

**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 17, 2013

MEMBERS PRESENT: Chairman David Witham, Vice-Chairman Arthur Parrott, Susan Chamberlin, Derek Durbin, *Charles LeMay, Christopher Mulligan, David Rheaume, Alternate Patrick Moretti
*Arrived after Case #9-1

EXCUSED: Alternate Robin Rousseau

ALSO PRESENT: Juliet T. H. Walker, Transportation Planner

Chairman Witham announced that Mr. LeMay would be delayed and Mr. Moretti would be sitting in as a voting member.

I. APPROVAL OF MINUTES

A) July 17, 2013

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

II. PLANNING DEPARTMENT REPORTS

Revision to Board of Adjustment Rules and Regulations regarding electronic submittals.

This item was taken out of order at the end of the hearing.

III. PUBLIC HEARINGS - OLD BUSINESS

A) Request for One-Year Extension of Variance granted September 25, 2012 for property located at 211 Park Street.

Chairman Witham noted receipt of the request and asked the Board if they wished to have a discussion or make a motion. Mr. Mulligan made a motion to grant a One-Year Extension of the Variance through September 25, 2014, which was seconded by Mr. Parrott and approved by unanimous voice vote.

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- B) Request for One-Year Extension of Variance granted November 20, 2012 for property located at 1475 Lafayette Road.

Chairman Witham noted receipt of the request and asked the Board if they wished to have a discussion or make a motion. Mr. Mulligan made a motion to grant a One-Year Extension of the Variance through November 20, 2014, which was seconded by Mr. Parrott and approved by unanimous voice vote.

- C) Case # 7-2

Petitioners: 4 Amigos, LLC

Property: 1390 & 1400 Lafayette Road

Assessor Plan 252, Lots 9 & 7

Zoning District: Gateway

Description: Install free-standing signs

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1243 to allow multiple free-standing signs on a lot where only one free-standing sign per lot is allowed.
2. A Variance from Section 10.1251.20 to allow a free-standing sign to exceed 100 s.f. in area.

(This petition was postponed at the July 16 and August 20, 2013 meetings)

Chairman Witham referenced the letter requesting this third postponement request, which was unusual for the Board. The applicant had advised that there would be no further requests as they were finalizing the materials that they needed.

Mr. Rheume made a motion to postpone the petition for a final month to the October 15, 2013 meeting. The motion was seconded by Mr. Moretti and passed by unanimous voice vote.

Chairman Witham advised that they would consider Old Business Item E) before Old Business Item D).

- E) Case # 8-3

Petitioners: Beth L. & Marco A. Gross-Santos

Property: Marjorie Street (number not yet assigned)

Assessor Plan 232, Lot 14 (rev.)

Zoning District: Single Residence B

Description: Construct a single family home.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.521 to allow a lot area of 9,596 s.f. ± per dwelling unit where 15,000 s.f. per dwelling unit is required.

2. A Variance from Section 10.521 to allow a 26.1'± rear yard setback where 30' is the minimum allowed.
(*This petition was postponed for additional information at the August 20, 2013 meeting*)

Mr. Mulligan stated that this petition had been continued for more information including a report back from the Planning Department. The Department had indicated that some information had been received but that further study was needed. Attorney Bernard W. Pelech, representing the applicant, was recognized and stated that he had only learned that day that more information was needed. Chairman Witham stated that he would entertain further discussion or a motion.

Ms. Chamberlin made a motion to postpone the petition to the October 15, 2013 meeting, which was seconded by Mr. Durbin and passed by a unanimous vote of 7 to 0.

D) Case # 8-1 (Amended)

Petitioner: Richard S. Bean

Property: 324 Parrott Avenue

Assessor Plan 129, Lot 36

Zoning District: General Residence A

Description: Construct a 529± s.f. garage with living space and deck above. Construct a 388± s.f. left side deck.

Requests:

- A. This petition was revised from that postponed at the August 20, 2013 meeting to include the following:
Amend previously advertised and posted application to add an Appeal from an Administrative Decision that a Variance is needed from Section 10.321.
- B. The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
 1. If the Appeal from an Administrative Decision is not granted, a Variance from Section 10.321 to allow a lawful nonconforming structure to be extended, reconstructed, enlarged or structurally altered in a manner that is not in conformity with the Ordinance.
 2. A Variance from Section 10.521 to allow a lot area per dwelling unit of 3,211± s.f. where 7,500 s.f. per dwelling unit is required.
 3. A Variance from Section 10.521 to allow building coverage of 34 % ± where 25% is the maximum coverage allowed.
 4. A Variance from Section 10.521 to allow a left side yard setback of 2'± where 10' is the minimum allowed.

Chairman Witham read the appeal and the variances that the applicants would seek if the appeal were not granted. He stated for clarification that the Board had granted approval to the applicant over a year previously for a garage with a deck above it. Since that time, a new dugout was built at the baseball field which blocked the view of the homeowner. The applicant would like to relocate the deck so that he could see the field. The Administrative Appeal was based on their previously receiving a variance for lot coverage to build the garage while the Planning Department

had ruled that the applicant could not build upward based on that approval or consider it as grandfathered as it was a substantially different project. The applicants maintained that they should be able to build upward based on the previous approval and meeting the setbacks.

SPEAKING IN FAVOR OF THE PETITION

Attorney Timothy Phoenix stated that he was appearing on behalf of the applicant, Mr. Rick Bean, and Mr. Eric Weinrieb of Altus Engineering was also in attendance. He asked the Chairman what he should deal with first and the Chairman stated that it should be the appeal.

Appeal From Administrative Decision:

Attorney Phoenix referred to the plans on display, noting that in 2012, Mr. Bean had received approval to build the garage shown in orange on the exhibited plan. He also indicated an existing deck on the house from which the family could view the game at the adjoining field. It was also the intention the previous year to have a deck on top of the proposed garage that would have the same view. He described the sequence of events that began with the City moving a dugout, which he indicated on the plan, so that the view of home plate was now blocked from the existing deck and would also be blocked from the approved deck over the garage. Attorney Phoenix indicated the picture on the exhibit which showed how home plate could be viewed from the proposed new deck. He stated that, with the Board's approval, they would move the deck and just add living space over the garage. There would be no deck on top of that living space.

Attorney Phoenix referred to Exhibit 3 on display which showed the existing house and, to the right, how the property would look with the garage, with the furthest right view showing the proposed living space with the deck he pointed out. He stated that he was appealing the administration decision as the requirements were essentially the same as in 2012, but the Planning Department had determined that the change in the proposed garage was enough so that the applicant should have to come back and seek new relief. Attorney Phoenix stated that the proposed living space was in the same footprint as the approved garage. He quoted Section 10.321 of the Zoning Ordinance that "a lawful nonconforming building or structure," which he stated this was for setbacks, "may continue but may not be extended, enlarged or structurally altered except in conformity with this Ordinance." He then read Section 10.324 which stated, "A lawful nonconforming building or structure shall not be added to or enlarged," which he stated they were doing, "unless such addition or enlargement conforms to all the regulations of the district in which it is located." He maintained that the garage conformed as to the height and setback requirements and its location was approved and therefore conformed by variance from this Board the previous year. As they were putting an addition over it that maintained the same setbacks and did not violate the height, nor change the lot coverage, he believed it was permitted by right of the Ordinance as defined.

Chairman Witham stated that he didn't support the appeal. He felt the Board had granted a variance based on a certain structure that had been proposed. That structure was now different and changed how the Board would have viewed the criteria. If the appeal were granted, the applicant could decide to add a third floor on top of what had been proposed or increase the height up to the limit just based on a variance having been granted for lot coverage.

Attorney Phoenix stated that he understood the point of view, which was shared by the Planning Department but he didn't share it. He had stated to Mr. Taintor in the Planning Department that, if they weren't seeking the other relief, he believed he could go down to the Building Department and say they wanted to add this to the garage and they would give him a permit. He felt, on Mr. Taintor's behalf, that he had to make this argument as well as the variance arguments. He wanted to be prepared for any eventuality.

Chairman Witham maintained that, while nothing coming before the Board set a precedent, it would be a slippery slope to allow people who needed building coverage relief to come in with a low structure and then ask for and receive a permit for a much taller structure.

Mr. Rheume asked if construction had started on the approved garage and Attorney Phoenix responded that there had been no construction on the lot since the variances were granted in 2012. All that had happened was a granted request for a one-year extension of time to act on the variances.

Mr. Parrott stated that, if the Board were to adopt this as a philosophy, nobody would apply for anything but an open deck and then build what they wanted. The Board, in granting a variance, was required to consider light and air. For that reason, traditionally, the Board had viewed an open deck as a different type of relief from a three-story addition. He felt that the argument that the approved footprint was there so the applicant could then build whatever they wanted was contrary to the philosophy of the Board and a stretch in interpretation of the rules so that he couldn't support the appeal.

Mr. Parrott made a motion to deny the appeal, which was seconded by Mr. Rheume.

Mr. Parrott referenced his prior comments, reiterating that it would be illogical to consider a two or three story addition in place of a deck functionally correct and deny the Board the opportunity to consider light and air in granting a variance.

Mr. Rheume stated that the applicant had brought up an interesting loophole in the zoning requirements. As the Chairman and Vice Chairman had pointed out, the Board looked at the overall size of a proposed structure. He felt that, in particular with this appeal, one of the reasons the appeal was not merited was that the Ordinance wording was that a "lawful nonconforming building or structure may continue..," but the important aspect for him was that the applicant's structure did not currently exist on this footprint and construction had not begun. There was nothing to continue. He added that, had the structure been built and this was happening some time after completion, the appeal might have some merit, but not in this case.

The motion to deny the appeal was passed by a unanimous vote of 7 to 0.

Variances:

Attorney Phoenix stated that the variances they felt were needed were listed on page three of his submittal. Referencing Article 3, Section 10.5.2.1 he pointed out the lot area information on the plan. He stated that he had met with the Planning Department regarding the appeal and, based on that discussion, it was his understanding that a variance was not needed for lot area per dwelling unit as that had already been granted and would not be changed by the proposed change in the

garage. He would like the Board to omit that from consideration. The other variances needed were from Section 10.321 regarding expansion of a nonconforming structure. There was an expansion as it existed for all of this proposed work and an expansion of a nonconforming structure as proposed and approved by virtue of the deck. The structure also did not conform because part of it is a little bit in the front setback and part in the side setback close to the field. They also needed Article 3, Section 10.521 because adding the deck would increase building coverage to 34%. Currently 25.3% existed where 25% was allowed and 28% was approved in 2012. A final variance was needed for a left side yard setback of approximately 2' where 7' existed to the existing steps and 10' was required. He pointed out that this property was next to a wide open ballfield.

Attorney Phoenix stated that he would address the criteria for all the variances at the same time. The first two criteria were considered together under the Malachy Glen court case which stated that they were met if the essential characteristics of the neighborhood would not be changed. The other test was that there would be no threat to the public health, safety and welfare. He stated that this was a unique property across the street from the library and at the edge of a residential neighborhood but also across the street was the Middle School and then commercial properties. He maintained there would be adequate light, views and space for the surrounding properties with no one's view of the ballfield obstructed. Letters had been provided by two abutters, one of whom was the applicant's sister. Attorney Phoenix stated that none of the basic objectives of the Zoning Ordinance were threatened and he read a list of objectives from the Ordinance, noting how each was met.

Addressing the third part the criteria, Attorney Phoenix stated that he had just listed the nearest properties which demonstrated that no one's light, air, view, or access to services would be negatively affected. It followed that the value of surrounding properties would also not be diminished. He stated that the hardship test was in three parts., the first that special conditions existed that distinguished the property from others in the area. They submitted that there were special characteristics or conditions. This was a single family home next to a large open area, the nearest residential property in family ownership. He stated that the property enjoyed a unique view of the baseball games which had inadvertently taken away by the actions of the City. The second test was that no fair and substantial relationship existed between the general public purposes of the Ordinance and their specific application in this instance. He stated that the purpose of the lot coverage and side setback requirements, as mentioned previously in the appeal, were adequate air, light, space, allowed access and a number of others he cited. While the deck would take up a little more space to 34% coverage, the effect was negligible by virtue of its described location. The last test under hardship was that the proposed use was a reasonable one, which he maintained it was for all the reasons he had just mentioned.

Attorney Phoenix stated that substantial justice would be done by allowing the property owner reasonable use of the home without his view being taken away. Given the location of the lot, it would also be substantial justice to grant this relief and unjust to deny it as there would be no benefit to neighbors, the public or the City. He noted that the deck had to be as close as proposed in order to get beyond the dugout obstruction.

SPEAKING IN OPPOSITION TO THE PETITION

No one rose to speak.

SPEAKING TO, FOR OR AGAINST THE PETITION

Mr. David Allen identified himself as the Deputy City Manager. He noted that the City had received the Mavericks this year and the deal included improvements to the field, including new dugouts, which were larger and placed away from home plate. Once constructed, Mr. Bean had called explaining his loss of view. The City officials were aware of the Bean Family's relationship with baseball in the City and understood his distress. He stated that the City, as the abutter to much of this property had no issues with this application.

Mr. Mulligan asked if they could assume that the dugouts would not be moved anywhere else in the future and Mr. Allen stated that a substantial investment had just been made so it was not anticipated that there would be any further changes.

DECISION OF THE BOARD

Chairman Witham stated that the Board would be considering Variances #1, #3 and #4 as advertised. Variance #2 for lot area per dwelling unit was not required, as recommended by the Planning Department.

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

Mr. Mulligan stated that the request was to allow reconfiguration of a project previously approved. The applicant was seeking to restore an important characteristic of his property which was inadvertently taken away. He stated that granting the variances would not be contrary to the public interest. Granting the proposal would not alter the essential characteristics of the neighborhood. It would still be residential with surrounding municipal uses and there was nothing that would threaten the health, safety and welfare of the general public. The spirit of the Ordinance would be observed. In this General Residence A zone, it was normal to see properties with accessory uses such as decks and additions over garages so the proposed would fit within the purposes of the zone.

Mr. Mulligan stated that, in the substantial justice balance test, the applicant would lose a fairly unique characteristic of his property which would not be balanced by any gain to the general public. Regarding the diminution in the value of surrounding properties, he noted that they had not heard from any neighbors in opposition and the significant properties in the area were all municipal with a few residential. The special conditions in the property creating a hardship were the fact that the property abutted a large open recreational space which was not likely to be subject to development any time soon so that there was no fair and substantial relationship between the general public purposes of the Ordinance and their specific application to the property. The applicant had made a good point in that the proposed use was a reasonable one in keeping with the residential uses allowed in this zone.

Mr. Parrott stated that he concurred with Mr. Mulligan's comments and felt that all the criteria were met.

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

Mr. Rheume recused himself from the following petition.

IV. PUBLIC HEARINGS – NEW BUSINESS

1) Case # 9-1

Petitioners: Kearsarge Mill Unit Owners Association & JSA Trust, owners

Property: 361 Hanover Street

Assessor Plan 138, Lot 63-1

Zoning District: Mixed Residential Office

Description: Locate parking spaces for a proposed 4,000± office expansion on an adjacent lot.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1113.111 to allow required parking spaces to be located on a separate lot from the principal use at a municipally owned uncovered parking facility where a municipally owned covered parking facility is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Jim Somes stated that he was the president of the Kearsarge Mill Unit Owners Association and also Managing Partner of JSA Trust. He stated that earlier that year, the parent company of the owner at 361 Hanover Street approached him and said that Heinemann's was expanding at a rate that their current space could not accommodate. Mr. Somes felt there were opportunities in the existing building to get them to the 25,000 s.f. which would allow them to satisfy their five-year plan. He noted that they had 84 parking spaces on the lot at 361 Hanover Street. One hundred spaces would be needed to arrive at the number needed for 25,000 s.f.. They had approached the City and negotiated a partnership where the City would provide 30 more spaces on a contiguous lot where they were tearing down a building. These would be dedicated to the Heinemann expansion during the working hours of 8:00 a.m. to 5:00 p.m., Monday through Friday. He, in return, would provide all 84 spaces on their lot to the public for off-hour parking. Mr. Somes termed the parking agreement a win/win noting that it had been endorsed by the Economic Development Commission, the City Council, and the Islington Creek Neighborhood Association, of which they were a part. It was also an important part in retaining the Heinemann operation, the largest downtown employer, in the City.

Mr. Somes stated that they had gone to obtain a permit for the 4,000 s.f. infill within the existing building and found out from the Planning Department that their actual agreement drawn up by the City, a copy of which had been provided to the Board, was in violation of the Zoning Ordinance. According to Ms. Walker and Mr. Taintor, it was alright to have a contiguous lot but, under the Ordinance, the parking had to be covered, an apparent throwback to the downtown garage. They

were denied a permit to continue the interior expansion and were now seeking relief from the requirement for covered parking. He stated that the City was prepared to provide the parking under their six year agreement but it was not covered parking.

In response to questions from the Board, Mr. Somes stated that a six year agreement was what was needed to allow them to amortize the necessary improvements for the expansion but he hoped it would go on longer than that. The access would be off Rock Street onto the contiguous lot.

Ms. Juliet Walker stated, as clarification for the Board that she had discussed this petition with Mr. Taintor and they would recommend that the Board consider this as a variance from Section 10.1113.11, which was that all required off-street parking spaces must be located on the same lot as the principal use. It would be better not to include the uncovered vs. covered parking issue as that also carried a proviso that the parking be done as part of the development. For simplicity, the Board should consider the request as for a Variance from 10.1113.11.

Mr. Peter Happny stated he had a business and residence at 66 Rock Street. He would like to see the Heinemann organization stay and hoped the Board would grant the petition. Ms. Beth Moreau of 18 McDonough Street stated that there was limited parking in the area, which received the overflow when the single downtown parking garage was full, and this agreement would help, particularly during on-street parking bans. Mr. Timothy McLoughlin stated that he lived at 7 McDonough Street. He could attest that parking was a challenge and he supported the petition. Mr. David Allen stated that he was the Deputy City Manager and, as Mr. Somes had mentioned, the City had worked hard to come up with this agreement, which was a positive situation for the City. Mr. Anderson from Heinemann had initiated meetings with neighborhood groups with a positive response. It was important to them so the City was in favor of this proposal.

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

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

DECISION OF THE BOARD

Chairman Witham clarified that the Board was considering a variance from Section 10.1113.11.

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

Noting that there appeared to be no downside to the proposal, Ms. Chamberlin stated that granting the request would not be contrary to the public interest as additional parking spaces would be made available to the public in off hours. The spirit of the Ordinance would be observed as the overall parking would exceed the parking requirements by almost 15%. Substantial justice would be done by keeping a business in this location and providing the necessary parking. She stated that the value of surrounding properties would not be diminished. An effort had been made to reach out to the community and the only abutters speaking were in support. Literal enforcement of the Ordinance would result in unnecessary hardship. They would actually lose parking by enforcing this provision.

Mr. Parrott stated that there was no downside to the proposal. An efficient use of a parking area would be in everybody’s interest, including that of the public.

The motion to grant the petition as presented and advertised, with the variance granted from Section 10. 1113.11, was passed by a vote of 6 to 0.

Mr. Rheaume resumed a voting seat. Mr. LeMay arrived to assume his seat and Mr. Moretti returned to alternate status.

2) Case # 9-2

Petitioner: Frederick I. McMullen

Property: 1262 Woodbury Avenue

Assessor Plan 237, Lot 67

Zoning District: Mixed Residential B

Description: Allow a retail space with juice bar and take-out food.

Requests: The Variances and Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Special Exception under Section 10.440, Use #8.31 to allow retail sales in a district where this use is allowed by Special Exception.
2. A Variance from Section 10.440, Use #9.20 to allow a restaurant, take-out only, as an accessory use in a district where such use is not allowed.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard W. Pelech stated that he was appearing on behalf of the Herbal Path and Mr. Fred McMullen, the property owner. The property was up near where the turn was onto Market Street Extension and had been the site for a number of past uses which he listed. The intention of The Herbal Path was to relocate there from Lafayette Road, which required them to come before the Board. He stated that the exterior would not be changed but the interior, formerly two rooms, would be opened up to make one large retail space with a juice bar and sandwich making area in the back. Despite the fact that they were surrounded by retail sales uses, they needed a special exception for retail sales in the Mixed Residential B district. He stated that the standards for that use, allowed by special exception, were met. There would be no cooking, only a juice bar so there would be no hazard to the public or adjacent property from potential fire explosion or release of All activity would be within the structure and nothing would cause a detriment to surrounding property values from smoke, noise, odor or other pollutants or outdoor storage. The traffic generated would be no different from previous uses. The property was in a high traffic area and this use would not result in any significant increase. No additional municipal services would be needed and, with no change to the exterior, no increase in storm water runoff onto adjacent properties or the streets.

Attorney Pelech stated that the 132 s.f. of juice bar was being considered a restaurant so that they needed a variance. There would be no diminution in property values as all the activity would be within the structure. He distributed a letter of support from the owner of an abutting property. In the public interest and spirit of the Ordinance tests, the essential characteristics of the neighborhood would not be changed by this operation, nor would the health, safety and welfare of the public be threatened. In the justice balance test, The Herbal Path provided a needed service

and a hardship would exist if they could not operate here as they had outgrown their space while the general public would not benefit from a denial of the variance. He stated that special conditions existed as the history of this building was with retail/food preparation types of uses and recently retail sales of beauty products. He maintained that the Mixed Residential Business district was a misnomer as business uses were limited but a convenience store would be allowed. This district only had six or seven lots, one a mobile home park, one a residence, one a business and professional office and one a retail establishment. The use was not out of character with the allowed uses. With the limited nature of the juice bar and sandwich component, there was no fair and substantial relationship between the general public purposes of the Ordinance and their specific application to this property. He felt that the intent of the zoning was not to apply to 132 s.f., but an entire restaurant. He noted that there would be two full-time employees and one part-time and the hours of operation would be 9:30 a.m. to 6:30 p.m. or 7:30 p.m. Most deliveries would be by small trucks with perhaps a once-a-month delivery by a larger truck.

Chairman Witham asked how they were going to handle traffic flow and parking. There was asphalt and gravel in the whole area and you couldn't tell where the property lines were. Attorney Pelech stated that the parking lot was compacted gravel, which had worked successfully for years. They could perhaps put in some lane markers or some differentiation between this area and the paved area of the abutter. Chairman Witham stated that they needed to show a travel lane as everything seemed to be crossing over in a haphazard manner similar to the convenience store next door.

Mr. Fred McMullen identified himself as the owner of the property. Snug Harbor Road was adjacent. There would be cement barriers between their back yard and Snug Harbor. When entering, there would be an opening for only two cars to pass and it would lead into their back yard.

Mr. Rheume stated that he wanted to validate that they were talking only about cold food preparation and there was no intention to install a stove, convection oven, deep fat fryer or similar equipment. Mr. McMullen stated that he would defer to the applicant but he had gone through an extensive screening process to find the right business for the location that would accommodate the zoning. Mr. Ron Stockton stated that he was the owner of The Herbal Path. The plan was mostly cold food with maybe heating up a panini. They were not planning an oven, a hooded unit, or a fryalator. They wanted to provide healthy food in a part of town where there were few healthy options and it would benefit their business to be able to grow into that area. Mr. Rheume asked if their customer base was routine return customers and Mr. Stockton confirmed that customers came back on a regular basis.

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

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

DECISION OF THE BOARD

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

Mr. Durbin commented that the lot had been vacant for some time and, apparently, the landlord had found the right applicant for the spot. He felt this was really a retail use with an accessory use as a juice bar, similar to a number of downtown establishments.

Addressing the standards for granting the special exception, Mr. Durbin stated that the use was permitted by special exception in this district. There was nothing in the use that would present a hazard to the public by fire explosion or release of toxic materials. They were dealing with a mixed use area close to commercial uses with residential uses on the other side so there would be no detriment to property values. He stated that there would be no creation of a traffic hazard or substantial increase in traffic. He had been reassured that there would be mechanisms on the property to control access and egress and the volume would not be significant compared to some uses that could exist in a building of this type. He saw no reason why there would be any significant increase in the demand on municipal services. This was also not a property in development but filling a vacant building so there would be no increase in storm water runoff onto adjacent property or streets.

Mr. Durbin then addressed the criteria for granting the variance. He stated that a useful business in this location would actually benefit the public interest. The proposed use was consistent with the characteristics of the neighborhood which contained a number of retail uses and food provision uses nearby. In the substantial justice test, balancing the harm to the applicant if the petition were denied against any corresponding benefit to the public, the balance weighed in favor of the applicant. He stated that he had spoken to the value of surrounding properties when addressing the special exception standards. This was certainly a better use than a vacant building and would not negatively impact property values. The property had special conditions that distinguished it from other properties. The way the property had been developed and the way the building was laid out, one of the few complimentary uses would be a retail or food establishment type of use so that there was no fair and substantial relationship between the general public purposes of the Ordinance and their specific application to the property. There were a number of commercial and business uses that would be more intense than what was being proposed here.

Mr. Rheume concurred. He felt that the more difficult relief to justify was the variance as it was going against what was in the Zoning Ordinance but he felt a good argument had been made that there was a certain incongruity in the fact that an allowed use in this district was a convenience store which, in modern times, often sold prepared foods. He felt that the spirit of the Ordinance was met and the petition should be granted.

Mr. Parrott agreed, stating that this was an appropriate use for this property in this neighborhood.

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

Mr. Rheume recused himself from the following petition and Mr. Moretti assumed a voting seat.

3) Case # 9-3

Petitioner: Gretchen J. Morgan
Property: 7 McDonough Street
Assessor Plan 138, Lot 50
Zoning District: Mixed Residential Business
Description: Construct porch and landing for new rear entry.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.324 to allow a lawful nonconforming building or structure to be added to or enlarged in a manner that does not conform to the requirements of the district.
2. A Variance from Section 10.516.40 to allow a side yard setback of 3'± where 10' is required.
3. A Variance from Section 10.521 to allow building coverage of 56.7%± where 40% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

Mr. Jeff Coburn from Jeffco Construction stated that he was representing the owner. They were trying to put in the smallest landing that would accommodate their needs but needed relief for the setbacks and building coverage. There was an elderly family member who visited and couldn't maneuver the stairs to the second floor so they wanted to change the stairs and add a bathroom on the other side.

In response to questions from Chairman Witham, he stated that they proposed the bare minimum of a 3' x 3' landing. Lot coverage would actually be decreased from what existed, but they would be on the edge of the property line. The only feedback they had received from neighbors was an e-mail in support which he believed had been provided to the Board. Mr. Mulligan asked him to confirm they were proposing to remove the door shown in the submitted photograph. Mr. Coburn responded that they were switching a door to a window. There was also a smaller set of existing stairs which were closer to the building. In response to a further question, he stated that there was an accessway to the basement for kayak and bike storage. You just went under the existing porch and there would not be any obstruction to that accessway.

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

With no one further rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

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

Addressing the criteria for granting variances, Mr. Mulligan stated that granting the petition would not be contrary to the public interest and would observe the spirit of the Ordinance as the essential characteristics of the neighborhood would not be altered nor would the health, safety or welfare of the general public be threatened. At first, this seemed like a close encroachment on the neighboring property but, in this neighborhood, the setbacks were not religiously adhered to by

existing structures. He stated that there was no potential placement for this project other than what had been proposed. In the substantial justice balance test, there would be a significant loss to the property owner if the landing could not be reconfigured which would not be outweighed by any gain to the general public. He stated that the value of surrounding properties would not be diminished and noted that the abutter most affected was in full support of the project. He noted that the nonconformity of the property was somewhat lessened by a slightly reduced lot coverage. He stated that literal enforcement of the Ordinance would result in a hardship due to some distinguishing features of the property, which included a large house on a fairly small lot with pretty much the entire lot, with the exception of a small back yard, swallowed by structure. Any alterations to the rear would likely require some setback relief. The proposal would locate stairwells in a logical location while decreasing a nonconformance so that there was no fair and substantial relationship between the general public purposes of the Ordinance provision and the specific application to the property.

Mr. Moretti agreed, adding that the proposed location had been well chosen, moving a little further from the right property line, and overall this was a good use of the property.

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

 Mr. Mulligan recused himself from the following petition. Mr. Rheume resumed a voting seat. Mr. Moretti remained in a voting seat.

4) Case # 9-4

Petitioners: Roxanne Raeside Wilton, owner, Bosen & Associates, PLLC, applicant

Property: 266 Middle Street

Assessor Plan 136, Lot 9

Zoning District: Mixed Residential Office

Description: Convert 2,000± s.f. residential space to office use.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1111.20 to allow the expansion of a use that is nonconforming as to the requirements for off-street parking.
2. A Variance from Section 10.1112.30 (5) to allow 6 parking spaces to be provided where 16 spaces are required for a business or professional office use.
3. A Variance from Section 10.1114.21 (D) to allow no maneuvering aisle to be provided.
4. A Variance from Section 10.1114.32 to allow vehicles entering or leaving a parking space to pass over another parking space, require movement of another vehicle, or back into a public right of way.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bosen stated that they were requesting a parking variance as part of a proposed relocation of their law firm to 266 Middle Street. He described the law firm, which owned their current location at 96 Chestnut Street where they occupied approximately 2,000 s.f. and had two

off-street parking spaces. The entire proposed space would be 4,000 s.f. and there were 6 existing spaces. He described the historic nature of the structure and its past uses which included a medical office. He noted that until recently the current owner resided on the property. While the property had contained for the past 100 years a professional office building, they required variances to convert the residential space to office use. Attorney Bosen stated that the building was 4,000 s.f. and, based on current zoning, they could occupy 2,000 s.f. of office space on the first floor and continue to use the second floor as residential space without a variance. Because they wanted to convert the residential space to professional office space under Section 10.4111, they would lose all grandfathered parking and it would be impossible with this building to meet the modern standards for parking. While cars could be easily accommodated, 16 parking spaces were required and parking had to be stacked.

Addressing the criteria, Attorney Bosen stated that it was within the spirit of the Ordinance to allow a property owner a reasonable use of his property. The test for whether or not granting a variance would be contrary to the public interest or the spirit of the Ordinances was whether the granting would substantially alter the essential characteristics of the neighborhood or threaten the health, safety and welfare of the public. He stated that the characteristics of the neighborhood would not be altered for the following reasons: (1) a professional office was a permitted use in the Mixed Residential Office district; (2) No exterior modifications were being made; (3) There were eight other law firms in the vicinity; and (4) the building was across the street from the Masonic Lot which was open for public parking Monday through Friday. He described a 90-day study of parking in that lot with an daily average of 22 cars and noted that, of the firm's eight staff members, two walked to work, five parked in that lot and he parked in his driveway on Chestnut Street and would do the same in his driveway on Middle Street.

Attorney Bosen stated that substantial justice would be done by granting the variances as the hardship on the applicant outweighed any benefit to the general public in denying them. It was just to allow property owners to use their property in a way that was consistent with permitted uses, including a relaxation of the Ordinance parking requirements when they were not needed due to the proximity of public parking. Conversely, it would be unjust to deny the requested relief as there would be no corresponding benefit to the neighbors, who supported the request, the public, or the City. He stated that the value of surrounding properties would not be diminished by granting the variance for the following reasons: (1) The intended office use was a permitted use; (2) this was a low impact, low intensity use; (3) The use was consistent with uses over the past 100 years; (4) The building would not be changed in appearance and the grounds would be maintained; and (5) The property abutted residential uses on both sides, which would require evening parking while theirs was an exclusive daytime use. He listed the letters of support that had been provided and passed out an additional one from the Portsmouth Housing Authority that owned the property across the street.

Addressing the unnecessary hardship test, Attorney Bosen outlined why the property was currently nonconforming, which was not uncommon in this historic City. He felt it was in the City's best interest to preserve the characteristics of a beautiful historic structure in a historic district yet allow the property to be used as it historically had been, which was primarily an office use which, he reiterated, was allowed in this district. With a large existing structure, the lot could not accommodate the parking changes under the current Ordinance so that a strict application of the requirements would prevent the proper use and enjoyment of the property. He stated that the conversion of 2,000 s.f. from residential to professional office use triggered the requirement for

sufficient off-street parking to satisfy current zoning. He noted, however that the purpose of the requirement was to prevent traffic congestion and parking scarcity, which would not be the case given the ample capacity of the underutilized public parking across the street. There was not, therefore, a fair and substantial relationship between the purpose of the Ordinance and its application to this property. As the last piece of the hardship test, the proposed use was a reasonable one, although it might appear initially to require a lot of relief. The use of the property for a law firm was similar in character and consistent with, not only past uses, but the existing uses of current properties on Middle Street. He concluded that they had worked hard to identify a property that would be suitable for the firm, the employees and the neighbors and they felt this was the perfect location.

Chairman Witham asked if Attorney Bosen could describe what type of clients came to the office and what type of traffic would be generated. Attorney Bosen stated it would not be a high traffic type of operation, unlike a medical office with patients coming in and out. Much of their work was done for national and statewide entities who did not physically visit the office. The previous day they had 4 visitors which would be considered unusual. In response to questions from Mr. LeMay and Mr. Rheume, Attorney Bosen stated that he would be the only person parking in the driveway with the other employees parking in the Masonic lot. He noted that few people parked in the driveway preferring to park on the street, which was a little bit outside the downtown sector. There would be occasional on-site parking use by clients.

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

With no one further rising, Chairman Witham closed the public hearing. \

DECISION OF THE BOARD

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

Mr. Rheume stated that, as the applicant indicated, this seemed initially like a lot of relief but when all the circumstances were considered, including the location and the availability of parking, the use was a reasonable one. His main concern was customers using the off-street parking area and having difficulty backing out. It appeared, as a practical matter, that the public was unlikely to use the area so he didn't feel it was necessary to add any stipulation that the area only be used by employees.

Addressing the criteria, Mr. Rheume stated that the lot had been used as a business for many years and this was just an expansion. While there was some intensification, the proposal was in accord with the neighborhood and there was no other public interest to be negatively affected. In the spirit of the Ordinance, the applicant was asking for quite a few less spaces than required but considering the nature of the business with few clients visiting the offices and adequate available parking, he believed that the proposed number of parking spaces was reasonable in practical terms. He noted that, if the parking area was used by employees, they could accommodate each other in passing over spaces. Mr. Rheume stated that substantial justice would be done by allowing the property owner full use of both floors and it would be a positive benefit to the community for this law firm to remain in Portsmouth. He stated that the value of

surrounding properties would not be diminished as there would be no substantial change from what had been happening on the property for years. He stated that there were special distinguishing conditions that prevented the property from being used in strict conformance with the Ordinance. These included its location on Middle Street with good available parking in a lot across the street. He believed that the conversion of the second floor to a business use was a reasonable use of the property.

Mr. LeMay stated that the important aspect of where clients would park was answered by the availability of parking in a lot across the street. It had been demonstrated that the neighbors were in support of this use in a mixed residential office area which would not change the essential characteristics of the neighborhood.

Chairman Witham stated that he would support the petition. While he agreed it read at first as a lot of relief, the reality of Middle Street was that it was a mixed use area. The way the parking requirements read, it was difficult to imagine any lots in that area meeting the requirement and it would not be in the public interest to pave the back yard or tear down buildings to make a parking lot. He felt it was reasonable to grant some parking relief and maintain the historic nature of the structure.

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

Mr. Mulligan resumed his voting seat and Mr. Moretti returned to alternate status.

5) Case # 9-5

Petitioners: Kenneth D. Markley & Joy L. Bryan

Property: 239 Raleigh Way

Assessor Plan 212, Lot 108

Zoning District: General Residence B

Description: Construct a 12'± x 20'± rear shed.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Sections 10.573.20 and 10.521 to allow a rear yard setback of 10'± where 12' is required for an accessory structure.
2. A Variance from Sections 10.572 and 10.521 to allow a left side yard setback of 3'± where 10' is required for an accessory structure.
3. A Variance from Sections 10.572 and 10.521 to allow a right side yard setback of 6'± where 10' is required for an accessory structure.

SPEAKING IN FAVOR OF THE PETITION

Mr. Kenneth Markley stated that he was one of the owners of 239 Raleigh Way and his son now lived on the property. Referring to the site plan on display, he stated that they wanted to build a shed in back for garden tools and outdoor toys that were currently stored outside.

Addressing the criteria, Mr. Markley stated that granting the variance would not be contrary to the public interest as the shed would be located as far back on the lot as possible and would not be seen from the road. It would be in the spirit of the Ordinance as this was a residential use and they would have greater enjoyment of the property if everything did not have to be moved in and out of the basement. In the justice balance test, he didn't see any negatives to anyone if their petition were granted. There were many sheds, barns and garages in the area and pretty much all were 1' or 2' off the property line. He stated that the value of other properties would not be diminished. These were all really small lots, ten to one depth to width. No views would be blocked. He stated that denial would cause a hardship for them as it would not allow enjoyment of the property while the public would not benefit. He added that they could not do anything about the width of the lot which created a problem in placement.

Mr. Rheume referenced the provided excerpt from a tax map where it appeared there was a structure where the shed was proposed. Mr. Markley stated that he didn't understand where that came from. There was nothing there. In response to further questions from Mr. Rheume, he stated that there was no fencing between 239 and 241 Raleigh Way and they shared the back yard. He confirmed that influenced their placement closer to the property line. Mr. Rheume questioned a larger structure between 231 and 239 Raleigh Way and Mr. Markley stated that was a swimming pool that had not been used in ten years.

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

With no one rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

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

Ms. Chamberlin stated that granting the variance would not be contrary to the public interest as the shed would be set in back out of view. She noted that it was becoming typical for people to use a shed to store outdoor property and equipment. The spirit of the Ordinance would be observed and the value of surrounding properties not diminished as this was storage shed and not a full use building so that no difficulties would be created for neighbors. Substantial justice would be done by allowing maximum use of the lawn while not infringing on anyone else's use or enjoyment. She stated that a hardship would be created if the shed had to be located further from the setback as it would reduce the functional use of the yard.

Mr. LeMay noted that the side of the shed was fairly large but he felt the important dimension was the 12' width which was not particularly excessive and was consistent with others in the area so that the essential characteristics of the neighborhood would not be changed. He noted that this was Atlantic Heights with property lines going through the middle of houses and with very narrow lots. The proposal would allow space for storage with the least impact.

Chairman Witham noted that the shed was perhaps a little larger than usual but this would be a one-shot occurrence.

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

 The hearing was temporarily suspended for a five minute recess.

6) Case # 9-6

Petitioner: Paula A. Chalfin

Property: 496 Middle Street #1

Assessor Plan 135, Lot 21-1

Zoning District: Mixed Residential Office

Description: Construct 14'± x 16'± left rear addition and stairs.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.321 to allow a lawful nonconforming structure to be extended, reconstructed, enlarged or structurally altered in a manner that is not in conformity with the Ordinance.
2. A Variance from Section 10.521 to allow a left side yard setback of 3.9'± where 10' is required.

Mr. Bob Cook stated that he was from Adapt Design and was representing the owner. He wanted to clarify the advertised variances. They could see on the elevations he had submitted that there had been an addition of a small one-story covered area to shield a bulkhead and not allow water into the basement. This would be where the current bulkhead and deck were on the site plan.

Chairman Witham asked if there would be an impact on the variance requests and Mr. Cook stated it would not affect the setback. It might affect lot coverage but it would not be by much.

As background, he noted that the original structure was built in 1810 on a lot that was larger. On the south end of the house where there were currently no windows on the elevation, there was a one-story addition used as a counting room for lace makers. In the late 19th or early 20th century, the owner of the lot next door had purchased part of this lot. The current two and a half story structure and adjoining driveway replaced the then existing structure on a smaller lot.

Addressing the criteria, Mr. Cook stated that granting the variances would not be contrary to the public interest. The owner was taking special care while addressing issues in the existing house, one of which was a 7' x 8' kitchen which she would like to enlarge in this addition. They also required relief to allow space to get furniture up to the second floor. The front stairway was of a historic nature and couldn't accommodate the furniture. They would also like to have a second egress for safety. The spirit of the Ordinance would be observed by allowing the owner to rectify these living conditions. He stated that the addition would be located in an area currently had a deck and a number of tall bushes so the look of the property and its density wouldn't be changed. He maintained that substantial justice would be done for all these reasons and that the value of surrounding properties would not be diminished. Adding a kitchen that would be more in keeping with modern needs and allowing use of the backyard would only increase the value of the property. The addition would not cast shadows on the property next door and values would also be enhanced by the retention of a 20' oak tree, which was one of the most important reasons for choosing a location. The owner would like to retain this defining element and placing the addition as proposed would minimize the risk of damaging its roots. Addressing the hardship test, Mr.

Cook stated that all the things previously stated were applicable. This was a small lot which had the unique condition of being a shared condominium development. They also had to deal with the narrowness of the Mixed Residential Office setbacks. They felt that allowing these variances would preserve the tree, as well as the historic character of the property and neighborhood.

Mr. Rheume asked where the small kitchen was in the current layout. Mr. Cook referred to Sheet A of the elevations stating the small kitchen was where the powder room and butler pantry were now shown. Mr. Rheume noted that they did not have all the dimensions to look at but, from a visual, it appeared that 40% lot coverage would not be an issue and he asked Juliet to comment.

Ms. Walker asked Mr. Cook if he could clarify how much building coverage there would be with the proposed addition, including the two units. Mr. Cook stated he had not calculated it with the two units. Ms. Walker asked if the units were about the same size, noting that they would need to stay under 40%. She noted that information had been missing when they did their analysis and she would like to quickly review that.

Mr. Rheume stated that, visually, from what they had seen in the past, it seemed that would be the case. Chairman Witham added that, if there were a motion to grant, it could be a stipulation that the Planning Department confirm the lot coverage. They did not have to feel pressured to decide that immediately.

Ms. Paula Chalfin stated that she was the owner of the property. The reason she needed the second staircase was that there was furniture still downstairs that needed to go to the second floor and they couldn't do so with the existing staircase. She stated this was really a necessity and not that she just wanted more space.

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

With no one rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

Mr. Rheume made a motion to grant the petition as presented and advertised with the stipulation that the Planning Department validate that the lot coverage was acceptable prior to the issuance of a building permit. Mr. Durbin seconded the motion with the stipulation.

Mr. Rheume stated that having looked at the plans and gone by the property, it was apparent that the house was narrow and, unlike other similar homes in the area, there was currently no addition. The layout was archaic and, as the owner pointed out, the single stairway in the middle of the house did not accommodate the furniture they needed to move to usable space on the second floor. He felt the applicant was trying to make reasonable changes and have a more modern house and kitchen. You really needed to place the addition to one side of the other of the house due to the nature of the two rooms in the historic section of the home. The applicant chose to put it on the side away from Union Street and closer to abutting neighbors but pointed out that there were good reasons to do so in terms of preserving an existing large old oak. He felt the Board usually supported such preservation so that was a positive selection. He noted that the two abutters that

would be most affected had provided letters indicating support for placing the addition where proposed.

Addressing the criteria, Mr. Rheume stated that granting the variance would not be contrary to the public interest. Again, the addition was in keeping with what could be seen with many similar homes of this sort of one-room depth homes. It was pretty rare to see that some type of addition had not been added on even in 19th century times so this was a reasonable request from that standpoint. The spirit of the Ordinance would be observed as the requested setback would be slightly more than half of what was required but it would continue a straight line from the edge of the existing home. In that sense, they were really only half a foot closer than the existing home. He stated that substantial justice would be done by allowing the property owner to fully utilize the property and maintain the historic nature of the home. A tasteful addition to the back would allow for modern convenience and access to the second floor for needed furniture. Mr. Rheume stated that the value of surrounding properties would not be diminished. There would be overall improvements to the home that should increase the value of this and surrounding properties. Considering the hardship test, he stated that there was no fair and substantial relationship between the general public purposes of the Ordinance and their application to this property. This was a tight neighborhood overall. The applicant was not asking for a lot of relief considering what was already there and the abutting property owners were in support. The second part of the test was that the proposed use be a reasonable one and, as indicated, an addition was not an unreasonable request in terms of making the house more livable.

Mr. Durbin agreed, noting that he didn't see that the appearance of the property would be changed by an addition in the same visual line of sight as the primary structure. The same building line was followed although the addition would encroach half a foot further due to the existing angle. He stated that this was a uniquely developed lot and there was an inherent hardship in the existing placement of the house on the lot.

The motion to grant the petition as presented and advertised, with the stipulation that the applicant provide dimensional information to the Planning Department so that a determination could be made that the 40% maximum building coverage allowed would not be exceeded, was passed by a unanimous vote of 7 to 0.

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- 7) Case # 9-7
 Petitioner: Elizabeth H. Blaisdell
 Property: 77 New Castle Avenue
 Assessor Plan 101, Lot 50
 Zoning District: General Residence B
 Description: Replace existing 16'± x 37'± x 11'± high barn with a 20'± high accessory building on the same footprint.
 Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance from Section 10.321 to allow a lawful nonconforming structure to be extended, reconstructed, enlarged or structurally altered in a manner that is not in conformity with the Ordinance.

2. A Variance from Sections 10.572 and 10.521 to allow a left side yard of 1.5'± where 10' is the minimum required for an accessory structure.
3. A Variance from Sections 10.573.20 and 10.521 to allow a rear yard setback of 3'± where 15' is the minimum required for an accessory structure.

SPEAKING IN FAVOR OF THE PETITION

Prior to the applicant's presentation, Chairman Witham commented that they were going to be talking about the height of the structure and it was noted as 20'± high. He stated that the ridge line as presented was 20' high but, as the Zoning Ordinance measured height, it was halfway up the slope so the actual height of the building was, from his calculations, closer to 15.5'± high, but understanding that the ridge itself was as presented in the drawings at 20'.

Ms. Elizabeth Blaisdell stated that she was the owner of 77 New Castle Avenue and had inherited this barn when she purchased the property about ten years ago and it was a decaying structure beyond repair, use or any type of aesthetic improvement. She had worked on the house and would have preferred to restore the barn but it really needed to be replaced. She was there for variances dealing primarily with the setback requirements. She stated that the barn was unsightly and, over the years, there had been a lot built up around it so that, on the left side of her house, there had been a large fence constructed, actually on her side of the property, kind of jutting around her barn to hide it. Behind her on Humphreys Court, the neighbors received a variance a few years ago and rebuilt their garage which was directly on her property line with the roof actually going over the line onto her side. She was kind of squeezed back in that corner and she would like to rebuild the barn on that footprint noting that it was difficult to determine how to work it any other way because of the existing fence and overhanging roof of the neighbor's garage.

Ms. Blaisdell stated that she was replacing a structure in kind and it was the only storage she had on the property. The design would not be substantially different with the difference a unified roof line where now there were two roof lines. She had received a lot of input from the Historic District Commission work session where a gable roof to match the house was encouraged. She listed the issues she believed the neighbors had, including privacy, height and the design and the steps she had taken, such as reducing the size of the rear windows. She and the architect took feedback from the HDC literally but were open to a conversation to make the project more amenable to neighbors and to the possibility of lowering the height. She would like to install solar tiles for energy if the HDC would approve them. The barn had served as a workshop in the past and she was excited to have it back for her projects.

Mr. LeMay asked the height of the current structure and Ms. Blaisdell responded that was 11' which coincided with what they were seeing now as the height of the building part before the gable roof. When he asked if it were the highest end of the slope, she stated it was. In response to questions from Mr. Rheume, she stated that she would like to heat the structure and treated it as a work space for projects. Right now it just held her kayak. Regarding the garden shed storage and another room drawn in the back area on drawing A1.2, she stated that the architect had put that in as there was enough height but she was, again, open to input. When Mr. Rheume asked if that was something she considered essential to her future endeavors, Ms. Blaisdell responded, "not at all," adding that she really just needed storage space.

Chairman Witham stated that she was obviously aware that they had received letters from abutters with regard to height and light and air. He noted that she had said she seemed amenable to working with abutters with regard to the roof but the Board had to vote on what was before them. They would next hear the abutters' testimony and make a decision. He noted that it was tricky as she could say she would lower it 4' for instance but the Board did not have a drawing before them reflecting that. Ms. Blaisdell responded that she was sorry about that. It was a process. Chairman Witham continued that he wanted her to know that the Board had read the letters from the abutters and he wanted to be clear about the limited options before them. She would be granted approval or, if not, perhaps she would appear again before them. Ms. Blaisdell thanked him noting that it would be great to get clear feedback, if that were the outcome, so she could come back and present something that would be amenable to all.

Mr. David Harrington stated that he lived at 59 New Castle Avenue. Ms. Blaisdell had shown him the plans and he felt the roof height was in keeping with his garage and the barn that was between his house and hers. That barn had a 26' or 27' peak so he was not sure that should be a problem. As far as the setbacks were concerned, his garage had a 3' setback on one side and the rear. One 3' setback was on Harold Whitehouse's property and the other was on the Orr's who had the 26' barn. Their setbacks were both on property lines, his property and that of Harold Whitehouse. The setbacks in the neighborhood were minimal to say the least. He stated that he had lived in the same house for 35 years and had watched the barn deteriorate and, right now, it diminished the property values on the whole neighborhood. He noted that the Orrs next door disliked it so much that they installed a spike hedge 8' or 9' tall so they didn't have to see it. Before they allowed that hedge to grow so tall, he could look across their back yard and watch the ships in on the river but he couldn't do that now. He felt that a substantial harm would be if the Board denied the proposal because everyone's property values would continue to be diminished.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Harold Whitehouse stated that he lived at 58 Humphreys Court. The applicant could remodel or demolish the shed, which was an eyesore, but he was concerned about being walled in by another large structure and lose sunlight and air. There would be excavation and he was concerned about water runoff. With respect to the rear setback, these garages and sheds were right on the lot line and somebody could refuse to allow the right to enter their property for maintenance. He concluded that he felt the project would devalue his property.

Ms. Andrea St. Jean stated that she lived at 54 Humphreys Court, directly behind this property. As could be seen in the photograph submitted with her letter, their back yard was modest. She felt the new structure would appear as a wall as there was a slight rise closer to their property line. In addition to the 11' they now saw, they would see an additional 8' so it would be like a monster in their back yard, especially if there were not any windows. They felt it would diminish their enjoyment of their home and its value and affect the sunlight in their back yard.

Mr. Parrott asked if she could estimate the drop in grade from 77 New Castle to their back yard. Ms. St. Jean stated that the structure was pretty much on their property line. Ms. St. Jean stated it was about 4', some of which was on their property and some on Ms. Blaisdell's. There was just a drop off there. When Mr. Parrott asked if she was quite a bit lower, she stated, "yes."

Ms. Jane Orr stated that she lived at 69 New Castle, next to this property. She noted that the neighbor on her other side had a garage that was inches from their house. Their concern with this proposal was the height of the structure. She had lived there for three years and they did have a large carriage house. While they wanted to support the applicant, there was a concern about losing sunlight which could affect their landscaping. She had thought the fence was a shared one but apparently it might have been put in by the previous owners of her home. She was amenable to removing it. She stated that her biggest concern was losing the water view they had in winter. Placement was also an issue as, if the applicant stayed in the same footprint, it would be one and half feet to their side. She didn't know what the motivation was to maintain the footprint but felt there was room on the other side to adjust.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Ms. Blaisdell stated that she heard the feedback on height and could possibly make adjustments as she didn't want to upset the neighbors. She also wanted to shed a little light on some other issues that had been raised. The barn facing Ms. St. Jean's property in the back at Humphreys was north facing and their property had a lot of trees. The light in the neighborhood was dictated by the height of all of their houses which were very close together and the fact that they had those trees in their back yard which was shaded with little sunlight. Addressing the comment about runoff, she was not changing the area of the house so there should not be increased runoff concerns. If anything, the way the roof would be set up, instead of dumping all the water back there, it would come onto her property. She noted that, as an environmental scientist, she was sensitive to any impact of construction runoff and would not allow there to be erosion, which would also be monitored by a permitting process. Regarding windows, she had thought she was doing the St. Jean's a favor by not putting windows on that side but she was amenable to putting them back.

Addressing Ms. Orr's concerns about why she was maintaining the one and a half feet, she stated that she was willing to move it forward into what was sort of an outdoor living room area for her. However, with the way the St. Jean's built a larger garage and did the roof overhang, they had to come onto her property to do any maintenance. She did not have to go onto her neighbor's property for maintenance on the barn in its current footprint. If she were to move the barn forward, it instantly affected the proximity to the overhang and diminished the ability of the St. Jean's to come onto her property to maintain their garage. She stated that was what she was up against. She welcomed any creative ideas as to how to deal with this but, as could be seen from the photographs, she had a very small back yard to begin with. She could move in maybe a foot or so, but would quickly run out of yard and lose the utilization and enjoyment of that space.

Mr. Rheume stated that she had talked about moving the barn laterally closer to the garage but wondered if the structure, currently 37' long could be made shorter. Ms. Blaisdell stated it was possible but she had a small house with no garage and was concerned about shrinking the size as it was really her only storage space. Before the St. Jean's built their garage, there had been a discussion about a driveway and using the current barn as a garage. That became out of the question with the way their garage was placed. She reiterated that she could move her structure forward a foot or so but that would require asking the Orr's to rebuild the fence, earlier described, that the previous owner built on her property. Mr. Rheume asked if she had done a survey to validate that the fence was on her property. Ms. Blaisdell stated that, because of all the issues this had raised while she was just trying to make an area more attractive, she felt that other people being able to go ahead and put things on their property had resulted in penalizing her. She would

have a survey done but she honestly did not want to create any hassles for neighbors. She just wanted to make the barn better and would prefer to not have to ask her neighbors to deal with it. In response to further questions, she stated that the gable roof was essential to any type of solar heating. She had someone over to look at the roof on her house and she could maybe fit in small solar hot water system on top of a dormer roof on the side of the Orr's property but it would be visible from their house and the street and she considering, not a hot water system, but an integrated roofing material with solar built in. Asked about the location, she stated it would be on the side of the roof facing her house and that of one of the abutters who were in support, which reminded her that she had brought additional letters of support, which she submitted

DECISION OF THE BOARD

Chairman Witham stated that he felt that what was drawn was tastefully done but he was not convinced that the replacement needed to be the same size, noting that the footprint was the same as the house on the previous application. Considering that two thirds of the space was open loft studio type space, he was not sure he would describe the structure as a shed. He was always concerned about uses in addition to storage in accessory buildings and this structure had the potential for generating light and sound at night. He understood that structures built by the neighbors were as close or closer to property lines but that did not mean this had to be as well. He felt it could be smaller in length and noted that to maintain a structure of this height, adequate space for a ladder would be needed for maintenance.

Mr. Parrott noted that the structure had been called various things but it was the size of a small house in length, width and height and, on a 60' wide lot, you were constrained in what could be built. His comments had nothing to do with style, except for height, which was significant. With windows, at night, there would be a whole different perspective than the tumbledown shed that was there. His sense was that the essential characteristics of the neighborhood would be changed by introducing a different type of structure. It was also not good planning to cram it into a corner. It was a nice structure, but too ambitious in terms of mass on a narrow lot with close adjacent neighbors and a grade differential affecting the height.. He noted that the roof area would be larger and shed more water, which he felt would go downhill. He concluded that the structure was too ambitious for the location and the fact that a shed existed in the back corner was no argument to rebuild the structure in the same location.

Chairman Witham stated as additional feedback that the whole roof did not have to be one long gable. It could be broken up with a flat section to lessen the density while still allowing room for future solar endeavors.

Mr. Rheume stated that the design was clearly influenced by the Historic District Commission who also had a say in the final outcome and he understood that it was difficult for applicants to bounce back and forth between a number of Boards to try and get something that worked for everybody. He could understand the Commission's desire for a more historic look but a gable roof added immediately to the height. He could also understand the applicant's desire to keep the same footprint but noted that maintenance of a larger structure was more difficult. He stated that he would feel more comfortable with a 5' setback from all property lines which would be adequate for maintenance. Mr. Rheume stated that he could also understand the neighbors' concerns about light and air. He noted that the neighboring properties also had outbuildings, one large in size and another close to the property line but, unfortunately, this applicant was the "last to the party." She

wanted something similar to what other abutters already had while dealing with the option of renovating and having the structure be unattractive to the Historic District Commission. It was difficult but he didn't like the setbacks as proposed and felt the size could be reduced by several feet and the gable roof, probably the greatest factor affecting the light and air of the neighbors, could be reworked.

Mr. LeMay stated that he wanted to point out that the members of the Board were speaking as individuals. People frequently referred to what "the Board said," while it was the statement of one individual on the Board. In this instance, he was speaking as an individual and his message was that the proposed structure on this lot was just too large, too tall and too badly sited. The fact that there happened to be a structure there now that was falling into ruin was not justification for this petition. His recommendation was to rethink the project with a clean sheet of paper, considering the lot more than clinging to the fact that there was a "crumb" on there that was falling into ruin.

Mr. LeMay then made a motion to deny the petition, which was seconded by Mr. Parrott.

Mr. LeMay stated that, while they would like to see some improvement there and he was certain the neighbors would too, he felt that the applicant had heard a lot about why the Board felt this was inappropriate. Of the three things cited in his previous comment, the "too tall" was the real killer as it would change the light and air for neighbors and could have an impact on property values. Although the lot had the characteristic of being small, he felt it would be hard to justify a need for a structure such as this based on the hardship criteria.

Mr. Parrott stated that he agreed with Mr. LeMay and referenced his previous comments.

Mr. Rheume stated that he would support the motion but had some sympathy for the applicant knowing the need for storage with a small house. He agreed that the current application had a lot of drawbacks but hoped that the applicant and the neighbors could work constructively together, with some give and take on both sides, to arrive at something that would be more pleasing, allow for the needed storage, and have the ability to satisfy all the boards.

Chairman Witham stated that he would support the motion as the five criteria necessary to grant a variance were not met. He noted that the proposed was a beautiful structure but it was hard to deny the adverse impact on neighbors, particularly the neighbors to the rear. He was confident that something could be built that would meet the needs of the applicants while satisfying the neighbors. He felt there was some flexibility and the ability to work with the roof line to accommodate solar capability without all the massing

The motion to deny the petition was passed by a vote of 7-0.

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- 8) Case # 9-8
Petitioners: Robert A. & Meghan M. DesFosses
Property: 115 Fairview Avenue
Assessor Plan 220, Lot 68
Zoning District: Single Residence B
Description: Construct a 12'± x 20'± right side deck with a 30" high grilling section.

- Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance from Sections 10.516.40 and 10.521 to allow a rear yard setback of 6.1'± where 15' is required for a deck less than 4' in height.
 2. A Variance from Section 10.521 to allow building coverage of 27.6%± where 20% is the maximum allowed.

Chairman Witham noted that this petition had been withdrawn by the applicant.

V. OTHER BUSINESS

Ms. Walker noted that, in the Board's packet, was a copy of the Rules and Regulations as modified. The only change since the last time they had viewed it was changing "Planning Department" to "Planning Director" in the section provided so there would be some specificity as to who would be accepting requests for an exemption.

Chairman Witham had a general comment. He noted that, in the last couple of months, they had a lot of petitions and the Board was on the same page with many unanimous votes. He felt that was indicative of the petitions coming before them. He felt that in the past people were constantly trying to push the limits, but the Board had set a certain standard and petitioners were recognizing that a reasonable petition could get a positive result. He felt the Board's work and consistency had set the tone.

VI. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 10:10 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk