

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

CONFERENCE ROOM A

7:00 p.m.

February 17, 2015

MEMBERS PRESENT: Chairman David Witham; Vice-Chairman Arthur Parrott; Charles LeMay, Christopher Mulligan, Jeremiah Johnson, David Rheume, Derek Durbin, and Patrick Moretti.

MEMBERS EXCUSED: None

ALSO PRESENT: Jessa Berna, Planning Department

I. APPROVAL OF MINUTES

A) January 21, 2015

B) February 3, 2015

*It was moved, seconded and **passed** by unanimous voice vote to approve both sets of Minutes with minor changes.*

II. PUBLIC HEARINGS – OLD BUSINESS

A) Case # 12-14

Petitioners: Robert & Eileen Mackin Revocable Trusts, Robert & Eileen Mackin, Trustees

Property: 56 Dennett Street

Assessor Plan: 140, Lot 13

Zoning District: General Residence A

Description: Allow a single family residence to be rented for short-term rentals 60 days annually.

Requests: An Administrative Appeal from the decision of a Code Official to issue a cease and desist order for rental of a single family home to vacationers for up to 60 days a year.

This petition was granted a rehearing at the January 21, 2015 meeting.

SPEAKING IN FAVOR OF THE PETITION

Attorney Kevin Baum representing the applicants and the applicants Robert and Eileen Mackin were present to speak to the petition. Attorney Baum stated that the appeal related to the short-term ‘VRBO’ and Homeaway rentals offered at their residence in the GRA District. He stated that the Mackins did not rent their home for less than seven days at a time, not more than 60 days per year, and not more than 32 days in aggregate during any single year.

Mr. Mulligan stated that the last time the petition was before the Board, the issue was the definition of an inn in the Ordinance, and he asked Attorney Baum to amplify his interpretation of it and why what his clients proposed did not meet that definition. Attorney Baum stated that the Board indicated it was not a good fit, and he explained how the Board’s determination was based on what the Supreme Court stated about transients, noting that the residence didn’t fit an inn because an inn typically had a caretaker, rented out individual rooms, and served food. Attorney Baum also cited the dictionary definition of an inn and said the main issue was the length of the tenancy. Mr. Mulligan replied that an inn was specifically defined in the Zoning Ordinance and the Board could not move over to the dictionary definition. Attorney Baum argued that the definition didn’t fit because the residence was a short-term residential use with limited week-long rentals. There was more discussion about the definition of transient. Mr. Mulligan asked Attorney Baum to clarify his contention that it wasn’t because the Ordinance defined an inn as a single building but was the fact that the Mackins were offering their entire property that somehow took it out of the Ordinance’s definition. Attorney Baum stated that it was more along the lines that the intent of the definition was renting out rooms like an inn, and that was not what was occurring.

Vice-Chair Parrott read part of Attorney Baum’s memo to the Board, which stated that the Mackins’ use of the property was no different than an ordinary residential rental, and that the only difference was the length of the rental term. He thought it seemed contradictory. Attorney Baum stated that there was a rental agreement, a security deposit, and insurance. The issue was the length of the term, which was the only difference, and that it was far closer to a residential use rental than an inn. Vice-Chair Parrott noted that, if it was not an allowed use or spelled out and listed in the chart, it was disallowed. Attorney Baum argued that it was a residential use listed in the Table of Uses. Vice-Chair Parrott also noted that the typical landlord/tenant agreement was for a year or more and then extended by mutual agreement and asked Attorney Baum if he agreed whether that was typical. Attorney Baum stated that he did not agree because having a seasonal rental on the seacoast was not uncommon.

In answer to Mr. Rheume’s questions, Mr. Mackin stated that the rental fee was calculated on a weekly basis and that the number of occupants did not affect the rate. Mr. Rheume asked whether there were check-in and check-out times, and Ms. Mackin said they always had them. Mr. Rheume noted that the memo stated that the company could arrange maid service for an additional charge, and he asked if that was something the Mackins did. Ms. Mackin replied that they would provide maid service if requested.

Attorney Baum said there were issues of fairness and property rights, and the choice was to allow the residence to continue operating, given the similarity to landlord-tenant use, while the City Council made their decision. There were constitutional property right issues as well as selective enforcement issues by allowing a disgruntled neighbor to drive the policy.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Greg Vanwormer of 49 Dennett Street stated that he was in favor of the petition. He said he lived across the street and had never experienced inconvenience, loud noises, or unruly behavior.

Attorney Scott Hogan on behalf of Mr. George Dempsey of 42 Dennett Street stated that he had reviewed the entire record and felt that the basis for the original Cease and Desist Order was well-grounded. He believed that the Board had a thorough process and that everyone had the opportunity to be heard. Relating to the motion for a rehearing, he felt that the Board had considered whether the Code Enforcer's decision was reasonable and that each member reviewed all the relevant issues, including the Ordinance's definition of an inn. He did not think there was any legal or procedural error on the Board's part. If the Ordinance provided a definition for the use, then that was the definition, and the dictionary definition of an inn didn't apply. Attorney Hogan further discussed the definition of an inn and the difference between traditional residential use of property and transient renting. He noted that if everyone in the neighborhood engaged in VRBO use at the same time, it would have a cumulative impact, which is why that use was regulated. Attorney Hogan further stated that he had never seen conditions of approval discussed within an appeal of an administrative decision. The Code Enforcement Officer made a decision and the Board would either uphold it or not.

Mr. Alain Jousse of 197 Dennett Street stated that he opposed the petition noting that the applicants were collecting taxes, which were not usually collected on semi-annual or yearly leases. A business was being run in a residential area and was not allowed. By overturning the Code Enforcement Officer's decision, it would change the character of the neighborhood.

Ms. Tylene Jousse of 197 Dennett Street stated that she opposed the petition and was concerned about the applicant advertising overflow parking a block away because the overflow was in front of her house. If transients parked there, it would limit neighborhood parking.

Mr. Jeff Cooper of 227 Park Street stated that he was in favor of the petition because he thought it was poor City policy to have a selective enforcement and felt that it was discriminatory.

Attorney Scott Hogan representing Mr. George Dempsey responded that the Mackins had limited their use and that the Board's decision should be based on the decision made by the Code Enforcement Officer. There was adequate off-street parking and nothing in the agreement that pointed to other parking. The application was ambiguous and not a good fit.

No one else rose to speak, so chairman Witham closed the public hearing.

DECISION OF THE BOARD

Mr. LeMay opened up the discussion and said what the Board had in front of them was a Cease and Desist Order issued by the Zoning Officer based on a definition that was a bit tortured to try to get it to fit. It happened to be the closest definition in the Zoning, but he wasn't sure that was his problem. The question in front of him was whether it was reasonable to define the residence as an inn and it didn't sit right. If the Board turned it down, it wasn't because the application was to operate an inn but whether it should have been done the way it was.

Chairman Witham stated that he also struggled and kept going back to the definition of an inn that the Code Enforcement Officer had relied on, and he couldn't find a part of it that didn't apply to the property. The GRA Zoning specifically said not to include transient occupancies. He felt it was a transient accommodation because there was no mail sent or license change, and he was comfortable upholding the Code Enforcement Officer's decision.

Mr. Durbin agreed with Chairman Witham, saying he had looked at a lot of Zoning Ordinances in different towns and felt it was black and white. The City did not have a regulatory scheme to deal with that particular situation, but the term 'inn' was a simple definition and clearly defined, so he saw no ambiguity in the language, and he felt that the Board was limited to simply looking at the plain language of the definition in the Ordinance, and he was inclined to make a motion to uphold the decision. Mr. Mulligan said he thought the applicant originally didn't articulate coherently how they were interpreting the Ordinance. They had the definition of an inn, and within that definition they were dealing with transient boarders. The operation would have 7-day minimum rentals and up to 60 days annual aggregate, so eight families would probably go through the property in a year. Even if it was a short-term rental, it seemed to be transient lodging, and he agreed that it met the definition of an inn. Until the Ordinance was changed, there was not a lot of ambiguity.

Mr. Rheume said that, in spite of the new information provided by the applicant, the terminology still made him think it was more like an inn than a short-term rental, which was the basic argument, and he continued to believe that the Code Enforcement Officer's decision was reasonable. He agreed with the applicant that there was a fairness issue. He attended the City Council meeting and listened to Attorney Sullivan explain his reasons for the enforcement and had found it wanting, but that wasn't what was before the Board. The applicant had asked the Board to go beyond the idea of what the Code Enforcement Officer did and do the right thing by them, but that wasn't really the Board's business and it also implied that the City Council couldn't work it out or that it would be too difficult for the applicant to wait. The City Council had begun the legislative process and it would get done sooner than later, so he didn't see anything that said there was gross unfairness in upholding the Code Enforcement Officer's decision.

*Mr. Durbin made a motion to **deny** the Administrative Appeal and uphold the Code Enforcement Officer's decision. Vice-Chair Parrott seconded the motion.*

Mr. Durbin stated that he would carry over his comments from the discussion. Vice-Chair Parrott stated that he had nothing to add.

Mr. LeMay stated that he would support the motion to deny, not because he thought it fit the definition of an inn well, but because he thought it was transient and short-term.

The motion passed by a vote of 7-0.

III. PUBLIC HEARINGS – NEW BUSINESS

1) Case # 2-1

Petitioner: Strawberry Banke Inc.

Property: Off Washington Street

Assessor Plan 104, Lot 7

Zoning District: Mixed Residential Office

Description: Clarification of Variances granted to construct and operate a skating area.

Requests:

1. Clarification that the Variances granted June 18, 2013 will apply to the operation of a skating area during the winter months for a three-month period beginning on the date operations commence each season.
2. Allow the current period of operations to run through March 15, 2015.

Mr. Durbin recused himself from this petition and Mr. Johnson assumed a voting seat.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin on behalf of the applicant and Mr. Larry Yeardon, CEO of Strawberry Banke, were present to speak to the petition. Attorney Loughlin stated that they were requesting that the variance relief be modified to permit the skating rink to be extended for two weeks to March 15. He felt that the project had all positive effects and no negative impacts. Since the rink was not able to open at the time it had planned to be open, they were asking to extend it in order to get the second weekend.

Mr. Rheume noted that it came down to 90 days versus 94 days and asked Attorney Loughlin what his rationale was in wanting the four extra days. Attorney Loughlin replied that they wanted to get the second weekend because most people enjoyed the rink on the weekends.

The following people spoke in favor of the petition: Mr. Gary Fagin and Ms. Valerie Fagin of 75 Gates St, Ms. Claudette Barker of 5 Hancock Street, Ms. Nancy Pollard of 294 Marcy Street, Ms. Lee Roberts of Court Street, Ms. Emma Reed Nelson of 87 Richards Avenue, Ms. Catherine Williams Kane of 337 Pleasant Street, Mr. Jeff Keefe of 280 Ocean Road, and Mr. Bill Downey of 76 Bow Street. Their comments and concerns included the following:

- Parking, noise and lighting concerns were not an issue
- The rink was a great community asset
- Many neighbors thought it was the best thing that ever happened.

- The costs of the rink were above the estimated amount and it was important for the museum financially to have the project extended.
- There were 15,000 skaters and zero complaints from neighbors.
- The four extra days were important financially, especially due to the snowy weather.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Ms. Beth Margeson of 24 Marcy Street said she challenged the approval originally and was there on behalf of those who didn't object to the extension into March but did object to the 94 days. It was clear the approval was for 90 days, and she was concerned about setting a precedent. She also noted that she had fought for sound, parking and light improvements.

Mr. Larry Yeardon rebutted by saying that he had a neighbor who said he did not support Ms. Margeson's petition and felt that it was unfair that his name appeared on the piece of paper. He felt that Ms. Margeson should not take any credit for any of the improvements because sound, parking and lighting were part of the original proposal.

No one else rose to speak, so Chairman Witham closed the public hearing.

DECISION OF THE BOARD

Mr. LeMay said he had a hard time finding mention of the 90-day limit and didn't think it was a big concern for the Board. Vice-Chair Parrott said he remembered December, January and February in terms of months. Mr. Mulligan noted that the review criteria identified a 3-month operation but he didn't recall that coming up. Chairman Witham said he wasn't concerned about the precedent issue. Vice-Chair Parrott said it was clear on the letter that the request was strictly for that year.

*Mr. Lemay made a motion to **grant** the request to extend operations of the skating rink to March 15. Mr. Moretti seconded the motion.*

Mr. LeMay stated that he didn't think the timing was a big concern of the Board's originally because they thought it would be three months, or all of 'winter time'. He believed that no one would hear any noise, especially with all the snow, and that there was no harm in approving it. Mr. Moretti concurred with Mr. LeMay and said he had nothing to add.

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

- 2) Case # 2-2
 - Petitioners: Donald S. Margeson and Beth S. Margeson
 - Property: 14 Hancock Street (Strawbery Banke)
 - Assessor Plan 104, Lot 7
 - Zoning District: Mixed Residential Office
 - Description: Appeal Administrative Decision

Requests: Appeal the decision of a Code official to decline to issue a cease and desist order to the White Apron Café for use of a wine and beer license.

SPEAKING IN FAVOR OF THE PETITION

Ms. Beth Margeson stated that she believed the White Apron Café amounted to a change of use in Strawberry Banke. She had noticed a lot of changes at Strawberry Banke, such as the Mombo operating as a standalone restaurant, the museum/retail store Pickwick's, the rink and the café, which she felt all amounted to significant changes of use. She researched the White Apron Café's wine and beer license to see if it was an allowed use and found that it was not. She also said that Attorney Sullivan's reasoning was not compelling to her because he had said the decision made on the café was related to an element of its principal use and that many other museums had cafes that served beer and wine. She said the definition of a museum did not mention the sale of wine and beer or fundraising as museum functions.

Mr. Rheume noted that the Mombo restaurant was not in the MRO District and asked Ms. Margeson if she had researched the restaurant. Ms. Margeson replied that the restaurant was established prior to Strawberry Banke and was grandfathered in.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Peter Loughlin stated that he didn't understand the point of the application and did not believe that Ms. Margeson was an aggrieved party. He was the closest abutter to the café and had not known it even existed because it was so low-key. He agreed with Attorney Sullivan's analysis of the museum being able to have food service, and that frequently involved serving alcohol. He felt that the Ordinance could be clearer but was sufficient, saying that the Board applied a common-sense interpretation of regulations and that the interpretation would say that Strawberry Banke could have the café and serve alcohol.

Mr. Rheume asked Attorney Loughlin to address the concept of accessory use versus principal use because the Ordinance's definition considered food service an accessory use. Attorney Loughlin said he believed that having a place where visitors could enjoy a drink with their meal seemed to be part of the principal use of it, and the accessory use was food service. Strawberry Banke was in the MRO District and was a museum and a business, so being able to satisfy its customers was part of that business. Mr. Rheume said he was concerned with what the café's relationship was to the museum because the museum was generally closed during the winter. Mr. Yeardon told Mr. Rheume that the museum did a number of things beyond the historic houses, like giving guided tours and opening the skating rink, and they were open all year long.

Ms. Lee Roberts of Court Street pointed out other museums that had cafes with beer and wine and thought it was a positive thing.

Ms. Margeson stated that food service did not include alcohol, and if an unpermitted use occurred within the café, it didn't matter whether it could be seen. The intention of a MRO district was to provide a transition between the heavy commercial use and the residential uses, and the museum was not just a place of business. She felt that it was clear that the café could

be an accessory use, but it was for food, not alcohol. In an MRO district, no wine or beer is allowed. Mr. Mulligan asked if there was anywhere else in the Ordinance where it was said that food service did not include alcohol. Ms. Margeson said she did not know. Mr. Mulligan asked if it was possible that food service could be expanded to include alcohol, and Ms. Margeson said she didn't think so. There was more discussion.

Chairman Witham asked Ms. Margeson if she had a personal issue with wine and beer served at the café and how she was negatively impacted. Ms. Margeson said it was commercially zoned and sometimes there was drunken behavior at the Mombo restaurant. She discussed the parking situation and how people were impacted by people who drank and came in from the downtown area. Mr. Johnson asked whether any drunken behavior at the cafe had affected Ms. Margeson, and she replied that it had not. They further discussed the parking issue and drunken behavior. Mr. Yeardon stated that he lived on the Strawberry Banke campus and did not know of a single case of anyone overdrinking at the café, nor had he seen drunken behavior at the Mombo. They also ran Vintage and Vine and had not had a single incident in ten years. Ms. Margeson said the Vintage and Vine had a license and the issue was whether that kind of use was allowed in that zone.

No one else rose to speak, so Chairman Witham closed the public hearing.

DECISION OF THE BOARD

Mr. Mulligan opened up the discussion, saying that he didn't understand Attorney Sullivan's memo noting that it wasn't an accessory use. He looked at it as a museum that was entitled to accessory uses that might include food service, and beer and wine were part of that service. Mr. LeMay thought that the result was the same no matter what the interpretation was. Vice-Chair Parrott agreed and found the interpretation more than a stretch. He thought it was far from true that all restaurants would automatically serve alcohol. He stated that the Board was all about enforcing the rules, and the rules in the Table of Uses were clear. Some of them talked about alcohol, bar, take-out only, and so on, but none of those restaurants were allowed in the MRO District. It wasn't clear to him that alcohol was understood to be allowed.

Mr. Rheume said he was torn because the applicant had a good academic argument and he saw concerns with the progression of the pressure that Strawberry Banke was under to find ways to get revenue. He still didn't see anything the applicant said to indicate something that was truly grievous other than that it should come through for another approval, and he didn't see where granting the applicant's request would change anything except create a lot of work. Vice-Chair Parrott noted that there had been no untoward activity coming out with people overdrinking, but that was irrelevant to the issues. The Board was about enforcing the rules.

*Mr. Mulligan made a motion to **deny** the Administrative Appeal. Mr. LeMay seconded the motion.*

Mr. Mulligan stated that it was about the definition of a museum in the Ordinance, which included the identification of certain accessory uses, which may include food services. The White Apron Café's accessory use of food services could properly serve beer and wine as part of its food service, and he thought it was an appropriate accessory use to the primary museum

use, notwithstanding Attorney Sullivan’s memo justifying the decision. He thought the decision not to issue the Cease and Desist Order was correct. Mr. LeMay concurred with Mr. Mulligan and said he had nothing to add.

Mr. Rheaume said he would support the motion but had reservations. He thought the applicant had some good points and felt that if the café was open until 11 p.m. instead of 7, it would be a different set of circumstances related to serving beer and wine, but because it closed much earlier, he didn’t think it was relevant.

The motion passed by a vote of 6-1, with Vice-Chair Parrott voting against the motion.

3) Case # 2-3

Petitioners: Great McDonough St LLC, owner, Cassie McCracken, applicant

Property: 135 McDonough Street

Assessor Plan 144, Lot 47

Zoning District: Mixed Residential Business

Description: Chiropractic/fitness facility.

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 #6.20 to allow a chiropractic use in a district where it is only allowed by Special Exception.
2. A Variance from Section 10.1112.30 to allow 44± off-street parking spaces to be provided where 73 are required for the entire building.

Mr. Rheaume recused himself from the following petition. Mr. Durbin resumed his seat and Mr. Johnson remained in a voting seat.

SPEAKING IN FAVOR OF THE PETITION

Mr. John Flynn on behalf of the owners, a tenant Ms. Cassie McCracken, and the building manager Mr. Dick Webster were present to speak to the petition. Ms. McCracken said she was also the co-owner of the chiropractic/massage facility and had recently discovered that the building was not zoned for chiropractic. She said she only had a single treatment room with a table for equipment and that all the criteria for a special exception were met.

Mr. Flynn stated that the building had always been a commercial one and that 80% of the building was used for storage, with 344 storage units, and was mixed use with other tenants. There had never been a parking problem. Nineteen parking spaces should be used for the storage portion, but the nature of the storage section was that people came in, unloaded, and then left. Because the building had a lot of part-time tenants, he asked that the Board consider the fact that the building didn’t have a need for a lot of parking.

Chairman Witham asked Mr. Flynn to pick a few tenants where the actual was far less than required. Ms. McCracken said she was probably the only tenant that actually saw clients and might need 10 parking spaces, but it wasn't 9-5 and it was in and out. Mr. Flynn said he realized there was a gap between what the Ordinance required and what they had on site, and the Board only had to look at the uniqueness of the building to see that they didn't need that many spaces. Mr. Webster said he had managed the building for 20 years and felt that 22-25 parking spaces would be the maximum because most of the artists showed up for an hour and then left. Mr. Flynn stated that all five criteria were met.

Mr. LeMay wondered what kind of artists wouldn't use the 14 studios in the building. Mr. Flynn said they used them periodically but that they were mostly for storage. Mr. Mulligan asked whether any space in the building was currently vacant, and Mr. Flynn told him no, so Mr. Mulligan thought the reason the parking variance was triggered was that the change in use required the applicant to meet current zoning parking requirements. The uses were previously grandfathered. He asked if the parking behind the building was part of the applicant's parking. Mr. Flynn said that it was not and that Ms. Walker from the Planning Department had told him that he couldn't use it because it wasn't paved. Mr. Mulligan noted that it was available for overflow parking. Ms. McCracken said she could attest that most of the businesses on the third floor did not use the parking spaces allotted.

Ms. Jocelyn Carey, the other co-owner of the chiropractic facility, stated that they were there six days a week and their business was probably the only one with significant foot traffic. The other studios were barely used and had no commercial business. Vice-Chair Parrott asked her whether there was available parking on or across the front street, and Ms. Carey said there was and that she had never heard complaints from people not finding parking.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Beth Moreau of 18 McDonough stated that she had questioned whether the building actually had on-site parking because she went there frequently and always found the street congested with parking. She had never seen the building's occupants or clients use the allotted parking and suggested that it be stipulated that they use the onsite parking. Mr. Mulligan asked if there was an egress into the building from the side that abutted the parking lot, and Ms. Moreau said she wasn't aware of any.

No one else rose to speak, so Chairman Witham closed the public hearing.

DECISION OF THE BOARD

*Vice-Chair Parrott made a motion to **grant** the Special Exception as presented and discussed. Mr. Moretti seconded.*

Vice-Chair Parrott stated that the Special Exception had specific criteria relating to the standards as provided by the Ordinance for a particular use permitted by special exception. Granting the special exception would pose no hazard to the public and adjacent property on account of toxic materials and so on. There would be no detriment to property values in the

vicinity or change in the essential characteristics of the neighborhood related to industrial districts. It was clearly an internal change in a building that had been there a long time and would not change the neighborhood in any way with respect to emitting noise, dust, odor, heat and so on. It would also not cause outside storage equipment or materials. There would be no creation of a traffic safety hazard and no substantial increase in traffic because the area was already congested. Granting the special exception would not place excessive demand on municipal services. It was unlikely that anything would have an effect on those factors or have a significant increase in storm water runoff because there would be no external changes.

Mr. Moretti concurred with Vice-Chair Parrott and said he had nothing to add.

The motion passed by a vote of 7-0.

*Mr. Durbin then made a motion to **grant** the variance for parking. Mr. LeMay seconded.*

Mr. Durbin stated that it was a retroactive request because the use had been in effect for a year and the applicant unknowingly violated the zoning but was attempting to correct it. There had been no complaints filed with the municipality regarding the use of parking issues, so he didn't feel that granting the variance would be contrary to the public interest or change the essential characteristics of the neighborhood. Substantial justice would be done because the detriment to the applicant in denying the variance would not be outweighed by any perceived public benefit. Granting the variance would not diminish property values because the Board would have known about it. As to the hardship test, there were unique conditions associated with the property that distinguished it from others in the area. It would be a challenge to fit the required number of parking spots on that lot, given the size of the building.

Mr. LeMay concurred with Mr. Durbin and said he had nothing to add.

Mr. Mulligan stated that he would support the motion if it had a stipulation that the applicant require the massage tenant to utilize the onsite parking on the northern end of the building. Based on the applicant's own representations of the number of spaces required by the Ordinance and the number of spaces that the tenants actually needed and used, the massage tenant seemed to be close to what the Ordinance required, and the abutters' representative had said that the onsite parking was basically ignored by the building's tenants and users. He knew that parking was an issue in that neighborhood, so he did not think it was unreasonable if granting relief to require the applicant to utilize its onsite parking more efficiently. Chairman Witham asked Mr. Durbin if he would include the stipulation, and he agreed.

Mr. LeMay asked if Mr. Mulligan meant that the employees would use the parking and also asked how it would be enforced with the public coming to use the services. Chairman Witham said maybe the clients would follow through if the tenant requested them to.

Ms. Berna pointed out that the Legal Notice said 44 parking spaces where there were actually only 22 spaces provided, so there was a discrepancy. Chairman Witham thought it was a bigger plus/minus than the Board normally dealt with, but he was comfortable voting for it considering that there was representation from the neighborhood committee.

Mr. Durbin modified his motion by adding the stipulation that the applicant require the building users to park on site and provide a plan to the Planning Department outlining how they would comply with this requirement. Mr. LeMay seconded the motion.

The motion passed by a vote of 7-0.

Mr. Rheume resumed his seat and Mr. Johnson returned to alternate status.

4) Case # 2-4

Petitioners: Scott & Kelly Cioe (Kelly Whalen)

Property: 44 Melbourne Street

Assessor Plan 233, Lot 20

Zoning District: Single Residence B

Description: Install air conditioning unit.

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

1. A Variance from Section 10.521 to allow a left side yard setback of 0'± where 10' is required.

SPEAKING IN FAVOR OF THE PETITION

The owner Mr. Scott Cioe and his contractor Mr. Mark Fogerty were present to speak to the petition. Mr. Cioe stated that he had an air conditioner installed, and the City brought to his attention the fact that it didn't meet the setback. They placed the air conditioner in the safest and least noticeable location. All the other areas of the house had safety issues. He discussed the distances from the house to the property lines and said he had a letter from the neighbor to the left saying she didn't have any issues. He believed that he met all the criteria.

Mr. LeMay wondered how the project went off the rails in the first place. Mr. Fogerty said he thought there was room on that side of the house and that they met the setback requirements, but the Ordinance had been in force intermittently over the years, so they got fooled.

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

No one rose to speak, so Chairman Witham closed the public hearing.

DECISION OF THE BOARD

Mr. Mulligan made the motion to grant the variance as proposed and advertised. Mr. Rheume seconded.

Mr. Mulligan stated that granting the variance would not be contrary to the public interest or to the spirit of the Ordinance because air conditioners were becoming more common throughout Portsmouth. The essential character of the neighborhood would not be altered

because it would still be a residential neighborhood, nor would the health, safety and welfare of the public be threatened by what was proposed or already existing. Granting the variance would result in substantial justice, because the loss to the applicant if the relief were not granted would not be counterbalanced by any gain to the public. It would not diminish the value of surrounding properties because it was a modest encroachment and had no visual effect on the neighborhood. Literal enforcement would result in unnecessary hardship due to the special conditions of the property, which included that the applicant was trying to site exterior mechanical improvements and there was no really good place to put them, given the existing deck and patio. The applicant only had one free side of the house available, so it was a reasonable place. Also, it had been there a while and no one knew it was even there.

Mr. Rheume concurred with Mr. Mulligan, saying that the unique aspect of the property was that basically the property lines didn't add up.

The motion passed by a vote of 7-0.

Mr. Moretti and Mr. Mulligan recused themselves from the following petition, and Mr. Johnson assumed a voting seat.

- 5) Case # 2-5
 - Petitioners: Harrison Alan Workman, owner, Heidi S. Ricci, applicant
 - Property: 912 Sagamore Avenue
 - Assessor Plan 223, Lot 26
 - Zoning District: Waterfront Business
 - Description: Demolish and reconstruct existing structure, adding a second story and an attached 24'± x 30'± garage.
 - Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
 - 1. A Variance from Section 10.334 to allow a lawful nonconforming use of land to be extended into any part of the remainder of a lot of land.

SPEAKING IN FAVOR OF THE PETITION

Mr. Corey Colwell of MSC Civil Engineers was present on behalf of the owners and stated that they wanted to make the space more livable for the family. It was located in the waterfront business district. The existing structure had 936 s.f. of living space. The home was built in 1950 and was substandard, and the septic system was leaching into the creek. The applicant wanted to raise the home and rebuild it in a similar footprint and also add a garage. The variance was to allow the expansion of a non-conforming use, but once the home and garage were built, they would conform. The structure would occupy 25.8% of the lot, so they were above the open space requirement. Trailers and sheds would be removed, which would bring impervious area down further. It would improve the property, neighborhood and waterfront buffer, and would also increase the value of the home and the surrounding homes. Mr. Colwell detailed how all the criteria for granting a variance were met.

Mr. Rheume said the Board held the Waterfront District zone pretty dear, and he asked whether, considering that there was a pier going out to Sagamore Creek, the property had always been a residential use. Mr. Colwell said it had been residential since 1950 and that he didn't know about the business aspect. Mr. Rheume noted that the dock looked quite a bit shorter, and Mr. Colwell said it was the existing condition. Ms. Berna asked if the footprint would be moved by raising the existing building, and Mr. Colwell said it would not.

SPEAKING TO, FOR, OR AGAINST THE PETITION

No one rose to speak, so Chairman Witham closed the public hearing.

DECISION OF THE BOARD

*Mr. LeMay made a motion to **grant** the variance as proposed and advertised. Vice-Chair Parrott seconded.*

Mr. LeMay stated that the Board's biggest concern was the use of the property because the waterfront business district was severely limited, and anything that compromised its possible use for that purpose was a big concern. The proposal was for a moderate-sized building in the same footprint, and it didn't appear that anything would be done to preclude access to the waterfront in terms of a subsequent buyer. Granting the variance would not be contrary to the public interest, and the spirit of the Ordinance would be observed. He was satisfied that it would not materially change the nature of the neighborhood. There would be substantial justice done, and there would be no benefit to the public that would outweigh the benefit to the applicant by replacing the house and doing a little development that didn't encroach on the water. The value of surrounding properties would not be diminished, and literal enforcement of the Ordinance would result in unnecessary hardship if the house stayed the way it was.

Vice-Chair Parrott concurred with Mr. LeMay and added that there was plenty of area and no variances required with respect to setbacks or other peculiar features, and it had been a residential use for as long as he was aware of.

Mr. Rheume stated that he would support it. It was a clever layout of the property and avoided all the various lines for setbacks and wetlands for the Waterfront Business District. There was a lot of economic pressure to convert a lot of waterfront spaces into mansions, and he felt the proposal was far from that. They were keeping the existing footprint, and the modest nature of what was being asked made sense to let the project go forward.

*The motion **passed** by a vote of 6-0.*

Messrs. Moretti and Mulligan resumed their seats. Mr. Johnson returned to alternate status.

- 6) Case # 2-6
- Petitioners: Constitution Realty of Portsmouth LLC & F/K/A Baroni Family LLC, owners, EVO Rock & Fitness, applicants
- Property: 300 Constitution Avenue

Assessor Plan 274, Lot 5

Zoning District: Industrial

Description: Indoor climbing/fitness facility.

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

1. A Variance under Section 10.440 Use #4.30 to allow an indoor recreation use in a district where the use is not allowed.
2. A Variance from Section 10.1112 to allow 226 off-street parking spaces to be provided where 266 are required.

SPEAKING IN FAVOR OF THE PETITION

The architect Ms. Hilary Harris stated that she was also the CEO of the fitness place. They were proposing to lease the space. The existing building was in the Industrial District, built in 2013, and had 65,651 s.f. and 266 parking spaces. It had multiple units, some of which were owner-occupied and other leased. They were looking at a space that had 9,360 s.f. of leasable space, so they had two requests. One was to allow nonconforming use with the exception of adding an overhang over the proposed new entrance. No alterations would be done to the exterior except for perhaps a sign. There would be no increase in truck traffic, and it would enhance the neighborhood with health activity and also increase surrounding property values. The second part of the petition was the exception to the parking requirements. Ms. Harris said the Planning Board had said it would be considered an indoor recreational use, and she had submitted a commentary on parking that she had on other existing facilities. For example, the Concord facility had 52 spaces and was a 13,000 s.f. standalone building. Peak hours would be from 5 to 8 p.m. and during the weekend, so they were not in conflict with the rest of the building's peak hours. She pointed out that the demand for spaces would only exceed the proposed when there was an event.

Mr. Rheaume asked how many spaces Ms. Harris highlighted, and she replied 39 spaces. He noted a lot of references to Suite 102 instead of 101. Ms. Harris thought they might be from the owner. Vice-Chair Parrott asked how Ms. Harris had calculated the 39 spaces. Ms. Harris replied that it was based on the 250 s.f. used in Concord. Vice-Chair Parrott stated the Portsmouth standards for rated capacity and asked Ms. Harris what the rated capacity for her building was. Ms. Harris said it was 175 but felt it would be absurd to have 88 parking spaces for a small bouldering gym. They didn't expect it go get the traffic that the Concord and Portland facilities got, due to the population density and demographics of the area. If they had to go with 88 spaces, they would never fill it. In answer to Vice-Chair Parrott's questions, Ms. Harris said there was a consistent usage pattern year around, that most of the other businesses in the building were closed on the weekend, and that she didn't believe the building was full.

Ms. Berna noted that the applicant would have to submit an application for a sign, if desired.

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

No one rose to speak, so Chairman Witham closed the public hearing.

DECISION OF THE BOARD

*Vice-Chair Parrott made a motion to **grant** both variances as proposed and advertised. Mr. Rheume seconded.*

Vice-Chair Parrott stated that his comments applied to both variances. Granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance because it was clearly not an allowed use in the Industrial District but it seemed to be where the interest was these days. It was in the public interest not to have vacant spaces. Granting the variance would do substantial justice because it was the case of public versus private interest, and it would be hard to detect any public interest, so it tipped to the applicant. Granting the variance would not diminish the value of surrounding properties because it was an industrial district with plenty of space and it was an indoor use. As to unnecessary hardship, the property had special conditions. It was a large building and in an unusual district for that kind of use, so it clearly met the requirements for special conditions.

Mr. Rheume thought that the Board seemed to be seeing a lot of cases with industrial spaces where the applicants wanted them for non-industrial uses, but they seemed to work out well for parking and other use patterns, and he thought it made sense. The applicant presented interesting hardship criteria, noting that it was the only space in Portsmouth where they could find sufficient ceiling height for their business. He suggested that in the future, the Planning Board could consider adding in a percentage of industrial spaces for non-industrial uses.

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

IV. OTHER BUSINESS

No other business was presented.

V. ADJOURNMENT

*It was moved, seconded and **passed** by unanimous voice vote to adjourn the meeting at 11:05 p.m.*

Respectfully submitted,

Joann Breault
Recording Secretary