

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE
CITY COUNCIL CHAMBERS**

7:00 P.M.

August 17, 2004

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice Chairman Jim Horrigan, Alain Jousse, Bob Marchewka, Nate Holloway, David Witham, Alternate Steve Berg, Alternate Duncan MacCallum

MEMBERS EXCUSED: Arthur Parrott

ALSO PRESENT: Lucy Tillman, Planner

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**I. OLD BUSINESS**

None.

**II. PUBLIC HEARINGS**

1) Petition of **150 Greenleaf Avenue Realty Trust, James G. Boyle Trustee, owner**, for property located at **150 Greenleaf Avenue** wherein a Variance from Article II, Section 10-208(35) is requested to allow the outdoor storage of vehicles within 100' of a residential district where a 200' buffer to a residential district is required. Said property is shown on Assessor Plan 243 as Lot 67 and lies within the General Business district. Case #8-1

**SPEAKING TO THE PETITION**

Attorney Bernie Pelech spoke on behalf of the applicant of the petition. Mr. Pelech stated that he felt that the reason for the necessity of an application for a variance is the ambiguous language in the Zoning Ordinance contained in Article II, Section 10-208, Table 4, #35, which deals with motor vehicle sales in the General Business district. Mr. Pelech quoted verbatim from the Table 4, #35, stating, "Motor vehicle sales, renting or leasing, including accessory repair services for vehicles not requiring tractor registration plates and weighing less than 32,000 pounds; provided, outdoor storage areas are located at least forty feet from the street right-of-way and two hundred feet from any Residential or Mixed Residential district; and, all accessory uses are located within a building." Mr. Pelech stated that he feels the critical phrase is the "outdoor storage areas," and noted that outdoor storage areas are defined in Article I as "storage of materials on a lot without benefit of a structure with four walls and a roof to protect said materials from the elements. This definition shall not be deemed to include the outside storage of junk (regulated separately) or as a temporary structure." Mr. Pelech stated that he felt that a variance is not needed because the parking of motor vehicles is different than the outdoor storage of materials. Mr. Pelech stated that the Zoning Ordinance says that one cannot have outdoor storage, and that outdoor storage is defined as the storage of materials not under a roof to protect them from the weather. Mr. Pelech stated that the applicant would submit that vehicles do not need to be protected from the weather and that vehicles are not materials, and thus the variance would not be needed.

Mr. Pelech stated that although it was the position of the applicant that a variance should not be necessary, he would nonetheless turn to the applicant's request for a variance and basically go through some of the constraints on this lot and the five criteria for the Board to grant the requested variance.

Mr. Pelech stated that this lot is located on the corner of Greenleaf Avenue and the Route 1 By-pass (making reference to the map). He made further references to the map, pointing out Portsmouth Dodge, on the other side of Greenleaf Avenue, and a large, and a large, undeveloped wetland area. Mr. Pelech stated that there is a large wetland area at the rear of the lot and it is a peninsula surrounded by residential districts. He pointed out the property line, which was in green, and the orange line, which depicts 200' from any Residential district. He pointed out the diminutive size of the remaining lot, which is within the orange lines. He then pointed out the wetlands and wetlands buffers, which were in blue and black. He stated that the existing parking spaces on site were shown on this plan. He stated that the spaces that were in red (approximately 55) were not within 200' of a Residential district. He stated that those that were in green (150 spaces) were within 200' of a Residential district, and the Planning Department has ruled that Portsmouth Toyota cannot park vehicles for sale in any of those green spaces.

He stated that the applicant was seeking a variance to allow parking within 100' of a Residential district. He stated that furthermore, the zoning line is the center line of the US Route One By-pass and so one would have to measure 200' from the center line of the bypass. There is another 50'-75' of pavement on the other side of the By-pass before getting to the residential properties which are located over there. Mr. Pelech stated that the applicant was actually asking for a variance to be within approximately 150' of the nearby residential properties.

Mr. Pelech stated that there was no question in his mind that the location of this lot, plus the wetlands, strictly qualifies that "special conditions" that this Board needs to find. He stated that not only does the lot have Residential districts on one side, two sides, three sides, and actually the corner down here (referring to the map) is the fourth side, which is accountable for this orange line which takes up all of these parking spaces. He stated that if there were not Residential uses adjacent to the property line, he would not be able to make this argument with a straight face. He made note again to the surrounding wetlands, and stated that the nearest residences, actual dwelling units, were probably well over 200', and that they were approximately 150' from the zoning line. He noted that the houses are "way up on the hill" and that Portsmouth Dodge parks up to the street on both streets.

He stated that the applicant believes this property has special conditions, which merit relief being granted by the Board. He stated that the applicant was aware what the zoning restrictions were when he purchased the property, but given the location of the property, knowing what Mr. Pelech would be presenting that evening, he felt confident that the Board would consider and grant reasonable relief to the property.

Mr. Pelech stated that this is an "Area Variance," not a "Use Variance," and that therefore, the application would have to meet the Boccia test. He stated that the Boccia Analysis is a two part analysis, the first part of which says that "an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property." Mr. Pelech stated that he did not think there was any dispute that this property has special conditions, being surrounded on four sides by Residential districts, and that the variance is needed to enable the applicant's proposed use of the property. He stated that on site, there are over 200 parking spaces, but that only 55 of them could be used to display motor vehicles. He stated that this was certainly not a reasonable use of the property.

Mr. Pelech quoted that second part of the Boccia Analysis, stating “the benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.” He stated that there is no other way to achieve this, because one cannot change the Zoning Ordinance, which states 200’, and one cannot change the lot lines unless one petitions the City Council or Planning Board to zone some of these residential areas something other than Residential.

Mr. Pelech stated that another factor he felt the Board should consider, and weighs heavily on the Board’s decision is the fact that at the present time, these spaces, which are approximately close to 100 spaces, are now used by New Hampshire College, of Southern New Hampshire University, which is a tenant of this property. He stated that the vehicles of affiliates of the college are there, coming and going, sometimes until 10 p.m. (for evening classes). He stated that those spaces are used at night, and that vehicle lights would be coming on in the evening. He stated that this was a much more intrusive use, as would be customer parking or employee parking, than would be the display of for-sale vehicles. He stated that vehicles being displayed for sale do not get started up every day, with people jumping in and out of there, but that employee and student vehicles do get used on a daily basis. He stated that the applicant submits that if this area could be used for the display of motor vehicles for sale, it would be less intrusive than what was going on presently, and likewise for the other spaces he pointed out on the map.

Mr. Pelech stated that granting the variance would be consistent with the spirit of the Zoning Ordinance. He stated that once again, he would ask the Board to make its own interpretation of what the outdoor storage of materials actually is. He stated that if the makers of the Zoning Ordinance had intended outdoor storage of materials to include motor vehicles, they did not state so specifically in the Zoning Ordinance. He stated that the applicant submits that the variance is consistent with the spirit of the Zoning Ordinance, especially given the fact that the Zoning Ordinance specifies 200’, and the applicant has to measure from the zoning line, which is the median barrier of the Route 1 By-pass. He stated that it is contrary to the spirit and intent of the Zoning Ordinance because the intent was probably to measure from the residential lot lines, not the zoning boundaries.

Mr. Pelech moved to the fourth criterion, and stated that the applicant believes that substantial justice would be done by granting the variance. He stated that it would require the Board to perform a balancing test, where it would have to weigh hardship upon the owner if the application for the variance is denied against the some perceived public benefit in denying the variance. He stated that the applicant did not see any public benefit in denying the variance. He stated that Board members are well aware that in most areas of the General Business district, where motor vehicles are located are set back at least 40’ from the street, and many of those motor vehicle dealerships have received variances from the 40’ set-back requirement. He noted that other dealerships in the area have parking of vehicles for sale right up to the street. He stated that very few, if any of them, have to adhere to the 40’ set-back, because many of them are grandfathered or they have received variances.

Mr. Pelech stated that the hardship upon the owner, if he were required to maintain a 100’ set-back, is certainly not outweighed by some benefit to the general public. He stated that there would still be a 100’ set-back from the residences across US Route 1 and there would also be a 50’ landscaped green area between the parking areas and the By-pass.

Mr. Pelech moved to the fifth criterion, that the value of surrounding properties would not be diminished. He stated that the applicant did not believe the granting of this variance would diminish the value of surrounding properties. He stated that if the applicant utilizes those spaces that are within

200', which obviously he does at the present time and will continue to do, for the students of Southern New Hampshire University, for employees and customers, and for vehicles that are awaiting repair. He stated that the impact upon the residential neighborhood is going to be more than it would be if the applicant parks for-sale vehicles. He stated that the for-sale vehicles would sit with very little if any activity. He stated that the headlights would not be coming on, and the doors would not be opening and closing, with anywhere near the frequency of the vehicles of the employees, customers and students. He stated that therefore the value of surrounding properties would not be diminished.

Mr. Pelech stated that to wrap up, the applicant does not believe that the variance is contrary to the public interest. He stated that it would be a use of the property that is benefiting the public interest. He stated that there have been close to \$1 Million spent to improve the place in that building since Mr. Boyle and the owners of the property purchased it back in December 2003. He stated that it had increased in value and that is a benefit to the public interest. He stated that it provides a service and a product that is beneficial to the public interest. He stated that approximately 50 people are employed at the dealership and that benefits the public interest. He stated that there is nothing in the variance that is contrary to the public interest. He stated that the property does have special conditions, and does meet the two-part Boccia Analysis. He stated that the variance is needed to enable Portsmouth Toyota to use the property given the special conditions of the property, those being the fact that it is surrounded on 3 ½ if not 4 sides by Residential districts, that it has substantial wetlands in the back which can never be developed, and that that there is a 100' buffer from the wetlands. He stated that all of those combined certainly give the property special conditions.

He stated that the second part of the test is that there is no other reasonably feasible way to achieve this use. He stated that the applicant cannot stack vehicles one on top of another in the center of the property, put a building over the vehicles, or move the zone lines, which causes this problem. He stated that the variance is consistent with the spirit of the Zoning Ordinance, as he had indicated, that the applicant believes that substantial justice would be done by granting the variance, and further that surrounding property values would not be diminished in any way given what can go on there now, which is vehicles coming and going on a regular basis in that space, rather than parking for-sale vehicles.

Mr. Berg asked how many parking spaces the property would have for for-sale vehicles if the variance were not granted. Mr. Pelech responded that 55 spaces would be available for that purpose. Mr. Berg asked whether or not that is in line with competing car dealerships. Mr. Pelech responded that it was not even close, that it would be approximately 1/10 to 1/5 the number of spaces most competing dealerships have. Mr. Berg verified with Mr. Pelech that the fact that the car dealership is permitted to sell motor vehicles, but the restriction impedes the ability to truly use the car dealership for this use, is another special condition of the property. Mr. Berg asked whether or not Mr. Pelech or the applicant had looked at the tax maps or zoning maps. He noted that there are three car dealerships within walking distance. He asked if Coast Cadillac had any such restriction. Mr. Pelech responded that there are no such restrictions because they are abutted by a Residential district on the rear but they are not abutted by a Residential district across the Route 1 By-pass. He stated that this was also the case for the Suzuki Dealership. He stated that they may have a Residential district across the street, but they do not have one on three sides, as this property does. He stated that Portsmouth Dodge has a Residential district abutting in the rear, but does not have one across the street. He stated that even if there were a Residential district there, that Portsmouth Dodge can still park vehicles right up to the street because it is grandfathered. Mr. Berg verified that Portsmouth Dodge abuts one of the Residential Zones that is the subject of tonight's variance request. Mr. Pelech stated that Portsmouth Dodge parks right to the street on Greenleaf and right to the street line of the By-pass because they

were there prior to 1995, when this Amendment to the Zoning Ordinance came into play. Mr. Berg asked Mr. Pelech to clarify whether or not the applicant would be adding any parking spaces or would be putting new cars in the existing parking spaces. Mr. Pelech responded that at the present time, that is what the applicant is proposing to do. He stated that the applicant may wish to utilize these spaces and may wish to move them so that he could put another row of spaces behind them, but that right now, that was not the case. Mr. Berg stated that those spaces could just as easily be customer parking spaces, or parking for cars waiting for service.

Mr. MacCallum asked Mr. Pelech what he considered to be ambiguous about the language in the Zoning Ordinance. Mr. Pelech responded that he considered the definition of outdoor storage as it relates to 10:208, (35), which states that outdoor storage areas are not allowed within 200' of a residential district. He stated that the definition of outdoor storage in the Ordinance is the storage of materials. Mr. MacCallum quoted from the Ordinance, stating "motor vehicle sales, renting or leasing, including accessory or repair services, and vehicles not requiring parking registration plates and weighing less than 32,000 pounds, provided that outdoor storage areas are located at least 40' from the street right of way, and at least 200' from a Residential or Mixed Residential district, and that all accessory uses are located within the building." Mr. MacCallum asked what else "outdoor storage areas" could be referring to other than motor vehicles. Mr. Pelech responded that it could be referring to a number of things, including part storage, dumpsters, or materials other than new vehicles. He stated that it could be referring to junk vehicles or vehicles awaiting collision repair. Mr. MacCallum stated that the Ordinance clearly makes reference to motor vehicle sales. Mr. Pelech stated that he did not disagree, but that was not the reason for the request. He stated that motor vehicle sales are allowed in this district. He stated that the applicant came before the Board for an area variance. He stated that the applicant is trying to find out whether motor vehicles are a "material" or not.

Mr. MacCallum stated that that is the general definition, and that it is a matter of statutory construction. He stated that Mr. Pelech well knows that any time there is a more specific condition that addresses a specific type, that is what controls the definition and overrides the general definition. Mr. Pelech stated that he did not "well know" that and did not believe that to be a correct statement of the law. Mr. MacCallum stated that he disagreed and that he believed that the more specific use always trumps the general definition. He stated that in this case, there is only one thing that the provision could possibly mean, which is referring to motor vehicle sales, renting or leasing, including accessory and repair services. He stated that he could not imagine how the applicant expected to get around the requirement that there has to be a 200' buffer. Mr. Pelech stated that if looking to the more specific definition, the more specific definition is that outdoor storage deals with materials, and that this definition, in his opinion is ambiguous.

Mr. MacCallum and Mr. Pelech continued to debate over whether or not the definitions of "materials" and "outdoor storage areas," as set forth in the Ordinance, are sufficiently specific or ambiguous, and whether or not these definitions are relevant to the requested variance.

Mr. Jousse stated that he is perfectly satisfied that the Board is dealing with the right section of the City Ordinance, and he would leave it at that. He asked when the applicant became aware of the certain restrictions applicable to the property. Mr. Pelech responded that the applicant became aware of certain restrictions applicable to the property prior to purchasing the property but that the applicant did not believe that outdoor storage areas included parking of new, for-sale vehicles until after the purchase of the property. He stated that the applicant then became aware that the City interprets outdoor storage areas as being a condition against parking for-sale vehicles within 200' of a Residential district. Mr. Jousse asked specifically when the applicant became aware of this particular

restriction. Mr. Pelech stated that it was some time between December 31, 2003, when the property was purchased, and February or March of 2004, when the Change of Use Permit was granted for this property, subject to the provision that there could be no parking of for-sale vehicles within 200' of a Residential district.

Ms. Tillman stated that the Planning Department met with the owner prior to his purchasing the property. She stated that he may have signed a Purchase and Sale Agreement at the time they met with him, but that he had not completed the sale. She stated that the Planning Department met with him some time after he signed the Purchase and Sale Agreement, but well before he actually purchased the property he was aware of the situation. Mr. Jousse asked to clarify that the applicant/owner had been aware of the situation since March. Mr. Pelech responded that the applicant/owner had been aware of the situation since at least March, and that back in January 2004, when the dealership actually moved from its former sight on US Rte 1 across from the furniture store to this location, the City required a Change of Use Permit and they gave Portsmouth Toyota a Change of Use Permit, saying that the use was allowed there provided that Mr. Boyle and his engineers forwarded a plan to the City showing a 200' perimeter.

Mr. Jousse stated that since the applicant has been aware of what the restrictions are, he has a hard time understanding why he has been violating the Ordinance since March 2004. Mr. Pelech responded that the applicant/owner has on occasion, because some of his employees have overzealously parked vehicles too close to the road. Mr. Pelech stated that the applicant/owner has secured the violation when he has been made aware of the violation. Mr. Jousse stated that he drives by the property everyday, and that all of the parking spaces to the road have been filled. Mr. Pelech stated that he would disagree with that. Mr. Horrigan stated that all of the parking spaces have been filled, but that they are not for-sale vehicles. Mr. Pelech stated that this is where the Ordinance becomes ambiguous, because if employee, customer and student vehicles are allowed to park in those spaces, but for-sale vehicles are not, the definition of what is allowed is unclear. Mr. Jousse stated that adjacent to the sign, he has seen several vehicles parked with for-sale signs on them, clearly within 200' of the Route 1 By-pass. Mr. Pelech stated that he would not argue with this statement, but that this is not a daily occurrence. Mr. Jousse stated that he does see it every time that he drives by the property, which is at least six times a week. Mr. Pelech stated that Jason Page, the inspector, has been to the site several times, and that whenever he has made the owner aware of any violations, they have been cured.

Mr. Horrigan addressed Mr. Pelech, stating that he failed to see any ambiguity in the wording of the Zoning Ordinance, other than the fact that some might put a comma before the word 'provided,' which creates a distance between the phrase "motor vehicles sales." Mr. Horrigan stated that he would rather talk about the request for Variance (rather than the clarity of the language in the Ordinance). He stated that he had some questions about what in fact was being planned. He stated that it was not clear to him. He stated that he had a question about the Route 1 By-pass side of proposal and then the Greenleaf Avenue side. He stated that Mr. Pelech made reference to cars coming and going from Southern New Hampshire University, and customers of Portsmouth Toyota, but as he understands it, those parking spaces are going to remain there and those vehicles would continue to come and go. He asked Mr. Pelech to clarify whether those parking spaces would remain for the existing use or if they would become display spaces, in which case the coming and going traffic would no longer be an issue. Mr. Pelech stated that the applicant would stipulate that any of the spaces on the Route 1 By-pass side would be for display vehicles. Mr. Horrigan verified with Mr. Pelech that the coming and going of vehicles is not a consideration. Mr. Horrigan noted that on the diagram, it appeared that there would still be some buffer, and asked whether or not the applicant was considering having a second row of display vehicles within the 100' buffer zone. Mr. Pelech stated that there is a possibility that they

would put a second row directly behind that would not be the typical parking spaces as they would be bumper to bumper, but would still allow an access way between the two rows of spaces and the building. Mr. Horrigan noted blank space on the drawing and asked what would be happening with that space. Mr. Pelech stated that it would primarily remain a landscape buffer. He stated that the existing spaces may be moved out several feet to allow back to back parking and still maintain a 20' travel way behind it.

Mr. Horrigan stated that the request of the applicant is ambiguous, and that the plan of the applicant is unclear. Mr. Pelech stated that the applicant could provide a detailed plan. Mr. Pelech stated that the applicant is asking to put two rows of parking where one is currently existing. He stated that the distance between this parking row and this green space is probably 24+/- feet. He made reference to the diagram, stating that the applicant would like to be able to move the existing row, and that it would require moving those spaces 10'-15' so that vehicles could be double-stacked within this green line area. Mr. Horrigan stated that he now understood the applicant's plan.

Mr. Horrigan asked if there is low-income residential housing on the Greenleaf Avenue side. Mr. Pelech pointed out the 100' line and 200' line on the diagram. Mr. Pelech then pointed out the green parking spaces on the diagram, which are allowed for parking of regularly accessed vehicles, but not allowed for parking of for-sale vehicles.

Mr. Horrigan noted that there are other parking spaces outside the 100' yellow buffer line, and asked whether or not those would remain. Mr. Pelech stated that those would still be available for customer parking, but not for display vehicles.

Mr. MacCallum asked how late the business remains open to sell vehicles. Mr. Pelech stated that the business stays open until 8:00 p.m. Mr. Pelech stated that the last class for Southern New Hampshire University ends at 10:00 p.m. Mr. MacCallum inquired about the outdoor lighting that would be necessary for the display vehicles. Mr. Pelech stated that the lighting would be for that size standard and would be approved by the City of Portsmouth Planning Board, and would meet all of the requirements of the Zoning Ordinance as to lighting, with regard to pole light and with regard to spillage of light over the property line. He stated that it would also stipulate that any outdoor loud speaker, which apparently is the second concern, would not such as to disturb neighboring abutters. He stated that there is one in effect now and that the applicant has no plans to change it.

Chairman LeBlanc asked whether or not a loud speaker currently exists on the property. Mr. Pelech stated that the applicant has an intercom system that does have an outdoor speaker. Chairman LeBlanc asked what time the business opens in the morning. Mr. Pelech stated that the showroom area opens up at 9:00 p.m. but that the service area for people who want to drop off their vehicles for repair opens at 7:30 p.m. Mr. Pelech stated that if the loud speaker is an issue, it would not be a problem if the Variance is conditioned upon having no outdoor speaker system.

Chairman LeBlanc asked what the distance is between the residential housing buildings and Greenleaf Avenue. Mr. Pelech stated that he could not give an accurate response but stated that the closest building is "quite a ways" from Greenleaf Avenue. He stated that it is probably 25'-30' from the property line and 100' from the closest parking space.

**SPEAKING AGAINST THE PETITION**

Mr. Sam Tombarelli of 433 Greenleaf Avenue, stepped forward to request that the Board deny the requested Variance, which would expand Portsmouth Toyota dealership on Lafayette Road onto residentially zoned area. He stated that he and his spouse, Amanda Tombarelli, are protesting the Variance proposed on the basis that this is one of several ways in which Portsmouth Toyota is encroaching upon the surrounding residential area, especially on the Greenleaf Avenue side. He stated that Portsmouth Toyota has encroached upon Greenleaf Avenue in three major ways, which have had tremendous negative impact on the neighborhood.

He stated that the first main grievance that he and his wife have with enlarging the car capacity of the Portsmouth Toyota dealership onto residential areas is that Portsmouth Toyota consistently uses Greenleaf Avenue for the use of their test drives. He stated that he and his wife see it as more cars equals more traffic, even though there is a sign on the street at the entrance of Route 1 to Greenleaf Avenue stating that through vehicles are prohibited (facing Chrysler Street). He stated that this has led to a dramatic increase in traffic on their street. He stated that he and his wife have witnessed test drivers exceeding the 25 mph speed limit in an effort to test the cars. He stated that at times, test drivers have used the driveways on Greenleaf Avenue to reverse direction.

Mr. Tombarelli stated that his second point is that Portsmouth Toyota consistently has 18-wheeler trucks carrying cars through Greenleaf Avenue to and from their dealership. He stated that this is a direct violation of the City Ordinance banning truck travel on Greenleaf Avenue. He stated that these trucks are so big that on occasion, they drive onto part of their front yard in order to take a left off of Greenleaf Avenue onto Peverly Hill Road. He stated that he and his wife live at the corner of Greenleaf Avenue and Peverly Hill Road. He stated that on two separate occasions, these trucks have actually hit and bent forward the Stop sign at the corner of Greenleaf Avenue as they attempted to take a right onto Peverly Hill Road. He stated that one would notice that the Stop sign is bent if one were to go there today.

He stated that his third point is that Portsmouth Toyota has dramatically industrialized the area in which they dwell, creating an industrially zone already dreadfully close to lower income residences at **[Wamesit]** Place. He stated that people who live in adjacent homes are finding the area increasingly encroached upon by cars being unloaded, increased exhaust emissions, along with a dramatic increase in traffic. He stated that all of these factors impose a danger, especially for the many children who live in close proximity to the dealership. He stated that in addition, residents of **Wamesit** Place on Greenleaf Avenue often have to weave around large trucks stopped on Greenleaf Avenue. He stated that it is clearly evident that the quality of life in this lower income section of the town has already been dramatically ill-affected by the enlargement of the Portsmouth Toyota dealership.

He stated that in conclusion, he and his wife firmly believe that Portsmouth Toyota at 150 Greenleaf Avenue has placed an unreasonable burden on the residents of Greenleaf Avenue and threatens to industrialize the entire neighborhood with delivery trucks, test drivers and large parking lots full of cars. He stated that Portsmouth Toyota has already encroached upon residents in the area by violating City Ordinances and by violating the common sense notion that human beings live in close proximity to the dealership. He stated that the people of Portsmouth depend upon the City Officials to create a happy medium between residents' needs and the needs to promote businesses in the community. He stated that he and his wife believe that Portsmouth Toyota is currently casting an unfair burden on the Greenleaf Avenue neighborhood. He stated that they are against granting the Variance and have attached a signed petition of other residents in the area, in protest of granting the Variance as well. He



stated that at the very least, they ask that the Board of Adjustment table consideration of this request for Variance or deny it, and request that a plan from Portsmouth Toyota outline the ways in which their dealership can prevent unreasonable burden on the residents in the surrounding areas, especially those who live on Greenleaf Avenue. He stated that, just to echo what he had heard Mr. Jousse state previously, he lives on Greenleaf Avenue 7 days a week, and that he drives by 7 days a week, and they are in direct violation of the Ordinance right now. He stated that the dealership has cars parked all across, including the grass, and that it has been this way since day one.

Mr. Christopher [Ray], a resident and abutter of 236 Hillside Drive, stepped forward to request that the Board deny the requested Variance. He stated that in order to best show how this is affecting his neighborhood, he wanted to go back in history. He stated that he was there on January 20, 2004, discussing a request for a change in a signage variance, and on that day he believed it was Mr. Horrigan who voiced his concern that the Board would go through the process of one request at a time, slowly, step by step, without a plan being put forth at the beginning. He stated that, as the Board could see, they were dealing with that now, and that perhaps it would continue.

He stated that ironically, although that was denied, a permit was issued for an aggregate signage of 258 square feet, where the Board denied an increase over 200 square feet. He stated that he realized that this was not connected to what was being discussed at the present meeting, but that these types of events are affecting the neighborhood in terms of the value of the neighborhood and what the people living there have to look at every day. He stated that the Board could find information on that themselves.

He stated that, as mentioned earlier, this has not been a case of occasional parking beyond the limits of the Ordinance. He stated that he drives past it every day himself, and that every day the cars are parked on the grass or sometimes at the edge of the parking lot beyond the Ordinance. He stated that at that point, it seemed to him that the property owner was not acting in good faith, and that the Board should not trust any sort of request for something that says they are going to increase land and that it may or may not remain as a display.

He stated that the gentleman representing the property here stated that the presence of the local college is already more intrusive than the dealership may be. He suggested that Board members would probably not prefer to look out their windows and see balloons and banners and hoods of cars open with "For Sale" signs on them. He stated that it looks like a "McDonald's Playland," and that it is just as intrusive as college students leaving, whom the neighbors rarely ever notice in the first place.

He stated that it was really upsetting to the neighboring residents because they are probably going to have to keep coming back before the Board because they don't know what it going to happen to their neighborhood. He stated that the dealership made a choice to move to this location, and that it is not the job of the neighboring residents to rectify problems that they accepted by choosing this location.

Mr. Ray concluded by stating that he is firmly against the granting of the variance, and that there will be others who feel that same way, who have expressed to him their constant frustration over this. He stated that a neighbor whom he speaks to regularly has a driveway that is constantly being used as a turn-around. He stated that this has been happening just since the dealership arrived. He stated that in addition to that, neighbors have to deal with the sound of trucks going by and actually shaking their homes.

The Chairman asked the Mr. Ray to confirm before he stepped down from the podium to confirm that vehicles have been parked on the grass that fronts Route 1 By-pass on a regular basis. He stated that the cars were parked beyond what is allowed in the Ordinance probably 75% of the time. The Chairman asked if these were the cars with the hoods open and the "For Sale" signs, and Mr. Ray responded that they were, and that the neighbors could also clearly hear people's names as they are called out on the dealership's intercom system. He stated that if he took notes, he could probably tell the Board the names of every employee of the dealership (because they are called out on the intercom system). The Chairman asked Mr. Ray to confirm his address (he asked if he lives at the end of Greenleaf Avenue) and Mr. Ray stated that he lives on Hillside Drive, across US Route 1.

Mr. Michael **Donal** of 152 Hillside Drive stepped forward to express his opposition to the petition. He stated that his main concern to bring attention to the Board is safety. He stated that he did not know how many of the members of the Board were aware of the fatal traffic accident that occurred in January 2003 at the intersection of the By-pass and Greenleaf Avenue. He stated that based on and determined to be inattention of the driver, killed a human being and ruined many families. He stated that it happened on his birthday, and that he did not see it but heard it. He stated that he did not realize the extent of the collision, and that it is still in his mind. He stated that he followed it in the papers. He stated that attention at that intersection is important. He stated that he now pays more attention than he ever had at that intersection. He stated that he goes out on that road every day.

He referred to another car dealership that has been in the neighborhood for a long time that has been very unobtrusive and does its business in a low-key way that is not gawky, and if anything, he did not think it causes a lot of distraction. He stated that in order to make its presence known, the dealership has not used a "whore house" mentality tactics for sales. He stated that Portsmouth Toyota is and has been in direct violation of the Ordinance for a number of months, especially on weekends, when the Zoning enforcement officers are not around. He stated that the cars are parked on the grass, with the hoods opened. He stated that he looks at that as an absolute distraction on the By-pass, and that prior to that, there hasn't been that much of a distraction.

He stated that the atmosphere portrayed by the dealership is that of a carnival or a circus. He stated that he has witnessed coming back home having someone at the By-pass stopped at the light waiting for the turn signal slow down and proceed past the intersection and then cross over that very small median that separates the road and making a turn, and then proceed to go into the Toyota dealership. He stated that the one thing that has been on his mind is the fatal accident that occurred at the intersection. He stated that the accident did not have to happen, and that the cause was driver inattention.

He stated that the hardship exists not with the dealership, but with the surrounding property owners who have already been encroached upon. He stated that the neighbors already live with the developments that are there, and that they do not need further encroachment. He stated that the Vo-Tech school and the users of the school have been good, and have not been obtrusive, and that it has existed there with very little fan-fair and attention. He stated that very seldom was the parking lot 25% full, and that now it is full all of the time. He mentioned other dealerships in town that have several for-sale cars, and that they are located in areas that do not abut residential areas, and that the Zoning regulations were put into effect to protect residential property owners from things that might adversely affect them.

He stated that in the fall, the neighbors enjoy some foliage that blocks their view of the dealership, but that in November, they will clearly be able to see it, and that it will be worse if this dealership is

allowed to expand with a multitude of more cars directly in the view of the neighbors. He stated that the dealership is not as unobtrusive as it was and that he does not expect it to get any better. He stated that with the help of Zoning regulations that are meant to protect citizens of the area, he hoped that the Board would consider the abutters and how the variance would affect them, and all of the people who utilize the road and look for safety to be of the utmost concern.

Mr. Linwood Arsneault, a direct abutter at 233 Hillside Drive, stepped forward to voice his opposition to the petition. He stated that his backyard faces the By-pass, so he has had the opportunity to see this property. He stated that he wanted to make a few quick points. He stated that he believed the proximity of stored vehicles would affect surrounding property values. He stated that since Toyota has moved there, he started hearing car alarms go off on a regular basis, at least a few times a week. He stated that if the dealership is allowed to park vehicles closer to the highway, that he would experience more of this. He stated that he wanted to submit a few names from his neighbors that are also encroached upon.

The Chairman asked Mr. Arsneault where the car alarms are coming from, if he could tell. He stated that he believed they were coming from the Toyota dealership. He stated that he has been living in the neighborhood since 1985, and does not recall car alarms going off prior to Toyota moving in.

The Chairman asked for anyone else wishing to speak to, for or against the petition. Seeing no one rise, he declared the public hearing closed.

### **DECISION OF THE BOARD**

The Chairman stated that Mr. Berg would be sitting on this question, and for the rest of the night. Mr. Jousse made a motion to deny the variance. Mr. Witham seconded the motion.

Mr. Jousse stated that a hardship really had not been presented, and when an applicant buys a piece of property knowing that there are certain restrictions on that certain piece of property and claim a hardship afterwards is rather unfounded. He stated that the applicant was aware that there were some restrictions on the property at the time that it was purchased. He stated that since the applicant has been there, it has been testified by many persons in person and by many signatures against this venture, that the granting of this variance would adversely affect the quality of life of the neighboring abutters.

He stated that he also, after the applicant has been made aware of certain violations by the code enforcement officer, it is quite apparent that the applicant has not acted in what would be considered good faith in trying to stay within the boundaries of the Ordinance or even within the boundaries of the variance that he is requesting. He stated that the enforcement of the Ordinance that we are supposed to safeguard would be violated. He stated that the spirit of the Ordinance would be violated by granting this variance.

Mr. Witham stated that he could see Attorney Pelech's argument that the parking of for-sale vehicles is not outdoor storage, as one could go to the definition for outdoor storage and argue that it does not include vehicles, but that he believes that the intent of that article was to include the parking of cars for sale. He stated that he would therefore go with the notion that the applicant would need a variance. He stated that even though it probably is a gray area, that he believes the intent was that that should be included. He stated that at one point, he was willing to grant the variance, and was keeping along side a list of stipulations, and the list was getting too long. He stated that he feels that that automobile dealerships in general are the most blatant abusers of the variances and the Zoning regulations. He

stated that if they ask to take an inch, they will take a mile, so he got a little leery of presenting stipulations because it all falls upon the inspector to enforce them, and they usually are abused. He stated that the property is unique, as the building and the parking around it has existed and has been used for various uses over the years. He stated that if the request was to use the parking lot as it currently exists, and never to expand or go onto the grass, he could see granting a variance to use the paved parking as it exists. He stated that he would put stipulations to not allow banners or balloons, but that he could go for that. He stated that the request is to allow 100' relief and that encroaches on the grass area and the plans are vague as to how they would encroach upon the grass area, and he thinks that it is not reasonable to encroach that far. He stated that he thinks it is reasonable to use the parking as it exists, but that the applicant is asking for much more than that. He stated that for those reasons, he would support the motion to deny.

Mr. Marchewka stated that he would like to add to Mr. Witham's comments. He stated that he read section 208, table 4 under #35, and he could see how it could be interpreted either way. He stated that he happened to agree with Mr. Witham that it was the intent to include parking cars. He stated that, like Mr. Witham, he was ready to potentially grant the variance because he has a hard time telling someone that they cannot park a car in a parking space. He stated that the spaces are there and that if the spaces are going to be used by cars, it would not matter whether they cars for sale or cars that are driven regularly. He stated the problem he has with the application is the 100' set-back. He stated that if the Board were to grant that, the applicant could park 3 or 4 rows of cars out on the lawn in front of the building, and that granting the variance would be opening the door for more problems than what has been seen already. He stated that looking at the Boccia analysis, that the benefit could not be achieved by some other method reasonably feasible – he stated that he was not sure what benefit was being sought, whether it was to park as many cars as possible on the lot. He stated that a method reasonably feasible would be to have fewer cars parked there. He stated that for those reasons, he would support the motion to deny.

Mr. Berg stated that to him, something amazing just happened, that he was convinced to change his vote. He stated that he was going to support the variance, but that what did him in was Mr. Witham's comment about the amount of relief that is being requested, a full 100'. He stated that he did feel that the applicant demonstrated a hardship, and that this is a unique situation, if not for the wetland buffer, there would be plenty of space. He stated that he has no problem with the Greenleaf Avenue portion of the relief, and that he thinks it is somewhat of a misnomer to call that a residential area or to require it to be buffered when in fact the Dodge dealership and Bournival dealership actually abut the same property (the low income housing on Greenleaf Avenue). He stated that he was not concerned about diminution of value of property of abutters as there is a highway there. He stated that, however, what does concern him is that the Ordinance is enough just to keep all of these cars away from the residents on the other side. He stated that it is aesthetics and, as Mr. Marchewka stated, there is plenty of rooms to stack 3 rows of cars with hoods open with balloons and signs. He stated that he fully supports the right of the car dealership to be there, and to park all of the cars in the existing parking spaces that they want, but the threat of having the carnival atmosphere. He stated that had the variance request simply have been to allow the display of new vehicles in the existing parking spaces, he would have no problem with it, but he believes that too much relief is being requested, and for that reason he would support the motion to deny.

Mr. Horrigan stated that he agreed with the comments made so far, and would join in with Mr. Berg's comment. He stated that, however, he does think that the barrier of surrounding properties is an issue here. He stated that it was an issue that concerned him since he first noticed the car dealership located

on this property. He stated that it was the basic nature of car dealerships to ask for signage and parking relief.

He stated that the dealership does have a sense of relationship to a very large residential neighborhood of Hillside Drive, and that there are some residential citizens living across Greenleaf Avenue as well. He stated that he feels that to give the dealership a variance for a proposed use for which the Board does not have a plan in front of them, is simply trusting too much, because car dealerships do have a tendency to become somewhat garish in presenting row after row of very large vehicles. He stated that he did not think the Board should force that kind of landscape upon the abutting residential neighborhood, or that they should not grant right up to the road in this case.

He stated that he would be willing to consider less open-ended relief, but that he did not hear any assurances from the petitioner that they would not in fact ultimately develop the "within buffer" zone to its maximum. He stated that that being the case, that the boundary of abutting properties would be affected, and that was his best judgment on this. He stated that he could not think of any scenarios in which abutting properties would experience increased values of their homes with the granting of this petition. He stated that he understands the special conditions of the property and whatever reasons that car dealership seem to want very large inventory sitting on the property, but that he needed to see a plan somewhat more modest than the one that was presented. He stated that for these reasons he would support the motion to deny.

The Chairman, hearing no further comment from the Board, called for the vote to deny the variance. The motion passed with a unanimous vote.

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2) Petition of **Christopher E. Muro, owner**, for property located at **293 Marcy Street** wherein the following Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow an L-shaped 96 sf deck with: a) an 11.91' rear yard where 25' is the minimum required, b) a 3.58' left side yard where 10' is the minimum required; and, c) 42.1% building coverage where 30% is the maximum allowed. Said property is shown on Assessor Plan 103 as Lot 47 and lies within the General Residence B and Historic A districts. Case # 8-2

SPEAKING TO THE PETITION

Mr. Christopher Muro, stated that he resides at and owns 293 Marcy Street, and that he would like to go through the five points for the granting of this variance. He stated that he has spoken with his neighbors, and has a petition signed by his rear abutter and right side abutter, and that his left side abutter was present in the room.

Mr. Muro stated that he felt "kind of silly" asking for about 12 square feet. He has .04 acres which is about 1568 square feet, and that currently his house covers 41.7% of the lot coverage. He stated that the requirements of Section 10-302(A) stated that a lot size of 5,000 square feet should have 80' of continuous street frontage, where he has a little more than 30' of street frontage. He stated that according to the Ordinance, a lot of 5,000 square feet should have a depth of 60' and that he has less than 53' on his longest side of lot depth. He stated that he has a front maximum yard of zero because his home comes right up to the property line. He stated that on the right hand side, his house sits on the property line and that on the left hand side he has a maximum of 3.5' of side yard space. His rear yard is 12.5'. He stated that he is asking for a variance that will allow him to reconfigure the shape of

his deck. He stated that the deck currently is 84.25 square feet, and does not allow him to use his parking space.. The new deck would give him 3.5-4 square feet of extra space, which would allow him to park an additional vehicle.

Mr. Muro stated that the special conditions or unique circumstances that exist are that his lot has less than half of the square footage which was designed for the minimum lot dimensions. He stated that this was the first property that he had ever owned, and that he did not realize that these limitations or procedures existed. He stated that he wanted to thank Ms. Tillman for her patience and excellent guidance and time in helping him complete this process.

Mr. Muro stated that the first piece of the analysis for variance was for public interest and that he passed the petition signed by the two abutters. He stated that he believed he had outlined the special conditions of his property as they relate to the petition. He stated that the unique condition is that with the new configuration, he would be able to properly park his car and thereby not park on the road or take up a parking space that the public could be using. He stated that he believes that substantial justice would be done by granting the variance and that the value of surrounding properties would not be diminished. He stated that his deck, as it exists now, is in a state of disrepair and that a new deck would bring more aesthetic to that area. He stated that his neighbor can see his deck from her driveway and side yard.

Mr. Berg stated that in looking at the proposed deck plan, that if he understands everything correctly, where Mr. Muro has an existing entrance through the back door, that is the back door. Mr. Berg asked if Mr. Muro had looked at other configurations that would improve his parking and recreational space. Mr. Muro stated that he has looked at other configurations of this space, and that the reason the proposed deck was this size was to meet dimensions of vehicles. He stated that he uses the deck for very few purposes, and that he was looking for something that allow easier access to his home. He stated that he has twins, and that the stroller he uses is very cumbersome. He stated that the proposed deck would facilitate entering the home with the stroller because instead of going up 6' of stairs, it would require going up 18" of stairs in the back. He stated that he has looked at other configurations of the deck, and that another option would be to take down the whole deck and put it up in the same fashion in which it currently exists. He stated that this would limit his use for parking.

SPEAKING AGAINST THE PETITION

The property owner at 37 Market Street, a neighbor on the right hand side, stepped forward to speak in opposition. She stated that she has no problem with Mr. Muro's proposed plan, but that she does not want the new deck to interfere with her yard. The Chairman verified that the lot was surveyed. Mr. Marchewka asked whether or not she has seen the proposed plans and she stated that she had not.

The abutter stated that after looking at the proposal, she has no problem with it.

The Chairman called for anyone else wishing to speak to, for or against the petition. Seeing no one rise, he declared the public hearing closed.

DECISION OF THE BOARD

Mr. Horrigan made a motion to grant the petition as advertised and presented. Mr. Jousse seconded the motion.

Mr. Horrigan stated that as far as the public interest is concerned, the Board had heard from one of the abutters, and that her concerns had been addressed, and that the Board also has signatures supporting the proposal. He stated that as far as the hardship is concerned, there are a number of area variances in the proposal – a rear yard variance, left side yard variance and coverage variance – as the petition has indicated extremely small lot, so just about any kind of renovation, even a change of deck, is likely to create dimensional problems.

He stated that as far as the side yard variance, it is not really being extended, as the house is currently 3.58 (roughly 4') from the property line, and that the applicant is proposing with the deck to continue along that same line. He stated that he feels the application makes sense because a deck that does not frame up with the side of the house would not be as attractive as one that ties in with the corner of the house.

Mr. Horrigan stated that as far as the lot coverage variance is concerned, the petitioner has indicated that he is currently at 41.7% and that he would be going up to 42.1%, and unless his arithmetic is wrong that is roughly 6 square feet additional coverage. Mr. Horrigan stated that in general, these would be small dimensional variances, though he realizes that the yard would otherwise be non-conforming as proposed.

The Chairman requested of Mr. Horrigan and Mr. Jousse to amend the motion to read that the right side yard be 10', not as on the plan at 9.25'. Mr. Horrigan and Mr. Jousse indicated that they agreed. Mr. Marchewka asked that another stipulation be added, that the deck remain open and clear to the sky (not enclosed).

The Chairman asked for any other comments from the Board, and hearing none, called for the vote. In a unanimous vote, the requested variance was granted.

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3) Petition of **MacLeod Enterprises, Inc, owner**, for property located at **1390 Lafayette Road** wherein an Equitable Waiver as allowed in NH RSA 674:33-a (Equitable Waiver of Dimensional Requirement) is requested to allow the existing Comfort Inn building to maintain a 34' rear yard where 50' is the minimum required. Said property is shown on Assessor Plan 252 as Lot 8 and lies within the General Business district. Case # 8-3

**SPEAKING TO THE PETITION**

Malcolm McNeill represents the applicant with regard to the Equitable Waiver petition. He stated that Mr. MacLeod was seated in the front row. He stated that Peter Knight, an appraiser from Stanhope Appraisal Services, was there and would speak briefly with regard to the issue of the impact of the dimensional issue on surrounding properties. He stated that a representative from Pro-Con Construction, who was involved in the construction of this building, would speak to the cost of making the building conforming, if the Board were to require that be done if this relief were not granted.

He stated that the packet contained a Certificate of Occupancy, which is rather unique for a ZBA hearing, and which was submitted to the Board to indicate that this building was complete and occupied in 1988. He stated that this is significant because there are four criteria for an Equitable Waiver, but that two of those criteria can be waived if it is found that the structure has been in existence without complaint for ten years. He stated that the provision is in the Statute 673:33-a,

which says "In lieu of the findings required by the Board under the sub-paragraphs A and B, the owner may demonstrate to the satisfaction of the Board that the violation has existed for ten years or more and that no enforcement action, including written notice of violation, has been commenced against the property during that time by the municipality." He stated that 16 years had passed since the Certificate of Occupancy and that there have been no complaints by the City or abutters with regard to this setback. He stated that this matter had been brought to the City by the applicant, not by anyone else, because the applicant was proposing to sub-divide the Comfort Inn lot from the Yokens lot. He stated that in the process of this application, another survey was done which came up with a different measurement than the survey that was the subject matter of the Planning Board approval in the late 1980s.

Mr. McNeill stated that also in the packet were photographs of the area that is impacted, which is the extreme rear of the building that one would notice is very well buffered from adjoining properties. He stated that also included in the packet was a report from ProCon Construction with regard to the cost of taking down 16' of the building and making the building conforming, which at a minimum would be between \$1.5 and \$1.75 million to accomplish that result. He stated that with regard to the standard of review, this is one of the unique areas of jurisdiction where hardship is not at all an issue. He stated that this building does not move, nothing happens on this site with regard to any activities. He stated that the application has been submitted solely because of a difference in a survey. He stated that the section of the Ordinance that is involved is Article III, Section 10-304(A), which is entirely dimensional, and states that the applicant should have 50' at this location (he has 34'). He stated that but for the fact that the new survey had brought up the issue, it certainly would not have been discovered as a result of activity of abutters and would not have been discovered by anyone else and no has there been any complaint by the City. He stated that the applicant is basically asking the Board to grant what he would call the "innocent mistake that doesn't hurt anybody" relief, that the legislature provided by this Equitable Waiver statute.

He stated that the second standard is that due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected. He stated that Mr. MacLeod certainly felt that he was in complete compliance with his approval when the building was built in 1988, and that he would probably still presume that he was in compliance were it not for the results of the survey that the applicant was speaking to at the time of the proposed subdivision.

Mr. Knight stated that if the applicant were to take the Comfort Inn and move it the 16' to the place in which it was supposed to be placed, that would not provide either of these properties with any additional visibility. He stated that the one thing the Board needs to know, which they could probably see from the photographs, is that if one looks at the section where the 16' problem area is, it is an area that has a great degree of slope. He stated that if one is standing at the Ford Dealership toward the Bowman property and looking out the back of the property, one would see a slope that goes upward fairly dramatically, at the base of the Comfort Inn at the top of the hill. He stated that the slope is entirely treed. He stated that no one can approve that slope for anything, given its location, and given the amount of slope, and that it provides a nice treed buffer between 150 and 180 Mirona Road and the Days Inn property.

Mr. Jousse asked whether part of the property was zoned Industrial and the other was zoned Business. The Chairman answered that the Industrial Zone is on the other side of the property. Ms. Tillman stated that was correct. Mr. McNeill stated that the Industrial Zone is contiguous to the General Business Zone, but that the applicant's property line was on the General Business line. Mr. McNeill



stated that this would also speak to the permissible types of uses that would not be impacted by this because industrial uses are permitted very close by.

Mr. David Rache, general superintendent of ProCon Construction, stepped forward to speak to the petition. He stated that he had been a superintendent for over 30 years and that he was the superintendent for the original construction of the hotel in 1988. He stated that Kevin recently called him and asked him to take a look at the feasibility of removing 16' from the end of the building, and what that would entail.

He stated he would estimate the cost to be \$1.5 – \$1.75 million to eliminate the encroachment. He stated that he would estimate that it would take six months to complete this work. He stated that the hotel could not be in use while this work was being done because they would be moving the stair tower, the fire protection system, the hearing and water main. He stated that the hotel could not function while they were completing construction.

Attorney Robert Ciandella representing Market Basket, which is abutting the site. He stated that he had some very brief comments to the application. He stated that the Board had heard a very comprehensive presentation already, and that his comments would be brief. He stated that the abutter is not opposed to this application and is very interested in the site. He stated that the area is a very congested intersection area using access to Route 1 onto the site and abutter has a direct and material stake in what happens with the site. He stated that they have reviewed the departmental Memo on this application and that they fundamentally agree with it. He stated that Mr. McNeill's explained in context of a pending application to subdivide the property that is going before the Planning Board on Thursday of this week. He stated that they do think that the Board, should note of record that if the Board were to decide to grant the Waiver, that relief should in no way be compounded or used to get relaxation of other standards.

The Chairman called for anyone else wishing to speak to, for or against the petition. Seeing no one rise, he declared the public hearing closed.

### **DECISION OF THE BOARD**

Mr. Jousse made a motion to grant the Equitable Waiver. Mr. Witham seconded the motion. Mr. Jousse stated that sometimes even with the best intentions, one does not get things just quite right. He stated that things were not quite right for 16 years until it was discovered by the applicant that their building was not where it should be. He stated that when the applicant found out about the discrepancy, they tried to get it remedied, and this is the process. He stated that no adverse effect has been suffered by anyone as a consequence of this misplacement of the building. He stated that no diminution of property has occurred because the Ford dealership was not in existence at the time (there was a lumber yard there) and nothing would be gained by requiring the applicant to meet the 50' set-back. He stated that it would be a total destruction of the business and would be a very expensive venture for really no good reason. He stated that he believed that the Board should grant the Waiver.

Mr. Witham stated that he agreed with Mr. Jousse. He stated that he thought he covered Section C. He stated that he would go to Section D, and state that the cost far outweighs any benefit to the public of making this change to the structure.

The Chairman, hearing no other comments from the Board, called for the vote to grant the Equitable Waiver. The Waiver was granted with a unanimous vote.

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4) Petition of **Vincent M. Yosua, owner**, for property located at **30 Spinney Road** wherein a Variance from Article IV, Section 10-402(B) is requested to allow an 8' x 10' deck adjacent to an above ground pool with a 3'± left side yard where 10' is the minimum required. Said property is shown on Assessor Plan 171 as Lot 2 and lies within the Single Residence B district. Case # 5-1 and Case # 8-4

### **SPEAKING TO THE PETITION**

Mr. Vincent Yosua, Sr., of 30 Spinney Road, owner, stepped forward to speak to the petition. He stated that first of all, he wanted to thank the Board for the re-hearing, and specifically thanked Ms. Lucy Tillman for her help. He stated that he just noticed now that the first Abutter's Notice reads the same as the Abutter's Notice for this petition. He stated that the letter states that it is now 7' where 10' is the minimum required. Ms. Tillman stated that Mr. Yosua was previously granted a re-hearing on the original petition, so that was what was re-advertised. She stated that what he was speaking to were the changes that he put into his request for re-hearing. Mr. Yosua stated that he had some other letters from neighbors that he wanted to submit before he continued.

Mr. Yosua stated that he believed the Board had a copy of the letter, plus pictures that were taken of where the pool and deck are situated. He stated that if they do have those, they should pretty well explain, with the letter that was written and the pictures that were shown, why it would be very costly plus a lot of other things to try to move that deck anywhere else around that small pool. He stated that one picture that shows where the filtration system is, and that if the deck were to be put there, he could not access that system. He stated that the other side is a hill, and the third side would be in violation. He stated that the new evidence is that he believed was also submitted for 400 square feet, 4 feet by 100 feet. He stated that it seemed to him to be in the 1970's that he had forgotten about. He stated that this was the new evidence that he was presenting. He stated that he was trying to show that it would be hard to move that deck, with the pictures and the letter and so forth. He stated that until Mr. Owens bought that property, he was under the assumption that he was in compliance. He stated that to this day, he is still not sure whether he has more than the 7' where 10' is required or not. He stated that it was not financially feasible for him to have a survey done, so it would have to stand as is, and that the Board was looking at 3+/- feet.

The Chairman stated that the Board had a letter from Mr. Owens, who claimed that Mr. Yosua's fence was actually on his property. He stated that he had moved that fence back about 4 feet when Mr. Owens complained about it when he had his property surveyed. He stated that if he moved the fence 4 feet from where it is, and he was happy with where it is now, if he moved it 4 feet, it would certainly not be on Mr. Owens's property, because Mr. Yosua moved it 4 more feet than Mr. Owens thinks he did. He stated that it does not show on the City plan. He stated that it has to be registered, so that is why Mr. Owens is stating that the fence is still on his property, which is not true. He stated that he had moved the fence 4 more feet from where it was before, and that when Mr. Owens complained, he moved it back.

Mr. Berg interjected, stating that in reading Mr. Owens's letter, it did not appear to him that Mr. Owens is claiming that Mr. Yosua's fence is still on his property today. He stated that the way he is reading the letter, Mr. Owens is claiming that the fence was previously on his property, in 1991 and 1992, and that a legal dispute arose as a result of which Mr. Yosua basically agreed to move the fence.

He stated that he did not believe the Mr. Owens was claiming that the fence is still on his property today. The Chairman stated Mr. Owens was therefore stating that the fence is where he claims is where the property line should be. Mr. Yosua stated that up until the point when he had to move his fence, he always thought he had the 10', so he did not know what Mr. Owens's surveyor said, but that he did not have the money to spend to make the deck compliant. He stated that he was sure that he had 7', 4 more feet from his fence, because he did move his fence to Mr. Owens's satisfaction. He stated that he did not intend to move the fence back 4', but that he still does have that 4' beyond the fence.

Mr. Holloway asked the Chairman if the BOA could legally make a move with this application, because it seemed to him that it was a boundary dispute. The Chairman stated that he did not think the BOA could. Mr. Witham stated that if the Ordinance that the applicant was seeking relief from is 10', it is not a matter of whether this gives him the 10', because there is still an issue of depth even if the boundary issue is resolved. Ms. Tillman stated that it was still advertised as 3', which was the original, before the issue of the extra 4' came into play. She stated that regardless, it was still advertised for 3', and if it is 3' it is 3', and if it is 7' it is 7', but it is still at the lower number. Mr. Witham stated that if the Board granted the variance for 3', hypothetically they could resolve this boundary issue, find that the boundary is the 4' over, and then a future owner of the property could up and move the deck over 4', because there is a variance to be 3' from the side lines. Ms. Tillman stated that this would be the case unless the Board stipulated that the deck not be moved. Mr. Yosua stated that the deck might not even be there when his granddaughter graduates in three years.

The Chairman asked Mr. Yosua when he moved the fence. Mr. Yosua stated that Mr. Owens would know better than he would, because he told him when he moved in (probably the early 1990s). He stated that it was 30 some-odd years that it stood at what he thought it was in compliance, and Mr. Owens stated that it was not. Mr. Yosua stated that if he had the property surveyed, it would be his word against Mr. Owens's, but that he just did not have the money at this time to have the survey done.

Mr. MacCallum asked what the height of the fence was. Mr. Yosua stated that it was a six-foot fence.

### **SPEAKING AGAINST THE PETITION**

Mr. William Owens, of Spinney Road, an abutter of Mr. Yosua's property, stepped forward to speak against the petition. He stated that he bought his home in 1991, and since it was an irregular lot and it was a bank foreclosure, he was advised to have it surveyed. He stated that he asked John Chagnon of Ambit Survey to do the survey and when it was done, he was told that there was a problem, that his neighbor's fence was 4' over the line inside my property. He stated that Mr. Chagnon mentioned the 4' that his neighbor Mr. Yosua had purchased from the previous owner in 1971, and said he took that into consideration. He stated that taking that into consideration, the fence was still 4' over his property line.

He stated that Mr. Chagnon also said that he had measured the front of Mr. Yosua's lot. He stated that Mr. Chagnon told him that Mr. Yosua had originally purchased a 90' lot in the front and then he purchased an additional 4', but that he was occupying 98'. He stated that he had had several discussions with Mr. Yosua, and that he had brought up the survey and the expense of the survey, and that there really is a simple way to look into this and that would be to have Mr. Yosua measure the front of his lot for himself. He stated that both John Chagnon and he had had this conversation with Mr. Yosua, telling him that he was occupying 98', and that though he had purchased four additional feet, he was still 4' over the property line.

He stated that it would be unnecessary for Mr. Yosua to do a survey unless he wanted to. He stated that at that time, he had told Mr. Yosua that he felt they needed to come to an agreement as to what the actual property line was. He stated that Mr. Yosua was welcome to continue to use that land as long as he owned the property, and that he was not asking Mr. Yosua to move his fence. He stated that he felt bad about the situation, as he had just moved in and did not want to cause a problem. He stated that he wanted to be a good neighbor but that Mr. Yosua said that he wanted to straighten this matter out, because he would be passing this property on at some point and wanted to settle this. He stated that Mr. Yosua did not accept that offer to continue to use the land after we could agree on what the line was, though that would have been fine with him. He stated that they then talked about what the value might be, and that Mr. Yosua said that he did not think that the land was worth very much, and tentatively said something about \$400 per foot, for the 4' x 100' strip that John Shagnon indicated he was occupying that was my property. He stated that he felt that the property was worth more than what Mr. Yosua suggested and that he could not go for that.

Mr. Berg asked whether or not the fence was on the property line now. Mr. Owens stated that it was. Mr. Berg asked how far away the deck was from the fence. Mr. Owens stated that at the closest, that it would probably be 2 ½' – 3 ½'. Mr. Witham asked whether Mr. Owens understood that the request before the Board indicates that that deck is 3' from the property line, not 7' (that he agrees that that is the boundary). Mr. Owens stated that he believed the fence was on the boundary, and that he was contesting the request because it would allow the deck to be where it sits now, which is 3' from the boundary, and that he would ask that it not be allowed to be that close to his property. Mr. Witham stated that Mr. Owens made some comment that the 4' is not there or not his (Mr. Yosua's), and that was not the request that was before the Board. He stated that the Board was not voting on Mr. Yosua stating he has 7', but that he has 3'. Mr. Owens stated that he request that the variance be denied because it would allow the deck to continue to sit where it is now, which is 3' from the boundary line, as the survey shows. Mr. Witham stated that if Mr. Yosua's request were to be granted, it would not be based upon 7' (that that is not what was before the Board).

Mr. Jousse asked Mr. Owens whether there was anything else besides the deck and where it is presently located that Mr. Owens objected to about having the deck there. He asked Mr. Owens if it was noisy, whether he could see it, etc. Mr. Owens stated that last time, he may have given the impression that his neighbors are noisy, and that he does not have any complaint about his neighbors being noisy. He stated that they use the pool in a reasonable and healthy way. He stated that it is not that he feels the neighbors are using the deck in an overly noisy way, but that it is elevated above the fence. He stated that the fence provided excellent privacy, and even though tension existed, they were getting along until the deck went up. He stated that it was the loss of the privacy and the fact that the noise has been elevated above the fence line, so that it tends to come in quite a bit more. He stated that it changes the area completely, and that he and his family do not use that part of the yard if the neighbors are using the deck.

Mr. Holloway asked how far the aluminum ladder is from the fence. Mr. Owens stated that the aluminum ladder is in the part of his yard that is being re-landscaped. Mr. Holloway asked how far that was from his house (that he could not see Mr. Owens's house because of the foliage). Mr. Owens stated that it was approximately 20 to 30 yards. He stated that he understands that he has a large lot (it is a half-acre lot) and that he understands the argument that the deck is fairly far away from his house. He stated that it is the use of the yard while the neighbors are on the deck, not noise from the deck when he is inside his house, that bothers him.

Mr. Jousse stated that he was on the deck a few days prior, and that besides vegetation, the only thing mainly that he saw was a ladder that was approximately 20' from the fence itself. He stated that the pool is rather small, about 15' across, so if Mr. Yosua were to put a deck on one side or the other, it would not make much of a difference as to visibility from the deck. He stated that the deck should be at the height of the pool, and that it would otherwise create an unsafe situation. He stated that the noise is going to be the same, and that the visibility from the deck to the surrounding area is going to be the same whether it is there or 15' away. He asked Mr. Owens whether he would be comfortable with the fact that if the Board were to grant this variance, that the deck would be disassembled if this pool were ever removed. Mr. Owens stated that he would not be comfortable, and that it would not really help him. He stated that having the deck back 10' would help him a great deal in terms of privacy. He stated that there certainly would be noise, but that it was not the intensity of the noise so much as that the deck is "right there" and that he does not want his neighbors to be right at his property line. He stated that it seemed to him that there was a very natural place to put that deck that would be closer to the house that would be perfectly useful to the applicant and would be 10' away from the property line.

Mr. MacCallum asked Mr. Owens to verify, just so that it is clear that, as the Board established at the May 18, 2004 hearing on the prior application, one cannot see the deck from Mr. Owens's house. Mr. Owens stated that possibly when the deciduous trees are not there, he could see the deck, but that right now he could not. Mr. MacCallum asked if there was any reason, legal or otherwise, why Mr. Yosua could not take down that fence if he were so inclined. Mr. Owens stated that as far as he knew, Mr. Yosua could do this. Mr. MacCallum verified that Mr. Owens is "far better off now" with the fence up than he would be if Mr. Yosua took down the fence. Mr. Owens stated that if Mr. Yosua took down his fence, he would put up his own fence. He stated that to put up a fence that would cover the deck would have to be at least 10'-12' high. Mr. MacCallum stated that in any event, Mr. Owens was better off as things stand now than if the fence were taken down. Mr. Owens stated that the fence does help.

Chairman LeBlanc declared the public hearing closed.

### **DECISION OF THE BOARD**

Mr. Holloway made a motion to grant the petition as presented and advertised, with the stipulation that the 3' boundary need a marker and with the possibility of tearing it down if they removed the pool. Mr. Jousse seconded the motion.

Mr. Holloway stated that he was aware the Board was not privy to settling disputes such as this, but that he felt, as a colleague said before, it should have been taken care of years ago. He stated that however, he could understand the financial hardship that surveying causes people. He stated that he saw no reason to move at this point, because if there ever was a change of owners, the bank permit should set the boundary straight square away one way or the other, if they wanted to sell it or move it. He stated that he would therefore support the motion, because as he saw it, it does not infringe upon Mr. Owens's property. He stated that Mr. Owens indicated that it is not noisy enough to bother him, and that there is no reason why Mr. Yosua should not be able to continue to use the deck at its current location.

Mr. Jousse stated that he believed that granting this variance would be consistent with the spirit of the Ordinance. He stated that it would allow the applicant to enjoy his property in a greater fashion, for dependents and relatives. He stated that even though the applicant is asking for a 3' variance, the Board is looking to get into where the fence is or where the property line is. He stated that the deck is not visible from the street or from any other place except on the applicant's property. He stated that the lay of the land is such that placing the deck any other place would not be really feasible. He stated that there is ledge in the area, and if the deck were to be placed on the opposite side of the pool, the

applicant would not be able to get to the filtering system, which is a part of the pool. He stated that to move the filtering system, someone would have to empty the pool, physically pick it up and turn it around 180 degrees, which is not a reasonable thing to do. He stated that many of the neighbors on surrounding properties are in favor of this variance, and he did not believe that this would affect the values of surrounding properties in any way, shape or form.

Mr. Marchewka stated that he would not support the motion. He stated that regardless of the boundary issue/dispute (whether it is 3' or 7'), the deck is not in compliance. He stated that it is supposed to be 10' and that the deck was built without a variance, and is already up. He stated that the deck was built without a permit, and that he felt that the benefit sought by the applicant could be achieved by some other method reasonably feasible. He stated that he did not think it would be impossible to build the deck in another location. He stated that he felt that the filtering system and the deck were separate issues, and that he did not see those as intertwined. He stated that he felt that regardless of how several of the people in the surrounding neighbors are in support. He stated that the neighbor who is most affected, Mr. Owens, clearly feels that his property is being diminished by having someone basically standing over the fence and interfering with his privacy in the back of the lot. He stated that this petition was re-heard presumably because the Board had new evidence to consider.

Mr. Berg stated that he agreed with Mr. Marchewka, that nothing had changed.

Chairman LeBlanc called for the vote to grant the petition as presented and advertised. The motion to grant failed, therefore the request was denied.

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5) Petition of **Henry S. Dutkowski**, owner, for property located at **806 US Route One By-Pass** wherein a Variance from Article XII, Section 10-1204 Table 15 is requested to allow 37 parking spaces to be provided where 58 parking spaces are required. Said property is shown on Assessor Plan 161 as Lot 43 and lies within the Business district. Case # 5-11 and Case # 8-5

This petition was tabled to the September 21, 2004 meeting of the Board of Adjustment.

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6) Petition of **Brewster Street Property, LLC**, owner, for property located at **98 Brewster Street** wherein a Variance from Article III, Section 10-303(A) is requested to allow the relocation of a previously approved 11'3" x 23' attached garage with a 2.11'± left side yard where 10' is the minimum required. Said property is shown on Assessor Plan 138 as Lot 56 and lies within the Mixed Residential Business district. Case # 7-3 & Case # 8-6

**SPEAKING TO THE PETITION**

The firm manager for Brewster Street Property, LLC, stepped forward to represent the applicant. He stated that his commentary is on record from the last hearing, and that he would be fine if the Board preferred to review the Minutes. He stated that the applicant bought the property in February 2004, with a 3" left side yard set-back and petitioned to increase that to 2' side yard set-back and that the current petition is to slide the bottom of the garage from the front of the house towards the back of the house. He stated that it would create a better looking house, put the garage further off of the street, a better floor plan and allows the possibility of parking a second car, albeit a small one, off of the street.

He stated that the previously approved application allowed for a 2' left side yard set-back and that the current request would not change that requirement by sliding the garage back on the property.

Chairman LeBlanc called for any questions from the Board, and anyone else wishing to speak to, for or against the petition. Seeing no one rise, he declared the public hearing closed.

**DECISION OF THE BOARD**

Mr. Horrigan made a motion to grant the petition as advertised and presented. Mr. Marchewka seconded the motion.

Mr. Horrigan stated that this is a piece of property that he believed was owned by the City at one time, and that it is being developed with a residential unit. He stated that the Board should note that the lot area is very small, but is also next to the railroad tracks and the North Mill Pond area. He stated that it is a lot that would require some dimensional variance of one kind or another. He stated that the special conditions of the property would again be its small size, its relationship to adjoining properties, and its connection with the railroad tracks. He stated that the hardship is in trying to somehow construct the house to fit the property and also have a garage for off-street parking. He stated that no matter how one chips around the positioning of the structure, some relief is necessary. He stated that he could not see any other way that the petitioner could comply with all of the other dimensional requirements and still have a garage on his property without the proposal he has before the Board. He stated that it is consistent with the spirit of the Ordinance, in that it provides more housing for the City and more off-street parking for this neighborhood. He stated that substantial justice would be done to the petitioner to allow him to add this garage to the structure and given the nature of the building itself, the plans the Board had seen would improve the values of surrounding properties in the neighborhood.

Mr. Marchewka stated that he agreed with all of Mr. Horrigan's points, and wanted to add that this was a re-construction of a non-conforming single family home and that this is more conforming now than the original home that stood there.

The Chairman, hearing no other comment from the Board, called for the vote to grant the petition as presented and correctly advertised. The petition was granted with a unanimous vote.

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7) Petition of **Robert and Loraine Tozier, owners**, for property located at **484 Lincoln Avenue** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow: a) a 6' x 26' two story front porch with a 14' front yard where 15' is the minimum required, b) 12' x 28' two story addition to the rear with a 7.5' left side yard where 10' is the minimum required, c) a 6' x 12' two story addition to the rear with a 7.5' right side yard where 10' is the minimum required; and, d) 26.9% building coverage where 25% building coverage is the maximum allowed. Said property is shown on Assessor Plan 133 as Lot 47 and lies within the General Residence A district. Case # 8-7

SPEAKING TO THE PETITION

Ms. Loraine Tozier, applicant, stepped forward to speak in favor of the petition. She stated that she wanted to present what the applicant is trying to do, and the hardship upon the applicant should the variance not be granted. She stated that she and her husband had tried to find a house in Portsmouth

for many months and that they had been residents of Portsmouth prior to moving to Madbury. She stated that since her children are now 2 and 3 years old, they were starting to need a social life, and moved back to Portsmouth. She stated that she and her husband both work partly at home. She stated that she and her husband had to find a house that would fit their needs, and have the space for an office, and that they were hoping for an opportunity for variance relief. She stated that with the prices of houses in Portsmouth, it was difficult to find a house that was finished and had the space that they needed. She stated that the house in question is the closest they found, and that they had fallen in love with the neighborhood. She stated that the only problem is that the house is too small, at just over 1300 square feet, with only one bathroom that is 5' x 8'. She stated that when her kids are teenagers, they are going to have a problem.

She stated that they were seeking a variance to be able to increase the size of the house, put a bathroom on the second floor, have an office and a half bath on the first floor, and more living space overall. She stated that she and her husband had spent a lot of time putting plans together and a design that meet requirements. She stated that it has been difficult because the existing house is already over the set-backs. She stated that they are not increasing the set-backs, but that they just want to set the house in the rear along the set-back lines that are there. She stated that the house on both sides is already at 7 ½' where it should be 10', and that they want to do a rear kitchen that continues along those lines for aesthetic reasons and that they don't have any room that is completely off-kilter in the back. She made reference to the lay-out of the floor plans. She stated that the addition that they are proposing in the back of the house is an ell shape. She stated that one chunk of it would be a 28' x 12' addition and that the other piece would be toward the right on the back, a 12' x 6' (two-story).

She stated that the most difficult thing in this case is probably "what is the hardship?" and "why aren't you doing what you are doing within the lines?". She stated that if they were to do the addition that they would like to in the back, in order to meet the set-backs, they would have to 'indent' the house at least 2 ½ feet on each side. She stated that it is more costly to do that and makes it very difficult to find a roof-line that would look nice in the neighborhood.

She stated that as far as the affect on others, she and her husband had taken the time to sit down with their neighbors that are abutters on each side of them, and that they felt that if anyone were to have a problem with what they were planning, those neighbors would be the ones (along with the neighbors across the street regarding the porch). She stated that they did not hear anything negative. She stated that they had shown the neighbors the pictures to show dimensionally both the outside and inside and really talked that through with their neighbors. She stated that their neighbors who abut their property where they want to put the 12' addition were in attendance earlier and didn't stay, but that they had been fortunate enough not to hear anything negative from their neighbors about their proposed addition.

Chairman LeBlanc asked if they were going to change the windows on the second floor to be doors to get out onto that second story porch. Mr. Tozier stated that they did hope the one on the left and the one on the right would become doors, but not the one in the middle.

Mr. Marchewka stated that part of the analysis that they were required to use for an area variance is that the benefit that the applicant is seeking cannot be achieved by some other method reasonably feasible. He stated that it looked like it would not be that big a deal to be conforming with the addition in terms of the side yard set-backs. She stated that she agreed that it was possible to do that, but that they were requesting to not do that because the house is already on those lines, and that they worked with an architect and it was just very difficult to find a floor plan that would work without going along

the existing lines of the house. Mr. Marchewka asked if the architect had stated that it was infeasible. She stated that the architect said it would be feasible, but that it would be difficult or much more costly and that the house would not be as nice to look.

SPEAKING AGAINST THE PETITION

Mr. William S. Divine, of 470 Lincoln Avenue, stepped forward to speak against the petition. He stated that he had lived at 470 Lincoln Avenue for 42 years. He stated that he did not see where the applicant had any hardship whatsoever. He stated that they lived previously on Wibird Street and were familiar with the territory. He stated that they came in and bought a house, and the first thing they wanted to do was encompass the area with the building. He stated that was what was happening there. He stated that if the Board did decide that they wanted to approve it, he wanted them to take into recognition that one of the bedrooms, he was fairly sure, was going to be an office. He asked if that was business. He stated that the other part is for a library. He asked if this was for their own personal use, and stated that this should be established.

Mr. Jousse asked where Mr. Divine's property was in relationship to the applicant's property. He stated that he was on the corner of Lincoln and Union, three houses toward the City Hall. He stated that he knew the applicant's property very well, as it had been for sale for two and a half years or three years. He stated that a two or three story building cuts out sunlight and air flow, and that is something that should be considered by this Board.

Ms. Tozier stated that one important thing that she forgot to express about the hardship is that in terms of the lot coverage, they were asking for 1.9% over the allotted amount, and part of the reason for that is that they know that they cannot put more space in the basement due to flooding. She stated that also, in their back yard is a drain, and that they are finding out there is a lot of water left on their property. She stated that they would never be able to finish the basement because of the water issues. She stated that, with regards to air-ways, that they had no intention of raising the house any higher than it currently is.

Chairman LeBlanc called for anyone else wishing to speak to, for or against the petition. Seeing no one rise, he declared the public hearing closed.

DECISION OF THE BOARD

Mr. Witham made a motion to deny the application as presented and advertised. Mr. Holloway seconded the motion.

Mr. Witham stated that he was sitting there thinking, "How can I deny this wonderful woman who is probably a wonderful mother and just wants to have bedrooms for the kids, and who presented this very eloquently." He stated that he felt it was an overly ambitious project for this lot. He stated that when he look at the site plan, it seems fairly reasonable. He stated that the request on the sides are 2 ½' and that they are going over area that exists (even though one is a deck). He stated that in crunching some numbers, he gets that the volume of the house more than doubles, and to him, that seems to intense for this lot. He stated that it gets back to the issue that Mr. Divine had spoken about, in terms of light and air. He stated that it just seemed too ambitious. He stated that from the site plan, when one compares the two, it doesn't look like a big difference, but everything is a full two stories and the volume of the house increases so much, that it would be out of character with Lincoln Ave. He stated that he had always been an advocate of front porches, but that the two-story front porch and the doors above would be out of character. He stated that, not to be an architecture snob, but that he felt

the design of the house to be out of character for that neighborhood. He stated that it felt like a whole different scale, the way the volume of the house had increased so much.

Mr. Witham stated that he felt that this is where the Boccia analysis has some weakness, because it does not mention reasonable use, as Simplex does. He stated that he was not sure that a five-bedroom house would be reasonable use, but that the Boccia does say that this benefit cannot be achieved through another method reasonably feasible. He stated that he would argue that a third floor dormer would be reasonably feasible for this house, and that many homes in Portsmouth have added dormers to gain two additional bedrooms, and he felt that could be done without having such a large volume impact on the side lines. He stated that he felt that the variance would be contrary to the public interest, just due to the mass of the new structure and its effect on the surrounding light and air. He stated that he felt that the benefit could be sought in another way, and that he did not see any special conditions to the property. He stated that he felt that the variance would not be consistent with the spirit of the Ordinance because it is overdeveloped and too dense for the lot. He stated that he did not feel it would give substantial justice. He stated that it might to the applicant, but that he did not think it would to the neighbors. He stated that even though the neighbors have seen it, and have signed on and wished them luck, he personally thought that it would diminish the value in terms of these two-story structures being close to property lines and the character of the new house, which he felt was at a greater scale than what is typical for that street. He stated that it was well-presented and that he understood the applicant's need, but that the volume of the house doubles, which scared him off because he thought it was too intense.

Mr. Holloway stated that he only seconded for discussion. He stated that he agreed with Mr. Witham, that this would be a lot of building for that small lot and would definitely change the character of the neighborhood. He stated that he did not see a hardship.

Chairman LeBlanc, hearing no other comment from the Board, called for the vote to deny the variance. The petition was denied with a 6-1 vote, with Chairman LeBlanc voting in favor of the petition.

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8) Petition of **William Ashley, property owner, Debora A. Paneblanco, homeowner**, for property located at **308 Oriental Gardens** wherein a Variance from Article II, Section 10-209 is requested to allow an existing 10' x 53' manufactured home to be replaced with a new 14' x 56' mobile home in the same location in a district where mobile homes are not allowed. Said property is shown on Assessor Plan 215 as Lot 9-7 and lies within the Office Research district. Case # 8-8

**SPEAKING TO THE PETITION**

Ms. Debora Paneblanco, who has lived at 308 Oriental Gardens since 1987, stepped forward to speak in favor of the petition. She stated that it has been a mobile home park since 1968. She stated that she was requesting to replace an older (42 year-old) mobile home with a new one. She stated that it has been used as a mobile home site since she has lived there.

Chairman LeBlanc asked Debora Paneblanco to verify that the new home that she wanted to put in is 2' wider and 3' longer than the old one. She stated that it is, considering the old one is 42 years old, that is the main reason why one would find that difference. She stated that all of the homes around it are around the same size, and some are a lot larger than her home is now.

Mr. Jousse asked what would happen if the Board were to disapprove the variance. She stated she would be homeless. She stated that she did not intentionally do this, and thought that she went through the right channels, and that she did not own the land, so she went to the landlord to get his approval.

She stated that unfortunately, he did not know it was against Zoning regulations. She stated that by the time she realized it was against regulations, she had already started the process of tearing the old structure down and it would not have been sellable.

Chairman LeBlanc called for anyone else wishing to speak to, for or against the petition. Hearing none, he declared the public hearing closed.

### **DECISION OF THE BOARD**

Mr. Horrigan made a motion to approve the petition as advertised and presented. Mr. Holloway seconded the motion.

Mr. Horrigan stated that he had never been in Oriental Gardens before, and that it is a quiet Oasis, and that he couldn't believe it exists in the middle of all of the commercial mayhem. He stated that he didn't know if it was a use variance or dimensional variance. Ms. Tillman stated that it would be a use variance. He stated that it certainly would not be contrary to the public interest. He stated that there are a lot of strong arguments for preserving Oriental Gardens, as it is a special place. He stated that although it is non-conforming, that the Board should continue to allow trailers to exist there. He stated that it provides low-income housing, among other benefits. He stated that as far as hardship is concerned, that taking it away would clearly interfere with the owner's reasonable use of the trailer. He stated that he did not know where she would take it. He stated that as far as whether or not there is a fair and substantial relationship between the general purpose of the Zoning Ordinance and the specific restriction on this property, he could not see it. He stated that it had been a trailer park for many years, and that by all appearances it would remain that way for a long time. He stated that it would not injure anyone's public or private rights. He stated that indeed, some of the properties around the site are injuring the rights of residents of Oriental Gardens, because it is a well-vegetated, well-kept neighborhood. He stated that the variance is consistent with the spirit of the Ordinance, and that the Ordinance is, among other things, designed to provide reasonable housing for all of Portsmouth's residents. He stated that substantial justice would be done, and there is certainly no question of value of surrounding properties, as they are all trailers and this one is going to be an improvement over some of the older trailers there.

Mr. Holloway stated that he agreed with Mr. Horrigan. He stated that at this stage, it would be terrible to not approve the variance, and that he therefore supported the motion to grant the variance.

The Chairman, hearing no other comment from the Board, called for the vote to grant the variance as presented and advertised. In a unanimous vote, the petition was granted.

### **III. ADJOURNMENT**

Upon motion duly made, seconded and carried, the meeting adjourned at 11:00 p.m.

Respectfully submitted,

Lori J. Becker, Acting Secretary

These Minutes were approved as presented at the Board of Adjustment Meeting on February 15, 2005.

Mary E. Koepenick, Secretary

