. Mr. Dirk stated that, for the pharmacy, someone who was dropping off a prescription might not necessarily want to talk to a pharmacist but that might change when picking one up so they put that function on the inner lane for privacy.

Attorney Uchida stated that he would like to address the standards for granting the Special Exception for the bank. He stated that this use was permitted by Special Exception as an accessory use to a principal function in the Gateway District. He stated that there was nothing to suggest any hazard to the public or adjacent properties from fire, explosion or the release of toxic materials from this proposed use. There would be no detriment to property values or change in the essential characteristics of the neighborhood from noise, dust, odors or a variety of other elements. He felt that the Gateway District was designed to encourage redevelopment and this project accomplished that goal. The proposed uses were professional and retail and he stated that it was common for a bank to have a drive-up facility. He maintained that the project would be very consistent with the growth and character along Lafayette Road.

Regarding the possible creation of a traffic safety hazard or increase in traffic congestion, Attorney Uchida stated that Mr. Dirk had spoken about the level of service remaining the same. He noted that, in the traffic study report, there were listed a series of improvements made to the site and off-site that would help in overall traffic circulation. With specific reference to drive-throughs, he noted that there were stringent regulations in site plan regulations here in Portsmouth and they had designed the project to meet specific criteria as to width of lanes, as well as other related issues. He stated that all Ordinance requirements and site plan regulations were met. Continuing with the standards, Attorney Uchida stated that the proposed use of the site would not cause any excessive demand on municipal services or increase in storm water runoff. He stated that there was a special condition in the Ordinance that required a number of issues to be the same or better than before development, noting that they were improving the site and creating better access control, demonstrated by the traffic study. He asked that the Board grant the Special Exception for the bank drive-throughs.

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 Special Exception as presented and advertised, which was seconded by Mr. Jousse.

Ms. Rousseau stated that this was simply a two-lane drive-through for a 5,200 s.f. structure. She felt this was a wonderful use for the space and thought that the City of Portsmouth welcomed this development. Addressing the standards, she stated that this was a permitted use in this zone. She stated that there would be no hazard to the public or adjacent properties on account of fire,

explosion or release of toxic materials as there had been nothing in the presentation to indicate that there would be anything hazardous to do with a drive-through lane. There would be no detriment to property values from smoke, gas, odors or other irritants, or change in the essential characteristics of the area. Ms. Rousseau stated that a two-lane drive-through did not have the potential to create any traffic safety hazard. As opposed to what had been there at Yokens, when there could be 200 cars at one time in that location, this use would be dramatically better with no increase in traffic or traffic congestion. Again, they were talking about a two-lane drive-through for a 5,200 s.f. facility and the impact would be minimal. She stated that there would also be far less demand on municipal services than the previous use. There would be no increase in storm water runoff onto adjacent properties or the street and she noted the stated plans to address this issue so that it would be substantially better than before. Overall, she felt this would be an improvement to the area and be minimally invasive.

Mr. Jousse stated that he had nothing to add.

Chairman Witham noted that, in addressing the standards, Ms. Rousseau had also touched on the requirements under Section 10.836 of the Ordinance.

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

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- 4) Case # 11-4
Petitioner: Michael’s Realty Trust, Owner, 4 Amigos, LLC, Applicant
Property: 1390 Lafayette Road Assessor Map 252, Lot 9
Zoning district: Gateway
Description: Construct two drive-through lanes in association with construction of a pharmacy.
Requests: Special Exception under Section 10.440, Use #19.40, and Section 10.836 to allow a two-lane drive-through facility as an accessory use to a 11,944± s.f. pharmacy.

Chairman Witham noted that, if the applicants wished, they could carry forward their comments from the previous petition.

SPEAKING IN FAVOR OF THE PETITION

Attorney Richard Uchida stated that he would like to incorporate all the testimony heard for the previous petition with regard to the Special Exception and would provide one observation with respect to the two-lane drive-through for the pharmacy. He noted that the bank had a low level of drive-through usage which would be even lower for the pharmacy so that the factors for a Special Exception would have even less of an impact.

**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 Special Exception as presented and advertised, which was seconded by Mr. Jousse.

Ms. Rousseau stated that she would like to carry over her previous comments regarding the Special Exception for the drive-throughs for the bank to the granting of a Special Exception for the pharmacy drive-throughs. She agreed with the applicant that there would be very little traffic impact and felt that the community would welcome this development.

Mr. Jousse carried forward his agreement.

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

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- 5) Case # 11-5
Petitioner: Stephen G. Erickson
Property: 257 Austin Street Assessor Map 145, Lot 71
Zoning district: General Residence C
Description: Construct 10' x 5'7" first floor bathroom/laundry addition.
Requests: Variance from Section 10.321 to allow a lawful nonconforming building to be extended or enlarged in a manner that is not in conformity with the Zoning Ordinance.
Variance from Section 10.521 to allow a building coverage of 44.7%± where 43.64%± currently exists and 35% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

Mr. Richard Boutin stated that he was the contractor speaking for Mr. Stephen Erickson, the owner. He stated that there was currently only a bathroom on the second floor and, with the family growing, they needed a second bathroom. This would be enclosed by a 5' wall within the existing building. He referred to the submitted drawing of the building footprint which showed a horseshoe-shaped section along the rear of the structure. Chairman Witham asked if he would then be infilling the bottom of the horseshoe section with one wall and a roof and Mr. Boutin stated that he would, while remaining within the building envelope.

Mr. Parrott asked where the parting wall was between the two duplex units. Mr. Boutin stated that, as they looked at the plan, one of the duplexes was on Union Street and one on Austin Street. He pointed out to Mr. Parrott the little drawing in the back showing where one wall belonged to the applicant and one to the tenant. Chairman Witham noted that essentially there was a line splitting the two units.

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

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

DECISION OF THE BOARD

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

Mr. Jousse stated that he could appreciate the owner's predicament which, similar to the situation in his earlier comments, was a byproduct of being located in an older city. He stated that granting the variance would not be contrary to the public interest and the spirit of the Ordinance would be observed. Substantial justice would be done and nothing had been presented as to the value of surrounding properties. He felt that none of the surrounding properties could even see the project. He felt the special condition creating a hardship was that this was a duplex with an odd shape, with the long side on Union Street, while the other address was on Austin Street. There was also a hardship with the way the building was skewed on the property. He felt the request was minimal and should be granted.

Mr. LeMay stated that this was just a little infill project representing only around a 1% increase in lot coverage. He felt that the character of the neighborhood would not be changed and there would be no negative effect on abutters.

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

VI. OTHER BUSINESS

No other business was presented.

VII. ADJOURNMENT

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

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk