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 16, 2014**

MEMBERS PRESENT: Chairman David Witham**;** Vice-Chairman Arthur Parrott; Susan Chamberlin; Derek Durbin; Charles LeMay; Christopher Mulligan; Jeremiah Johnson

MEMBERS EXCUSED: David Rheaume, Alternate Patrick Moretti

ALSO PRESENT: Juliet Walker, Planning Department

I. APPROVAL OF MINUTES

A) July 22, 2014

It was moved, seconded and ***passed*** *by unanimous voice vote to approve the Minutes.*

II. PUBLIC HEARINGS - OLD BUSINESS

1) Case # 8-6 (Amended)
Petitioner: Thea Murphy
Property: 67 Mark Street
Assessor Plan 116, Lot 51
Zoning District: Mixed Residential Office
Description: Replace front porch and bulkhead with covered portico and storage locker.
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, reconstructed, enlarged or structurally altered without conforming to the requirements of the Ordinance.
2. Variances from Section 10.521 to allow the following:
   a) A front yard setback of 2'± where 5' is required;
   b) A left side yard setback of 0.44'± where 10' is required; and
   c) Building coverage of 42.2%± where 40% is the maximum allowed.
3. A Variance from Section 10.1113.11 to allow required off-street parking to be located on another lot.

This petition was postponed from the August 19, 2014 meeting and

amended by the addition of Request #3.

SPEAKING IN FAVOR OF THE PETITION

The residential designer Mr. Brendon McNamara appeared before the Board on behalf of the applicant. He stated that the proposed change to the entry was a bureaucratic issue that had already been approved as a variance. The condos at 46 Mark Street had been sold, so it just required approval to acknowledge that it had been approved but the ownership had changed. A non-conformity already existed. Mr. McNamara spoke about the site plan that showed the reshuffling of the lot coverage and noted that the resulting change and setback could be seen. He went through the criteria, stating that granting the variance would enhance the use of existing, and the spirit of the Ordinance would be observed. There was no change to the existing non-conformance. As to enforcement, the current owners were working with an existing non-conformance and respecting the historic nature of the building. A parking easement at 46 Mark Street for use at 67 Mark Street would alleviate an impossible parking situation.

Vice-Chair Parrott asked what the status of the easement for parking was. Mr. McNamara replied that it was an existing legal definition. Vice-Chair Parrott asked if the new easement was with the new owners. Ms. Walker stated that the easement went with the property and was not based on ownership. Vice-Chair Parrott asked if the material provided to the Board was for a proposed parking easement, and Mr. McNamara agreed stated that the easement currently existed.

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. Walker noted that the staff report did not include the parking variance, but it had been advertised and posted. Mr. Mulligan asked whether there was a condition of approval tying the grant of the parking easement to common ownership when it was approved two years before. Ms. Walker stated that the letter of decision had no condition related to the parking spaces which met all the standards. Mr. Mulligan noted that at the time, the two legal existing lots of record happened to be next to one another.

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

Mr. Mulligan said that, with respect to the physical changes to the structure, they were very modest and reshuffled the existing lot conformity, so they would require a variance and would not change the character of the neighborhood or be contrary to the public interest or the spirit of the Ordinance. Physical changes to the front of the house would result in substantial justice because the loss was not counterbalanced by any gain to the public. There was no evidence of values to surrounding properties being diminished because the structure would be improved. As to unnecessary hardship, the literal enforcement of the Ordinance would result in hardship. There were several existing nonconformities with the property which was on a dead-end street leading onto an alley so that changes dealing with access to the dwelling would likely encroach. There

was, therefore, there was no fair and substantial relationship between the general public purposes of the Ordinance and their application to the property. Relating to parking, there were two adjacent lots of record, and the original exception was granted two years before. All that had changed was that the ownership of the two lots was no longer unified, and there was no condition placed two years before that they remain in common ownership. The goal was to provide enough parking for the units, and a creative solution was applied. The variance for the parking requirements was outlined in the staff report and he felt that the application should be granted approval.

Mr. Durbin stated that he would incorporate Mr. Mulligan's comments as his own and move forward.

*The motion **passed** by a vote of 7 to 0.*

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2) Case # 7-1
Petitioner: Kyle Crossen-Langelier
Property: 304 Leslie Drive
Assessor Plan 209, Lot 47
Zoning District: Single Residence B
Description: Construct an 11' x 21' free-standing carport.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. Variances from Section 10.521 to allow a front yard setback of 18'11" ± where 30' is required and a left side yard setback of 7'± where 10' is required.
This petition was granted a rehearing at the August 19, 2014 meeting.

Chairman Witham noted that the original petition had failed to pass, and therefore was denied. A rehearing had been granted as no findings had been made regarding the reasons why the request failed to meet the criteria. The Board was to hear the petition as if this was the first time it was before them.

Ms. Kyle Crossen-Langelier stated that she wanted to install a carport and needed a variance for 7'. She noted that area properties between 2000 and 2013 had been granted variances. The reason for metal steel construction was due to site drainage problems. A bathroom was added in 2008 for her handicapped mother but there was no apartment in the basement. The property never had a carport or garage. She stated that granting the variance would not diminish the value of surrounding properties because the carport would be 60' from the other property. Two fences and overgrown landscaping shielded the area, and along with the garage and shed, there was no view of the property from Mr. Peirce's property at 296 Leslie Drive. The carport would abut a one-story addition that had no windows and would be tucked in 8'-9'. There was also a 5' fence where the neighbor parked his car. She said that the carport was a personal choice and was better than nothing, and her mother wanted the carport for safer winter access.

Ms. Crossen-Langelier felt that the available designs and quality of carports had evolved. The carport with a pitched roof would resemble a small one-car garage with three partially-enclosed walls. She cited examples of motor homes and boats that were stored in other driveways and were

accepted with no complaints. She had 36 signatures from people who had no objection to the carport. The owner also had no objections. She stated that Mr. Peirce was against the carport, but 296 Leslie Drive was in probate and the owner was not available. Mr. Peirce wanted to purchase the property, and he spoke against the carport, even though he was still a renter. She felt that just because the abutter did not like her was no reason to deny the variance.

Ms. Lynn Libby, the designer contractor from Projects Unlimited, addressed the variance points and the unique drainage system. She reviewed the criteria and stated that granting the variance would not be contrary to public interest because there were 43 improved lots on Leslie Drive, 20 with garages and 6 with carports. It would not alter the essential characteristics of the neighborhood and would not violate the purpose of the Ordinance or the surrounding properties. It also would not be contrary to the spirit of the Ordinance because the carport would not overcrowd the lot. It was over the minimum 25,000 s.f. and the open space was 89%, where 40% was required. There would be no loss of light or air to abutting properties. It would not increase fire danger or pose danger to the safety or general welfare of neighbors. It would result in unnecessary hardship if not granted because the lot was the largest in the area and was shaped like a funnel. The house was toward the front and did not allow sufficient room for a carport except for the front.

As for the drainage problem, it was an extensive system that controlled on-site drainage and City storm water overflow. Two basins were located in front of the property, and the overflow would follow a natural path to Mr. Peirce's property and the drain. Extensive piping was involved, and the driveway was part of the drainage system. The wet site environment required a galvanized steel construction for the carport, and the carport had to be located on the driveway. She talked about the installation requirements, access to the front and side walkways and access to the shed, location of the pipe and the drywall system and retaining 2-3 parking spaces, which all contributed to finding the best area with the least impact. Metal was the best option due to longevity, mold resistance, and lower maintenance. She felt that it would add to the home's value because metal was becoming commonplace. The unique characteristics of the lot and existing driveway were special conditions of the property so it could not be in strict compliance to the Ordinance, making variances necessary.

Mr. LeMay asked whether the cited variances were for garages or carports and was told that one was for a garage at 6'6", and the side setback was 6'6". Chairman Witham asked if there were other freestanding carports in the neighborhood or others made of metal and was told no on both counts. He noted that the blank wall with one door that was located in the front of the house looked like it could have been a garage at one point. Ms. Libby stated that it hadn't been.

Mr. LeMay asked if the carport would line up with the shed area, and Ms. Libby replied that it would. She said the property was slightly askew and the house was not parallel to the property lines. It had been tweaked to make it look parallel to the front of the driveway.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Peirce stated that he was the son-in-law of the neighbor Mr. Peirce and lived at 52 Rogers Street in Kittery. He said that he had submitted an email letter, and he had a photo of the carport placement that showed it was not much of a carport. He felt that if the Board approved the petition, they would approve not a 12' tarp but rather a 21' long carport set 10' from the house.

The City would incur a big expense for the drainage problems, which he said only the applicant had complained about and no one else. The City would have to expand pipes and tear up the street to make larger pipes for storm water drainage. Placing the carport next to the house would interfere with the underground drainage system. He thought the carport should be moved back against the house because a 21' carport was not necessary and would look odd because it would be the only L-shaped carport in the neighborhood. He also noted that if the carport were pushed up against the house, a 7' setback to the side yard would not be needed. There were second-floor windows from his father-in-law's house that would overlook the carport, so it would be seen. He suggested that either a better quality of carport be used or that it be pushed back toward the building.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Ms. Libby stated that the tarp would be cut down to the size of the carport, 11' x 21'. The placement in the driveway was due in part to the drainage system. It would be a worse setback if pushed back because the building was not parallel to the property lines. She noted that when the addition was done in 2008, it had gone through the wetlands issue and was approved. She emphasized that the abutter's wall was blank, a one-story with no windows. The two-story addition was on the other side, so he would have to lean out the window to see the carport. The carport size was based on what was required for a parking space, which was 9-1/2' x 21', so the carport was 11' x 21'.

Ms. Crossen-Langelier spoke again and said she had explained the situation to the neighbors and had received 36 signatures in support, which she thought was important.

Mr. Peirce stated that the photos showed the truth. It was a 21' tarp, and the concrete post was put in recently. It was very close to the street. Ms. Libby stated that the concrete post was a tube due to sewer clean-up and was placed in that location to protect the pavement. She said it would be cut down and a cover would be placed over it.

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

DECISION OF THE BOARD

Ms. Chamberlin made a motion to ***grant*** *the petition as presented and advertised. Vice-Chair Parrott seconded it.*

Ms. Chamberlin stated that it was a reasonable proposal and typical to add to the home for convenience. It was placed to accommodate the drainage system, and the relief was modest. The front setback did not seem unusual for the neighborhood. She reviewed the criteria and said it would not be contrary to the public interest because the neighbors had no problem with it. It would observe the spirit of the Ordinance due to the placement rationale. Substantial justice would be done because it was a typical item that people used to protect their cars from snow and was not unsightly. The house was an odd shape, making setbacks more difficult. The applicant had kept the property up and made improvements, so the whole area was better off. There was no substantial relationship that would exist between the general public purposes of the Ordinance and their application to the property, which was to keep the neighborhood functional and attractive.

Vice-Chair Parrott said it was a very unusual request and not typical of the neighborhood, but the explanation was sufficient. The neighborhood had a variety of structures including several attached carports, but what the applicant was asking for was entirely different. If it were fabric, he would not support it, but because it was an unusual situation for a lot of reasons, it could be an exception.

Mr. Lemay stated that he would not support the motion. He appreciated the effort that had gone into the property but it was not a garage, and it seemed like an afterthought. Even a permanent garage attached to the house would have less impact. Although a number of properties encroached on the 30' setback, the houses were consistent and lined up. He thought it would affect the neighborhood.

Chairman Witham said he had no problem with the setback relief in itself, but he did regarding what would be placed in that setback. It would be the only freestanding metal carport in the neighborhood. The Board could not permit the essential character of the neighborhood to be changed. If there were 20 freestanding carports, it would give a very different feel to the neighborhood. He was not comfortable with the idea of a freestanding metal structure out front within the setbacks and felt that it did not meet the variance requirements. He disagreed that it would be an attractive addition.

Mr. Johnson stated that he also did not support the project. He sympathized with the unique lot shape, but the surrounding lots had similar shapes or sizes. There was a pattern in the neighborhood and most of the houses had garages or carports that fit into the same area as opposed to being out in the front.

Mr. Durbin felt that it did not meet the variance criteria and echoed previous comments. It could change the essential character of the neighborhood. The zoning map showed the houses all in a line, and it would bring an encroachment into the front setback and the side yard. While there were some unique conditions in the property, he felt that there was a fair and substantial relationship between the purposes of the Ordinance and their application to the applicant's property. The carport brought it out of that context.

*The motion to grant the petition **failed** by a vote of 3 to 4. (Messrs Durbin, LeMay, Johnson, and Witham opposed).*

III. PUBLIC HEARINGS – NEW BUSINESS

1) Case # 9-1
Petitioner: Paul T. Marino
Property: 287 Marcy Street
Assessor Plan 103, Lot 46
Zoning District: General Residence B
Description: Rear porch stairs.
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 to be added to or enlarged without conforming to the requirements of the Ordinance.
2. A Variance from Section 10.516.40 to allow a rear yard setback of 11.8'± where 12.5' is required.
3. A Variance from Section 10.521 to allow 48.5%± building coverage where 30% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

The owner, Mr. Paul Marino, stated that he bought the home in 2007, at which time the steps were very close to a neighbor's fence. It was almost impossible to get onto the steps. The requested change had already been completed. He had picked up the steps and slid them over to the side of the porch, decreasing their width. Chairman Witham acknowledged that Mr. Marino was requesting after-the-fact approval.

Mr. Marino said he decreased the width and square footage by 3' from the original 29 s.f., making the steps smaller and nicer. Vice-Chair Parrott asked him to explain the deeded common right-of-way. Mr. Marino said that he had the benefit and his neighbor had the burden for access to Marcy Street and the rear of the property. Vice-Chair Parrott asked where the right-of-way lay with respect to the tenants and whether the fence was still there. Mr. Marino replied that the fence was gone. The steps were in the right-of-way, which was why he moved them. Vice-Chair Parrott asked if the fence was built within the right-of-way and was told yes, so he assumed that Mr. Marino was in greater conformity with the steps. Mr. Marino agreed.

Mr. Mulligan asked if there was a previous landing from the porch to the steps, and Mr. Marino told him there wasn't. The sixth step was the landing that he added on.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Christopher Muro of 296 Marcy Street stated that he was a direct abutter and shared 53' of the property line. He used to own the fence, and now it was gone. They shared the right-of-way for foot access, not vehicle access. For his benefit and Mr. Marino's, the easement was recorded on his deed. He mentioned that he had submitted a formal objection earlier in the week and read it into the record. He stated that he was negatively affected by the after-the-fact request for a zoning variance, so he asked that it be denied. The applicant did not intend to live there because the property was for sale. It was already a non-conforming property on all sides except for the back lot setback. Allowing the variance would make the property more non-conforming. He believed that it was contrary to the public interest and said that he took his packet to every abutter, and they supported his objection. The public interest was to maintain open space, so the spirit of the Ordinance would be violated by what he saw as overcrowding. The homes were in close proximity and he was concerned about the risk to safety, outdoor space, views, and value to properties. It was against preserving land, light, air and quality of life.

Mr. Muro stated that improving property for a greater return on a sale was not grounds for hardship, adding that the new lot coverage and stair width would not be in conformance. He continued, showing photographs of areas he considered were nonconforming and provided his opinion on past behavior. When Chairman Witham stated that his comments should be directed to

the relief requested, Mr. Muro concluded that he felt a precedent would be set if this were approved.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Marino stated that when he bought the house, the stairs were coming off the porch and were 8" from the fence, so the fence was at the bottom of the step. The new porch also had no birch logs. Mr. Mulligan noted that Mr. Muro had indicated that the changes still encroached on the right-of-way. Mr. Marino replied that was not true. Mr. Mulligan asked if Mr. Marino had created steps and access to the basement, and Mr. Marino stated that he had done so.

Vice-Chair Parrott asked how wide the right-of-way was and was told that it was the width of the house. It used to go all the way to the fence but was shortened. Vice-Chair Parrott asked if the right-of-way was foundation-to-foundation, and Mr. Marino stated that it was. He said the bottom of the old steps was in the right-of-way, which was why he moved them. Vice-Chair Parrott asked where the right-of-way ended relative to the new stairs. Mr. Marino replied that one would have to walk 5' to be in it. Vice-Chair Parrott asked where it stopped, front to back. Mr. Marino did not know the measurements. Chairman Witham asked if the easement would go to the furthest back point, and Mr. Marino said it would not.

Mr. Muro spoke again and said that the easement ended at the back of both homes. The stairs attached to a structure on his property that was on an easement were being litigated. He thought the variance might be a moot point.

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

DECISION OF THE BOARD

Chairman Witham stated that it looked benign on the surface, but once the abutter's testimony was heard, it was apparent that it was a messy situation and involved bad blood between the owner and the abutter. He did not like after-the-fact requests, and the project had been built without permits and variances, but the Board had to regard it as if it had not been built. The arguments against the petition were so strongly opposed to light and air and had so many issues that he could not grab hold of any of them. What should have been presented and what had been done made a lot of sense because the stairs were out of the easement. He didn't feel it adversely affected the neighbors. There were no birch logs as had been mentioned and it was tastefully done. If he were to see it as a proposal with existing conditions, he would fully support it. It was more conforming in regard to side setbacks, where the biggest violation was. It was a minimal increase in lot coverage over the previous existing. He felt that it was unfortunate that the owner and abutter were in litigation, but the proposal was well thought-out and well placed, so he could support it.

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

Mr. LeMay agreed that it was a net improvement and felt that the opposition had not spoken much to the setback. Granting the variance would not be contrary to the public interest as the character of the neighborhood would not be changed. This was a small change with no substantial impact to the lot which would be more conforming as to the side yard setback. Substantial justice would be

done because it would allow a more practical design in the backyard where the space had been reduced. The value of surrounding properties would not be diminished and there would be no effect on light and air so that the spirit of the Ordinance would be observed. Mr. LeMay stated that it would be an unnecessary hardship if the request were not granted because forcing the owner to keep the stairs going down in the right-of-way would be a safety hazard.

Mr. Mulligan concurred with Mr. LeMay and added that one of the variances sought was for a rear yard setback of 11.8' while 12.5' was required, a minimal encroachment into the rear yard setback. The applicant was the one losing the use of property in his own rear yard, so the loss to the applicant outweighed the gain to the general public if the petition was denied. He would lose significant egress to the rear of the property. A special condition of the property that distinguished it from others was that it was a very small lot, and the right-of-way was a burden to all. Setbacks and lot coverage were always problematic in the south end. He felt that this was a reasonable change.

Chairman Witham agreed with Mr. Mulligan and stated that the Board was granting relief from the rear yard setback for a set of stairs. The Board promoted projects for greater conformity of properties. It was consistent with the neighborhood, and there was no net change in building coverage. It pulled lot coverage off an easement.

*The motion to grant **passed** by a vote of 7 to 0.*

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2) Case # 9-2
Petitioners: Theodore M. Stiles and Joan H. Boyd
Property: 425 Pleasant Street
Assessor Plan 102, Lot 70
Zoning District: General Residence B
Description: Add a right side dormer within existing 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 building to be added to or enlarged without conforming to the requirements of the Ordinance.
2. A Variance from Section 10.521 to allow a right side yard setback of 3'± where 10' is the minimum required.

SPEAKING IN FAVOR OF THE PETITION

The architect Ms. Anne Whitney showed the Board a letter of support from the immediate abutter and stated that a dormer was proposed on the right side of the existing residence, which was very narrow and tight on both sides but especially the right side. The setback was 1.75' and went to 2.6' at the street side. The building was a timber frame, so the dormer would go in on the right side 3' from the right property line and set back almost 8' from the street. They would not put it on the other side because the stairway in the attic was tied into the narrow house stairway. The existing stair would be reconfigured to make it more comfortable. Having the dormer on that side would allow more headroom. It would not be contrary to the public interest because there were a lot of added dormers in the south end, and pulling it back 8' from the front property line mitigated

it. It would be consistent with the spirit of the Ordinance because it would not add to the existing footprint. Substantial justice would be done because the house was under 1300 s.f. of living space, and the dormer would add 400 s.f. of finished space and make a big difference in the use of the house by adding more living space on that level. It wasn't a large expansion. Property values would not be diminished because the property would be renovated. There would be new windows, detail on the exterior, and lots of similar additions around, so it would not affect property values.

Mr. Johnson asked whether the ridge height of the abutter's property looked the same. Ms. Whitney said it had a lower pitch roof but was a wider structure, so they were close, except that the pitch could be lower on the front elevation. Chairman Witham thought it lined up with the eave of the dormer.

Ms. Chamberlin asked whether the chimney would be removed. Ms. Whitney said the chimney was in poor condition and she had proposed at her HDC session that it be relocated up to the ridge and done as a thin brick chimney.

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

Vice-Chair Parrott made a motion to ***grant*** *the petition as presented and advertised. Ms. Chamberlin seconded the motion.*

Vice-Chair Parrott said that the dormer was straightforward. The house was situated at the narrow end toward the street, which would make the dormer less noticeable. He didn't think that it would interfere with the side neighbors. It was not contrary to the public interest, and it would observe the spirit of the Ordinance. It was hard to see that there was any public interest involved because it was out of direct view from the street. It would make the house more usable. The additional space would be welcome. It would do substantial justice and tip the balance to the owner because there was no public interest that would argue against it. It would not diminish the value of surrounding properties because it was a tasteful design that respected the size of the house and the neighborhood in general. It met the unnecessary hardship test because of the special condition of the house being small, and the desire to make more use of the roof and the second-floor area would not adversely affect others.

Ms. Chamberlin said she had nothing to add.

The vote ***passed*** *by a vote of 7-0.*

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3) Case # 9-3
Petitioners: Brian Short LLC, owner and Michael Wallace, applicant
Property: 2225 Lafayette Road

Assessor Plan 272, Lot 2
Zoning District: Gateway
Description: Automotive muffler repair and replacement.
Requests: The Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Special Exception under Section 10.440, Use #11.20 to allow motor vehicle repair in a district where the use is allowed by Special Exception.

SPEAKING IN FAVOR OF THE PETITION

The applicant, Mr. Michael Wallace of 12 Pages Court in Billerica, stated that the parking was all off the street and there was no traffic congestion, pollution, excessive noise, toxins, or chemicals.

In response to questions from Vice-Chair Parrott and Ms. Chamberlin, Mr. Wallace stated that he was moving the business from the old fire station to this proposed location near Water Country with no change in the nature of his operations.

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 the motion to **grant** the special exception as presented and advertised. Vice-Chair Parrott seconded.*

Mr. Durbin said that there was no potential release of toxic materials and no fluids stored on property, so the first two standards were met. The proposed use posed no detriment to surrounding properties and was an appropriate use in this commercialized area. This would be a relatively low impact use which would not create any traffic safety hazards and place demands on the water and sewer systems. With no physical changes to the lot itself, there would be no significant increase in storm water runoff.

Vice-Chair Parrott stated that it was a logical use for this unusual building, placed toward the back with woods behind. The previous operation was a tire service and sales business, so it would continue the successful automotive use and would fit in.

*The motion **passed** by a vote of 7-0.*

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4) Case # 9-4
Petitioner: Andrew J. Lane
Property: 245 Thaxter Road
Assessor Plan 167, Lot 3
Zoning District: Single Residence B
Description: Construct new roof over front entry.
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 added to or enlarged without conforming to the requirements of the Ordinance.
2. A Variance from Section 10.521 to allow an 18'± front yard setback where 30' is required.

SPEAKING IN FAVOR OF THE PETITION

The contractor Mr. Dominic Grugnale stated that his client wanted to enhance the outside of his property. The porch overhang would be set back towards the house. The submitted photographs showed the stone wall in relation to the street, and the columns of the porch would be closer to the house, at 4' instead of 5' on the wall. He stated that the change would make the property much more appealing.

Mr. Mulligan asked what the front yard setback was. Mr. Grugnale said it was around 21' to the pavement. The setback was 25' but was nonconforming when it was built. Mr. Mulligan asked how much further out it would extend from the front of the house. Mr. Grugnale replied that it was currently 21' from the front to the street, so it would come out 4' closer to the road.

Attorney Bernard Pelech of 175 Thaxter Road stated that he was an abutter and had lived there for 42 years. The house had been nonconforming from the beginning and had special conditions. The topography was a steep hill. The two houses had underground garages due to the grade change, which was a special condition. He had seen the property transform over 42 years and thought the change would improve it more.

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. Vice-Chair Parrott seconded the motion.*

Mr. Mulligan stated that the proposal would not be contrary to the public interest or to the spirit of the Ordinance. A modest cosmetic change to an existing modest structure would not alter the character of the neighborhood nor affect the public health, safety and welfare. Granting the variances would result in substantial justice because the loss to applicant if the petition were denied would not be outweighed by any benefit to the public. Encroachment into the front setback exacerbated existing non-conformities but there would be no encroachment on Thaxter Road, so it would not affect abutters. It would not diminish the value of surrounding properties and would make the area more attractive. The lot was already non-conforming, so it would result in unnecessary hardship if not approved. The uphill portion of the lot forced the structure very close to the road, so there was no fair and substantial relationship between the general public purposes of the Ordinance and their application to the property. He stated that this was a textbook example of unnecessary hardship.

Vice-Chair Parrott concurred with Mr. Mulligan's comments and thought it was a nice upgrade to the property with no detrimental effects on anyone.

*The motion **passed** by a vote of 7-0.*

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5) Case # 9-5
Petitioners: Blake A. and Christina M. Dubin
Property: 336 Miller Avenue
Assessor Plan 131, Lot 27
Zoning District: General Residence A
Description: Construct 30' x 20'6" attached garage, with second floor office, bathroom and exterior stairway.
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 an 8'6"± right side yard setback where 10' is required

SPEAKING IN FAVOR OF THE PETITION

Mr. Arthur Young, representing the applicants, told the Board that the addition would not conflict with the Ordinance because the footprint was 200 s.f. and only encroached in a 7.5 s.f. area due to the angle of the house. The addition would be in the back of the house and would not block views. The area with the 10' addition was presently driveway parking. It would not affect access because the addition would be in the existing driveway area. There would be no diminishing of property values of the abutting property because the owners' cars would be inside instead of in front of the garage. The property was burdened by the zoning restriction. The 10' setback was required in the general area. The angle of the house and garage would force the new addition onto the setback only by 1.5' and would not alter the character of the neighborhood. The owner wanted to put an office above the garage, so they would use the foundation wall on the outside of the garage and add a second floor.

Mr. Mulligan noted that the addition would be extended along the same planes and the same depth of the existing garage. Chairman Witham stated that the second floor did not look like a shed dormer to him. Mr. Young said it looked like a dormer but was a regular gable type end. It was just a trim board and there was definitely a full second floor. In response to a further question, he stated that part of the existing foundation would be re-used. Ms Chamberlin said that the photo showed the garage, the car, and the grassy area and asked whether they were part of the applicant's lot or the neighbor's lot. Mr. Young said it was the neighbor's back yard.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Chairman Witham noted that the setback relief was minimal but the structure encroaching on it was rather large.

Mr. Mulligan stated that the request before them was for setback relief, which he felt was relatively modest. The applicant did not need lot coverage or height relief. He said he had the same reaction as Chairman Witham when he saw the elevations, but after reviewing what was allowed and done, he felt the applicant had to slide the structure 1-1/2'. Chairman Witham wished the design was more sensitive scale-wise as opposed to maximizing it, but agreed that was not what was before the Board. Ms. Chamberlin shared those concerns but felt that it was a small amount of relief requested; no one objected to the size; and it wouldn't affect the neighbor's property. Chairman Witham said that if the Board denied it, it would force the applicant to put in a jog. The request was minimal, but the design was massive.

*Mr. Mulligan made a motion to **grant** the petition as presented and advertised. Vice-Chair Parrott seconded the motion.*

Mr. Mulligan said the subject of the variance was not the mass and scale of the proposed addition, so they were not appropriate concerns to deny the variance. The variance would not be contrary to the public interest or to the spirit of the Ordinance because the applicant was proposing something that met all dimensional requirements of the Zoning Ordinance and it only required modest setback relief, even though it was a fairly massive proposal. The essential character of the neighborhood would not be affected, nor would the health, safety and welfare of the public. No one had opposed it. It would result in substantial justice. The loss if the Board required the applicant to reconfigure the proposal and slide it back a few feet would not be counterbalanced by any gain to the general public. The side yard for which relief was requested abutted a public way and not neighboring properties so that surrounding property values would not be diminished. The literal enforcement of the Ordinance would result in hardship due to special conditions of the property. This was a corner lot with an existing house constructed at an angle making it difficult to site the addition. Due to these special conditions there was no fair and substantial relationship between the purposes of the Ordinance and their specific application to the property. By extending the lines of existing additions, the applicant had chosen the most reasonable location for the proposed structure.

Vice-Chair Parrott stated he concurred with Mr. Mulligan and had nothing to add.

*The motion **passed** by a vote of 7-0.*

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6) Case # 9-6
Petitioners: Lisa L. and Brett Comack
Property: 2 Sylvester Street
Assessor Plan 232, Lot 35
Zoning District: Single Residence B
Description: Appeal
Requests: Appeal the action of the City Council in resolving that they did not have jurisdiction over the request of the property owners to restore involuntarily merged lots pursuant to RSA 674:39aa.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard Pelech, on behalf of the applicants, presented and said it was an interesting case because it was an appeal from a vote that the City Council took in August. He felt that it was a strange motion and a strange vote. It began in early July with his submitting a request to the City Council to restore lots which he stated were involuntarily merged by the City, depicted in the Prospect Park subdivision plan. All the lots were 40' x 80' lots, and there were over 300 lots. Through the years, the predecessor acquired Lots 231, 232, 233, 234, and 235, so what the City considered one lot was once five lots. He stated that, before April 2000, the tax map showed that Lots 231, 232 and 233 had been merged by the City into Lot 35. He stated that there was no evidence of a voluntary merger. The lots were just consolidated by the City for tax purposes. In 2005, Mr. Spinney, who owned the lots, merged Lots 34 and 35 on the April 2000 tax map, so one big lot resulted, 198' from Middle Road down Sylvester. They wanted to take the unmerged Lot 231 and separate it, for which they submitted an application to the City Council. Mr. Taintor wrote a memo to the City Council on August 14 and concluded that, due to the 2005 merger of Lots 34 and 35, the present owners were not able to seek to have Lot 231 on the 1903 plan unmerged. Mr. Taintor's position was that the City Council did not have jurisdiction. Attorney Pelech stated that he had gone to the City Council in August maintaining that the Statute stated the City Council had jurisdiction because it was the governing body. However, the City Council voted that they did not have jurisdiction, and that was why he was before the Board of Adjustment that evening. After reading portions of Mr. Taintor's memo, Attorney Pelech stated that someone had to have jurisdiction. The statute said that if an error had been made, the applicant had the right to come before the BOA and appeal.

Chairman Witham stated that the City said the City Council had jurisdiction on lots involuntarily merged, and they were looking at it as a voluntarily-merged lot. Attorney Pelech did not interpret it as voluntarily merged. Chairman Witham said that on the record and deed, it was one lot because five lots became one lot. Two voluntarily became one, so they were dealing with a lot that was voluntarily merged. Attorney Pelech said that the City Council stated that they had no jurisdiction. Chairman Witham thought the City Council interpreted it as being able to act only on involuntarily-merged lots. Attorney Pelech disagreed and said the City committed an error because the City Council was the only body that had the jurisdiction to rule on a request to restore involuntarily-merged lots, so the applicant had the right to a yes or no answer but received no answer at all.

Chairman Witham asked what the standard of review was. Was it *de novo* as an administrative appeal? Attorney Pelech felt it was under the appeal statute. Mr. Mulligan stated that he felt jurisdiction didn't make any real difference as whether or not they exercised jurisdiction, the appellants didn't like the decision. Vice-Chair Parrott felt that Attorney Pelech was raising what another body would or should have done, which was not relevant. Attorney Pelech maintained that the statute directed him to come before the BOA, which was their right and which had to be done before going to Superior Court.

Mr. LeMay asked if, before they entered phase two, they needed to make a decision as to whether there was an administrative error in terms of the jurisdiction and, if so, remand it and go no further or should the Board, determining that the issue would ultimately return to them, make the

decision. Chairman Witham stated that there were two distinct parts to the presentation and that Attorney Pelech should be allowed to finish his presentation.

Attorney Pelech stated that the second part related to whether there was a voluntary merger of Lot 231 as shown on the 1903 plan into another lot. He said there was not until the City merged it with the other two lots to create Lot 35 as shown on the tax map. The City created that lot by merging three of Mr. Spinney's lots that he acquired at different times through three separate deeds and those lots were merged prior to the year 2000 not, he maintained, voluntarily. He felt there was no question that the burden was on the City and not the applicant to determine that the lots were voluntarily merged. The City had not voted on the issue as the vote of the City Council was that they had no jurisdiction. He believed they had jurisdiction and that Lot 231 should be restored.

Chairman Witham wondered if the result of a court action would be that the section of the statutes that addressed involuntarily merged lots that later were voluntarily merged would be revised. He could understand the position where it came before the City Council with no name or address but just a lot number, "Lot 35", which was a voluntarily-merged lot. Attorney Pelech said that the lot in 1903 was involuntarily merged. Chairman Witham said the final lot in question was the voluntarily-merged one and it was complex.

Ms. Chamberlin asked if what the applicant wanted was to have Lot 231 as a separate lot and the other four lots stay as one lot, and Attorney Pelech agreed.

Mr. LeMay referred to the paragraph in the statute regarding someone with ownership in the chain of title voluntarily merging his or her lots, noting that he felt there was no point in merging lots that had already been merged. Therefore, he felt that at least one of the lots being merged would have to have resulted from a prior involuntary merger in order to be the subject of this statute. He believed the section was specifically there to put some finality to a voluntary action of the owner to construct his lots a certain way and prevent the owner from coming along years later and want to peel off a section. In response to a question from Chairman Witham, he stated that the Council did have jurisdiction and the request should be turned down because the involuntarily merged lots were merged with another later. That was exactly what this law said and that ended it.

Mr. Mulligan agreed, saying that it made no sense to say the City Council did not have jurisdiction because it was determined that the Statute came up negative. He felt the City had the burden of proof on these applications to show that a previous owner had voluntarily merged the lots and thought it was appropriate that it be sent back to the City Council because there was no record before the BOA that gave enough information to make the decision. Chairman Witham said that the City Council could hear cases of involuntarily-merged lots, but it was two lots that were voluntarily merged. They discussed Mr. Taintor's position. Mr. Durbin said the issue was the jurisdiction and didn't think their vote would mean that the Board had deliberated the merits. They would be faced with a motion for rehearing by the City Council, so it was appropriate that the jurisdiction was clear in the Statute. If they ruled on that issue, it would be remanded to the City Council. He suggested closing the discussion.

Vice-Chair Parrott said that, in terms of jurisdiction, the BOA was charged with variances, special exceptions, and administrative appeals of code. Mr. Mulligan read the Statute. Vice-Chair Parrott said the two sections of the law were not perfectly consistent.

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 Administrative Appeal which would resolve the jurisdiction, meaning that the City Council did have jurisdiction on whether the lots in question were voluntarily or involuntarily merged. Mr. Mulligan seconded the motion.*

Mr. Durbin asked if, in this instance, the City Council did not have jurisdiction, then who did? The Statute set forth clearly that the City Council did have jurisdiction to rule on the issue. They could not punt it because there was no one else to exercise that jurisdiction. He felt the City Council had not made a decision that made sense and, for that reason, he moved that the Administrative Appeal be granted, which would remand the matter back to the City Council to exercise the jurisdiction he felt it had.

Mr. Mulligan said that he had nothing to add.

Chairman Witham said he would support the motion to grant the appeal, thus remanding the petition back to the City Council. He agreed that the City Council did have jurisdiction and that they had erred by failing to rule.

*The motion **passed** by a vote of 7-0.*

IV. OTHER BUSINESS

Chairman Witham noted that Ms. Chamberlin's term would expire in December, causing a vacancy. Ms. Walker introduced Ms. Breault as the new taker of minutes.

V. ADJOURNMENT

*It was moved, seconded and **passed** by unanimous voice vote to adjourn the meeting at 10:00 p.m.*

Respectfully submitted,

Joann Breault
Acting Secretary

Draft for approval