

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

**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**February 25, 2014, Reconvened  
from February 19, 2014**

**MEMBERS PRESENT:** Vice-Chairman Arthur Parrott; Susan Chamberlin; Derek Durbin; Charles LeMay; Christopher Mulligan; David Rheäume; Alternate: Patrick Moretti

**MEMBERS EXCUSED:** Chairman David Witham

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In the absence of Chairman Witham, Vice-Chairman Parrott called the meeting to order. Mr. Moretti assumed a voting seat for the meeting.

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**I. APPROVAL OF MINUTES**

A) November 20, 2012

*Ms. Chamberlin made a motion to **approve** the Minutes with corrections. Mr. Rheäume seconded and the motion **passed** by a unanimous voice vote.*

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B) February 19, 2013

*Mr. Mulligan made a motion to **approve** the Minutes with corrections. Mr. Rheäume seconded and the motion **passed** by unanimous voice vote.*

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C) March 19, 2013

*Mr. Rheäume made a motion to **approve** the Minutes with minor corrections. Mr. Moretti seconded and the motion **passed** by a unanimous voice vote.*

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**II. PUBLIC HEARINGS - OLD BUSINESS**

No old business was presented.

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**III. PUBLIC HEARINGS – NEW BUSINESS (continued from the February 19, 2014 meeting)**

2) Case # 2-A

Petitioner: Kim Ham Iozzo (Nelsen)

Property: 610 Middle Road

Assessor Plan 232, Lot 33

Zoning District: Single Residence B

Description: Part-time aesthetics services offered in a portion of a residence.

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 #19.22 to allow a Home Occupation 2 in this district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Peter Nelsen, representing the petitioner, stated that she was planning on running a home business for skin care, facials, and waxing on a part-time basis with 4-6 clients a week and no signage. Mr. Nelson said they decided to have street side parking on Marjorie Street after considering the traffic on Middle Road and the Islington Street Bridge being closed.

Vice-Chair Parrott asked Mr. Nelsen to address the Special Exception review criteria. Mr. Nelsen said he was not familiar with the criteria and was filling in at the last minute. Mr. Durbin provided the criteria sheet to him.

Mr. Nelsen read through the standards and stated that it would be a very quiet indoor business for natural products and there would be no explosive materials. He said they were just putting an aesthetic services area in a spare room and were not making any changes to the building inside or out so there would be no detriment to property values. He stated that business activity would primarily run on Saturday and early in the week between 4 p.m. and 6 p.m. and traffic would be limited to 4-6 clients a week. He said there would be no excessive demand on municipal services, little water would be used and no changes would be made outside so there would be no additional stormwater runoff.

Ms. Chamberlin said her understanding was that there would be one extra car at a time and not 2-3 people waiting. Mr. Nelson said that was correct and he would usually be gone so his car would not be there.

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

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

*Mr. Durbin made a motion to **grant** the petition as presented and advertised and Mr. LeMay seconded.*

Mr. Durbin reviewed the standards, noting that granting the Special Exception would not be contrary to the public interest because the use was permitted in this zone by Special Exception. He said there did not appear to be any hazardous materials, nor detriment to property values in the area. He said the applicant represented there would be light use as a home occupation and not more than 4-6 clients during the week, less than one a day, one car a day and no increase in traffic. He said there would be no increased demand for municipal services, or an increase in stormwater runoff. He said granting the Special Exception would not alter the character of the neighborhood nor threaten the health, safety or welfare of the general public.

Mr. LeMay agreed with nothing further to add.

*The motion to grant the Special Exception **passed** by a vote of 7-0.*

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Mr. Mulligan recused himself from the following petition.  
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- 3) Case # 2-2
  - Petitioners: GRN Realty Trust, owner, and The Chandler’s Loft, applicant
  - Property: 15 Pickering Avenue (7 Pickering Avenue)
  - Assessor Plan 102, Lot 24
  - Zoning District: Waterfront Business
  - Description: Seasonal private functions in 30’± x 15’± outdoor seating area.
  - Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
    - 1. A Variance under Section 10.440 to allow outdoor space to be used for private functions from May to October in a district where such a use was not allowed.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Glenn Normandeau stated he and his wife Robin owned and lived at the property, which had been in his family for several years. He said the zoning had been changed from residential to waterfront business during their ownership in the 1980’s. He said they a legal agreement with the City that allowed them to have their home on one side so long as they kept the waterfront business. He said they have had a camera shop and a marine construction business on the location in the past twenty years. He said he sold the construction business and his wife has had a store for the last four years with access by boat or car that sold fishing, tackle, bait, beverages, sandwiches, and salads, and some stayed to eat on the dock.

Mr. Normandeau said people have requested to lease space on the dock for small parties. He said they had an approved cooking area and they talked to the Planning Department about including private functions of not more than 25 people, which was what they were currently allowed for outside seating for their take out business. He said they did not have a liquor license and did not intend to, there would be no music and they would not go past 10 p.m. He said the dock area was

not visible from the street and they had abundant parking on their property. He said many marinas in the area did the same sort of thing.

Ms. Chamberlin wondered if they owned the two parking areas. Mr. Normandeau said they did but they had not been open for the public. When they had a heavy construction it contained lumber and a crane for the business. Mr. Rheume asked what the square feet of the parking area was and how many cars could park there. Mr. Normandeau said there were no lines, but they could probably park 25 cars for a private function where they would not need to worry about cars moving in and out. Mr. Rheume asked Ms. Walker how they met requirements for parking. Ms. Walker said they satisfied the requirements for current use, and this was an extended use so she believed they would meet the requirements.

Mr. Normandeau said the public interest was served by access to the water for anyone who would like to enjoy the property. Regarding the spirit of the Ordinance, he said the Waterfront Business Ordinance was extremely restrictive. He did not believe there was a single conforming lot in the District, but they always maintained the water dependent business and were proposing an additional use. He said substantial justice would be served because he did not believe anyone could see the dock seating unless at they were at the end of the pier or on Pierce Island looking back at the boat ramp. He said the use would not affect the neighbors and there would be no issue with surrounding property values because there would be no large extravaganzas as there were at Prescott Park, Pierce Island, or Strawberry Banke. He said he was asking for as maximum of 25 people, but would only expect a dozen most of the time. He said literal enforcement would result in an unnecessary hardship because the permitted use was so narrow that many water dependent businesses did not meet the requirements and were not compliant. He said the proposal was compatible with the area. Mr. Normandeau said literal enforcement would result in unnecessary hardship because it was challenging to support their existing operation without diversifying.

Ms. Nancy Grossman of 170 Mechanic Street said her home faced their business and they have had numerous activities that go late, but she could not hear them and it did not affect parking so she had no issues with the proposal.

Ms. Sandra Dika of 333 Marcy Street believed allowing seasonal private functions would cause no harm and would help to build community as the Normandeau's current operation already did.

Ms. Patty Kennedy of 267 Marcy Street said she lived two blocks over and up from Chandler's Loft. She said she and others enjoyed going there to sit on the deck for coffee, etc, and the entire city could take advantage of their operation. She said the proposal was something that offered a wonderful sense of community for birthday or retirement gatherings and would help the Normandeau's who were committed to continuing and by allowing them to do will allow them to continue to support the Portsmouth boat launch across from them.

Ms. Karen Fisk of 44 Pickering Street spoke in favor and said it would be lovely to sit on the dock in the evening.

### **SPEAKING IN OPPOSITION TO THE PETITION**

Mr. Hugh Jencks of 25 Hunkings Street said he had owned two properties with waterfront businesses as neighbors and he understood the purpose and intent of the Waterfront Business

District. Mr. Jencks said this use was non-conforming and the Planning Department determined they needed a variance for this new use. He said once before the applicants took the City to court and overturned the denial of a variance to establish a non-conforming use on the same property. He said this property was already spot zoned to allow a residence with an apartment in the waterfront business zone. He said they were now asking for another exception and granting this variance would result in two non-conforming uses on the property.

Mr. Jencks said in 2009 the applicants prevailed over the Planning Department to write an addendum to the Waterfront Business Zoning Ordinance to allow the sale of prepared food at Chandler's Loft, which was defined at the time as a retail marine operation. He said there was no public hearing on the matter, just a letter from the City Attorney's office.

Mr. Jencks said the expansion of the applicant's food operation has pushed the envelope further. He said granting a permanent variance for the applicant and all future owners in this formerly industrial property was contrary to the spirit of the Ordinance. He said the purpose of a Waterfront Business Zone in Portsmouth was to protect and promote the working maritime waterfront, such as the maritime engineering business that previously operated on the property in conformity with the law for years by the applicant's father. He said to grant the variance would be in conflict with the public's interest, which was served by the exclusion of non-marine uses such as condominium developments, bars, restaurants, and hotels on the working waterfront. He said allowing functions at Chandler's Loft in the densely built and charming residential area would lead to an increase in hours of operation, traffic, noise, and parking as well as a diminution of property values due to the intrusion of a non-permitted use.

Mr. Jencks said the Board should find no hardship existed and there was no justification for granting a variance based on the assertion that none of the allowed uses could be carried out there. He said the applicants ran such businesses themselves until voluntarily exiting in the last decade. He said it was not a dimensional variance, it was a use variance that undercut the purpose of the zone and impacted the surrounding properties. He said once use variances were granted, they went with the land into perpetuity. Mr. Jencks referred to former City Attorney, Peter Loughlin's description of use variances as a cancer in the zoning system, seeking to grow the extent of their non-conformity, affecting the conforming properties around them, and serving as precedence to weaken the zone, often to the detriment of the spirit and intent of the statute. Mr. Jencks commented that the applicants were long time residents of the south end, were well liked and it was uncomfortable for their abutters and neighbors to oppose their proposal, but residents needed to be able to purchase property secure in the knowledge that the zoning laws would be enforced by the City.

### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

Mr. Bob Pollard of 294 Marcy Street said he was not intimidated and disagreed that neighbors would be intimidated to speak up because they lived nearby. He said the applicants' parcel was fairly isolated from others in the south end and believed it would be an asset to the community.

Mr. Chris Hubbard of South Street said Chandler's Loft was an asset to the community and for the water users who enjoy visiting for bait, tackle, etc. Mr. Hubbard said he viewed this additional use as a small revenue stream to keep it viable.

Ms. Esther Kennedy of 41 Pickering Avenue addressed the Board as a small business owner and direct abutter to the applicant. She said the waterfront had Gino's Chowder House that was a restaurant and function entity; Chandler's Loft that had a beautiful location for sandwiches and fishing gear, Sander's Fish Market, South Street and Vine Wine and Cheese, and her operation, Esther's Marina with kayaking rentals. She said they all managed to have nice places for Portsmouth residents to get out of the hubbub and enjoy the old Portsmouth. She said Gino's Chowder house could be booked for events and Chandler's Loft if the proposal went through. She said the Board needed to determine how the historic commercial use of the waterfront could stay viable. She said she could see others coming before the Board with creative proposals to keep the waterfront going for local people to sit by ocean.

Ms. Marcia MacCormack of 53 Salter Street agreed that other applicants would come forward and she was concerned with the scope and direction of Waterfront Business zoning. Ms. MacCormack said Salter Street was a dead end street that would have a problem with traffic turning around, and she said it would be helpful to get a clearer definition of what could and could not be done. She said she could see what goes on in Chandler's Loft and the rest of the neighborhood.

Mr. Charles Lassen of Round Island said he would be most affected if there were pulsating music, merriment and noise funneling across the channel. Mr. Lassen said he operated the ferry that docked at Chandler's Loft and it was a pleasure to see neighbors sitting on the dock and he had no problem with small groups celebrating in the evening and thought it would be an asset to the community.

Mr. Jim Fernel of 1000 Maplewood Avenue said he did research on the zoning ordinances. Mr. Fernel said Section 10:233:31 referred to the "...special conditions of properties that distinguished them from other properties of area..." and said he did not see any special conditions on this property. He said there was no "...fair and substantial relationship between the general public purpose of the ordinance provision and the application to the property..". He said the property already operated as a marina with marine retail so he did not think that criteria were met. He continued to read from Section 10:233: 32 that said, "...under the provision of the ordinance, an unnecessary hardship shall not be deemed to exist if any reasonable use including an existing use was included in the ordinance," and the existing use conformed so there was no hardship.

Mr. Normandeau said there had been no multi-generational use of the property. He explained that his father bought it when it was zoned residential and he had a variance to operate a branch office of his environmental consulting company. He said when he sold it, they had a dispute with the City and they did not win or overturn the zoning, but they did reach an agreement with the City and they still abide by a legal agreement. He said his construction company was deemed to be in the spirit of the Ordinance by the City for 20 years despite objections by Ms. MacCormick because of construction noise.

Mr. Normandeau said the site was unique, relatively large and he agreed that the business could not be put on Salter Street, though Salter Street was also Waterfront Business zoned. He said the Waterfront District had been developed as a combination of residential and water use businesses and none of the businesses all the way up Sagamore Creek complied by a rigid interpretation of the Ordinance. He said his taxes were over \$24,000 a year, which he struggled to pay. He said the property was one of the top five most valuable properties in the south end of Portsmouth and if he

had to sell the property, the next owner wouldn't want to pay \$2,000,000 so they could have a few people eat a couple of lobsters under a tent a few times a week to make some extra cash.

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

### **DECISION OF THE BOARD**

Ms. Chamberlin stated that she could see merits to both positions and she was torn. She said she believed part of the hardship was that the marina was a seasonal business that could go under. She said they could not fit more than 25 people at the location and an argument could be made that allowing this use would help preserve the marina business.

Mr. LeMay said he could sympathize with being torn, but he questioned how dependent the extended use was on the waterfront. He stated that waterfront businesses depended on the ocean or Piscataqua River, which the marina uses, as the current use clearly did by selling bait, tackle, supplies and sandwiches to boaters. He said the expanded use might cross the line into a use that was not dependent on being on the waterfront. He said right now that area could seat 10 to 20 people to accommodate a small group coming buying food and sitting down to eat it. He said his impression was that it was a big variance for a very small restriction.

Mr. Rheume said he was not as torn and felt strongly that the variance request should be denied. He said he was struggling with it meeting the spirit of the Ordinance. He explained that the job description of this portion of the zoning ordinance made it clear that they were really talking about businesses related to providing some type of marine service. A lot had been said about economic hardship, but he explained that the hardship criteria asked what was unique about the property as it related to its land use or the special conditions of the property that distinguished it from others in the area. He said the property was being used in a manner that was in conformance with the Waterfront Business area. He said suggesting the nature of the Waterfront Business Zoning needed to change was fine, but it was not something that the Board should be doing. That should be taken up through the Planning Board to redefine what waterfront business was and then go the City Council to make zoning changes.

*Mr. Rheume made a motion to **deny** the petition as presented and advertised and Mr. LeMay seconded.*

Mr. Rheume reviewed the criteria, stating that he did not feel the request met the spirit of the Ordinance, which was well defined in regard to what the allowable uses were and what the intent of the Waterfront Business District was. He said even looking at the surrounding neighborhood, which was in the General Residence B District, a restaurant, public assembly or function room would still not be allowable in the surrounding neighborhood. He said in that sense the spirit of the Ordinance was not observed. He added that he had not heard a specific hardship that was related to the shape, condition or some other aspect of the property that would lead him to believe it met that criteria either.

Vice-Chair Parrott said it was fair to say that this was the most restrictive zone in the whole city and the definition of activities that could take place was purposely very narrow because there was only so much waterfront. He said the City Council determined that the Waterfront District was a small, but critical part of the City and it would be better to work on recrafting and expanding the uses rather than making changes piece meal by variances.

Mr. LeMay reiterated that the Board had been very careful with waterfront variances, whether residential or business. He said the waterfront was very limited and they had to pay attention to the type of business that went on there. He agreed with Mr. Rheume that the request failed to meet the spirit and hardship criteria.

*The motion to deny the petition was passed by a vote of 4-2 with Ms. Chamberlin and Mr. Durbin voting against the motion.*

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4) Case # 2-3

Petitioners: Brady J. Byrd & Brian L. Neste

Property: 184 Walker Bungalow Road

Assessor Plan 223, Lot 19

Zoning District: Single Residence B

Description: Second story addition, deck and canopies.

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 building to be extended or reconstructed without conforming to the requirements of the Ordinance.
2. Variances from Section 10.521 to allow the following:
  - (a) A front yard setback of 25'± where 30' was required.
  - (b) A rear yard setback of 20.8'± where 30' was required.

**SPEAKING IN FAVOR OF THE PETITION**

A representative from TSM Architects stated that she was speaking for the applicant and noted that this was a reapplication. She said they originally applied for a garage that was denied and then they came back in 2002 for a second story. She said the stairs and some of the architectural feature infringed on the setback slightly and the request passed, but they then had a family emergency and their permit time ran out, but nothing had changed since their initial application.

Mr. Rheume noted that the setbacks on the property line appeared to run down Walker Bungalow Road and he wondered if it was a privately owned road. Mr. Brian Neste, the owner said there was some ambiguity as it was not considered a City road, but it was maintained by the City.

Mr. Rheume asked Ms. Walker if there was a standard policy that the Planning Department used for such roads that were part of the property. Ms. Walker said she believed they treated the road as a public way. Mr. Rheume said it appeared they were within the required 20% if they used the corrected measurement and Ms. Walker agreed.

**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. Chamberlin made a motion to **grant** the petition as presented and advertised and Mr. Durbin seconded.*

Ms. Chamberlin said the request was identical to what had been granted previously. She reviewed the criteria, noting that granting the variance would not be contrary to the public interest as it was becoming less non-conforming. She said it observed the spirit of the Ordinance because there was no change to the character of the residential neighborhood. She said substantial justice would be done by allowing the addition of a second story to an existing home. She said there was no evidence that it would diminish the value of the surrounding properties. Lastly, she said the odd shape of the lot and road was a special condition.

Mr. Durbin said it was a vertical expansion built on the same footprint, and there was a hardship due to the odd shaped lot.

Mr. Rheume said the applicant had previously applied for a garage, which they deleted from the request. He said the owner added some new elements, but they were within the existing setback, making the application reasonable.

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

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5) Case # 2-4

Petitioners: Kara Lynn Cole & Alistair James Ferguson Cole

Property: 40 Mill Pond Way

Assessor Plan 143, Lot 6

Zoning District: General Residence A

Description: Remove existing two story detached nonconforming structure and build an attached 20'± x 36'± two story garage, 11'± x 24'± connector, and 3'± x 9'± one story balcony

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 building or structure to be extended or reconstructed without conforming to the requirements of the Ordinance.
2. A Variance from Section 10.521 to allow building coverage of 30.9%± where 25% was the maximum allowed.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Kara and Mr. Alistair Cole appeared before the Board. Ms. Kara Cole said their current detached garage was grandfathered, but violated the setback to the rear and to the left. She said the garage was just a shell on cement platforms with no foundation and although it had two bays, they could not park cars in them so they only used it for storage. Ms. Cole said their proposal would place a new garage closer to the house and would be more conforming, but the connector would exceed the 25% requirement.

Mr. Rheume said there was a 3D front elevation in the package, but there was none from other perspectives with windows to allow site lines onto abutting properties. He said it appeared that they were adding windows on each level at the rear of the home, and then two windows on each floor facing the garage. Ms. Cole said that was correct along with a bathroom window.

Mr. Rheume asked why there was a difference between the front setback for the front porch built in 2010 that showed an 8' setback and the staff report that indicated the variance granted was for 10'. Ms. Cole said she was not sure, but the other setbacks were 15'. Mr. Rheume asked if they had done a survey and Ms. Cole said she just used a tape measure from the street.

Mr. Alistair Cole said the structure was built in 1900, but it could only be used for storage not as a garage and it was not in keeping with neighborhood. Mr. Cole went over the criteria stating that granting the variance would not be contrary to the public interest and would observe the spirit of the ordinance by improving compliance in keeping with the neighborhood. He said granting the variance would do substantial justice by allowing additional family space for the home as well as garage space. He said the building currently bordered a neighbor's garage and taking the structure down would increase the distance between structures and improve the appearance and value of surrounding properties. He said the non-compliant detached garage created a special condition and an unnecessary hardship and therefore, the request was a justification for the variance.

Mr. Cole went said they would like to continue living with their daughter in Portsmouth and to create enough space that would include one or two home offices that would also serve as guest rooms when his family visited from the U.K.

Mr. Rheume noted that part of the argument was that the current garage did not fit in with the neighborhood, but he saw similar detached garages across the street, next door and another on Dennett Street. Mr. Cole said they were trying their garage look more like other attached garages. He said their current garage was not only detached, but it was offset and at an angle.

Mr. Moretti asked if they also intended to move the driveway closer to the house when they moved the garage closer. Ms. Cole said the existing tar was long because the garage was set back, so they would still use the driveway, but it would not be as long. Mr. Moretti said there was a lot of impermeable surface. Ms. Cole said she understood it would only go to the front of the garage, and leave what was there on the side for their trash bins.

### **SPEAKING IN OPPOSITION TO THE PETITION**

Ms. Petra Huda of 208 Dennett Street said she was a direct abutter on the corner of Dennett and Mill Pond. Ms. Huda said she realized it was only a 5% variance, but she was opposed to the request because she felt it would affect her property and quality of life by blocking sunlight and airflow, casting a shadow on her property, and blocking her second floor view of the Mill Pond. She said there were no dimensions on the property sketches, but she calculated that the proposal would be 10' higher than the current garage, obstructing her view from the east. Vice-Chair Parrott asked Ms. Huda how she came to the conclusion that it would be 10' higher. Ms. Huda said she counted the number of clapboards on the garage and house and calculated the difference in that manner. She said the drawing made it look like the addition would be level with the current roofline, but the current garage was not level and they would be raising the height of the new

addition. Vice-Chair Parrott said he would ask the applicant to come back for comments because they did not have any architectural drawings to interpret the height.

Mr. Rheume asked Ms. Huda what the use was of the small structure closest to the garage behind the parking pad and if there was any living space there. Ms. Huda said there was not, just a two-car garage that opened toward Manson Lane.

Ms. Grace Duke of 206 Dennett, a condex of 208 Dennett Street, said she was also concerned with the obstruction of their water views from the height of the new garage, which looked as high as the current house. She said she wanted to know if the garage would stick out or be flush. She said if it stuck out it would create more shade.

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

Vice-Chair Parrott asked the Coles to address the concerns and Ms. Cole said she did not have exact measurements. She said when she looked through the second story of the house, the barn was also two-stories and could not see over the roof. She said there would be a difference in the new structure, but she didn't believe it would be 10'. Mr. Cole said the neighbor's property was set back and he thought there would be a minimal impact to the views. He said the structure would be the same height as the house.

Mr. Rheume said he was struggling with some aspects of the application without full elevations. He said some of the setbacks were exactly as required by the Zoning Ordinance, but he would be more comfortable if the applicants had more information on property lines. He recommended the applicants withdraw their application and come back with more information.

Mr. LeMay concurred that he would like to see elevations, and some assessment of the neighbor's concerns. He said there was an option to have an addition to the back of the lot that could solve the problem, though it would still require a variance. Ms. Cole said they were trying to comply with the setbacks. Mr. LeMay said it would be a trade off. Mr. Rheume agreed with working with the abutters.

Vice-Chair Parrott agreed that they did not have enough dimensional information to make a sound judgment, and it could be resolved in a one-month postponement. Ms. Walker agreed they could postpone and come back with dimensional drawings or they could withdraw and come forward with a different proposal. Ms. Cole asked for clarification on what they were looking for and Vice-Chair Parrott said they should visit the Planning Department and talk to be clear.

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

**DECISION OF THE BOARD**

*Mr. LeMay made a motion to **postpone** the hearing to the March 18, 2014 meeting so that the applicants could provide more information on the dimensions of their proposal. Mr. Rheume seconded and the motion **passed** by unanimous voice vote.*

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Ms. Chamberlin recused herself from the final petition.

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6) Case # 2-5

Petitioner: Searay Realty LLC, owner and Public Service Company of New Hampshire, applicant

Property: 445 US Route One By-Pass

Assessor Plan 234, Lot 3

Zoning District: Office Research

Description: Construct electrical substation.

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

1. A Variance under Section 10.440, Use #15.12 to allow construction of an electrical station providing community-wide or regional service.
2. Variances from Section 10.531 to allow the following:
  - (a) A left side yard setback of 46' where 75' was required.
  - (b) A rear yard setback of 31' where 50' was required.

### **SPEAKING IN FAVOR OF THE PETITION**

Attorney Rob Ciandella and Patrick Crimmins from Tighe and Bond appeared before the Board along with officials and engineers from PSNH. Attorney Ciandella said the project would replace the obsolete technology installed at the substation in 1957 with a new electric substation. He said it was not a regional project, but a local city project to meet the electric demands of downtown development and hotels.

Attorney Ciandella said they obtained variance approvals in 2012 to install a new transformer, but then determined it would not meet the needs. He said the path of least resistance would have been to utilize the variances on the land they had, but found it could not meet the needs so they contracted to acquire land on adjacent parcels. He said they were seeking a use variance and a dimensional variance. He said PSNH was encouraged by the Planning Department to build on the property on the other side of the Route 1 By-Pass, which was in the Office/Research zone. He said this use was permitted by Special Exception. He said they were also requesting a dimensional variance for a side setback, though the adjacent land on the south side with the existing substation was owned by PSNH. He said a lot line adjustment would cure all of the nonconforming aspects of the property except for the side yard setback.

Mr. Patrick Crimmins of Tighe and Bond showed an aerial of the area to orient everyone to the proposed parcel for the proposed substation. He showed the lot line adjustment of the two lots to the rear, and the existing right of way for the transmission lines that they were proposing to remove.

He said there was a commercial building and a garage that sat in the middle of the lot, which was surrounded on three sides by paved parking to support the commercial use. He said it was all wetlands to rear. He said it was a non-conforming lot with only 2 plus acres where it was supposed to be three acres, a lot depth of 125' where it was supposed to be 300', a 9' setback at the rear yard where 150' was required and a 12' setback to the side where 75' was required. Mr. Crimmins

showed how the lot line adjustment would bring the lot to a more nearly conforming lot with the exception of the setback for which they were seeking a variance.

Mr. Crimmins then went on to describe the site plan improvements that involved replacing the existing substation with a mobile substation and reducing impervious surface and storm water runoff by removing 90% from the building and pavement. He said some of the site was located in the wetland buffer so they would need a Conditional Use Permit from the Planning Board. He said they were also proposing some buffer enhancement planting with a natural conservation mix and they were proposing a 6-8' high berm of arborvitae trees and a retaining wall to screen the substation view from abutters and travelers on the Route 1 By-Pass and to make it aesthetically pleasing. He said there would be a view through the curb cut coming in on the northern side, but it was an improvement and there would be new poles. He said there would be no traffic associated with the site except for maintenance.

Mr. Rheume asked for clarification on the changes to property. Mr. Crimmins said the existing substation would be removed and there would be a mobile substation area that would be on a gravel pad surrounded by fencing. He said it would be empty and only there for a twelve-year maintenance period in case of emergencies. Mr. Rheume asked if the expansion would decommission any other substations. Mr. Brian Dickey, PSNH Engineering Field Manager said the Islington Street station would be decommissioned.

Vice-Chair Parrott asked what the type and height of the new structures would be and Mr. Kevin Duhaime, PSNH Substation Engineer said the substation base structure would be approximately 67' feet high, the conductors would be 40' high with an additional 15' for lighting. Vice-Chair Parrott said the maximum allowed was 60' in the district, but appurtenances could go an additional 10' so he guessed it could be called an appurtenance. He asked what the height of the current substation was and Mr. Duhaime said the highest pole was approximately 45', and the transformer was approximately 15' and the replacement would be 19' high.

Attorney Ciandella said granting the use request would not result in a diminution of surrounding properties. He explained that they would screen the project and the closest structure was a four-lane highway with no adjacent residential uses. He stated that it would not be contrary to the public interest and granting the variances would be in the spirit of the Ordinance as the changes were essential for local service. There would be no conflict with the objectives of the Zoning Ordinances because the property sat at the outer edge of the OR zone, separated by significant wetlands and across from the industrial zone.

Attorney Ciandella said there would be no threat to the public safety, health, or welfare and the new substation. He said it would decrease traffic demand, reduce the demand on municipal services from the existing use, and would reduce the dimensional non-conformities and reduce wetlands impact by decreasing impervious surfaces by 90%. He said substantial justice would be served by providing Portsmouth with the kind of electrical infrastructure needed for the added demands. He said they worked constructively with the City and exhausted every alternative and to deny the request would result in unnecessary hardship. He said there was no fair and substantial relationship between prohibiting an electric substation in the zone as long as it provided community wide or regional service so the application was reasonable. He said most of property was within the wetlands buffer that created a special condition that distinguished it from other

properties. He said the special conditions created a hardship because the property could not be used in strict conformance with the Ordinance.

Attorney Ciandella said all criteria applied to the dimensional variance. He said there would be no diminution of surrounding properties because PSNH owned the side yard that was used for ingress and egress. He said substantial justice would be served and literal enforcement would result in a hardship. He said a vast majority of the property was in a wetlands buffer that created a special condition. He said the existing substation would be removed and granting the variance would improve the effects on the wetlands buffer.

Mr. Rheume asked for clarification on the dimensions of the variance for the rear yard setback. Ms. Walker said the Planning Department tended to err on the side of caution in terms of legal notice. She said they discussed the dimensions with the applicant and chose to list the lot line adjustment, and Planning Board approval could be listed as a condition.

Mr. Mulligan asked for clarification that the condition for the lot line adjustment was on proposed “Plan of Lot Line Adjustment.” Attorney Ciandella said that was correct and it would transform the .82-acre lot into a 5.83-acre lot.

### **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. Mulligan made a motion to **grant** the petition as presented and advertised with the stipulation that approval was contingent upon the Planning Board approving a lot line adjustment. Mr. Rheume seconded.*

Mr. Mulligan reviewed the criteria, noting that granting the variance would not be contrary to the public interest and the spirit of the Ordinance would be served by attempts to improve the infrastructure while decreasing impervious structures, and protecting wetlands. He said granting the variance would not alter the character of the neighborhood nor threaten the health, safety or welfare of the general public because there was already an existing substation in the immediate neighborhood. He said substantial justice would be done because a loss to the applicant would not be outweighed by any benefit to the public.

Mr. Mulligan said the values of surrounding properties would not be diminished because PSNH already owned the adjacent property, there was already a substation, and they provided a report showing there would be no diminution. He said literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship, as the applicant stated, because the property contained significant wetlands adjacent to the existing transmission structure. He said those were special conditions that distinguished it from other properties in the area.

Mr. Mulligan said there was no fair and substantial relationship between the general public purposes of the Ordinance and the application of those provisions to the property; and the proposed use was a reasonable one. He said this was the right site for the project even though it

was not a permitted use for the zone, and they were moving from greater to lesser non-conformity.

Mr. Rheume said the use was an important one. He said the lot was unusual, an island at the edge of the Office Research District near an industrial zone so it was just a highway away from being in an appropriate zone. He said it was unique and the spirit of the Ordinance was being observed considering this parcel would more appropriate in the Industrial District if it was simply across the street.

Mr. Rheume said the applicant touched on the difference between a local substation versus a general area substation. He said this was what they were thinking in regard to the intent of the Ordinance. He said they never had a power grid and they had to bring one in and a substation for it so in this particular case the Zoning Ordinance didn't apply. He said the property lying at the very edge of the zoning district created a hardship from those special conditions and that the applicant was requesting a reasonable use.

*The motion to grant the petition with the stipulation **passed** by a vote of 6-0.*

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## **V. OTHER BUSINESS**

Proposed Revisions to Board of Adjustment Application Form and Rules and Regulations.

Ms. Walker offered Board members new zoning maps.

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## **VI. ADJOURNMENT**

*It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 9:29 p.m.*

Respectfully submitted,

Jane K. Kendall  
Acting Secretary