

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

**7:30 P.M.**

**CITY COUNCIL CHAMBERS**

**December 14, 2004**

**MEMBERS PRESENT:** Chairman Charles LeBlanc, Nate Holloway, Alain Jousse, Bob Marchewka, David Witham, Alternate Steven Berg and Alternate Duncan MacCallum

**MEMBERS EXCUSED:** Vice-Chairman James Horrigan, Arthur Parrott

**ALSO PRESENT:** Lucy Tillman, Planner

**I. APPROVAL OF MINUTES**

The Minutes of the Meeting of September 21, 2004 were reviewed and approved unanimously by the Board.

**II. PUBLIC HEARINGS**

1) Petition of **Lawrence and Ruth Gray, owners**, for property located at **80 Curriers Cove** wherein a Variance from Article III, Section 10-301(7)(a) is requested for retroactive approvals for the following where the minimum setback from salt water marsh wetlands / mean high water line is 100'. Item 1) Approval is sought for an existing second story deck with dimensions of 10' x 14' which differs from the plan submitted to the Board showing the second floor deck having dimensions of 8' x 14'. The second floor deck constructed by the Applicant's contractor has a curved front which results in the deck being 10' x 14', the maximum extent of the "bump out". The plan submitted shows this Item as being 74' from salt water marsh wetlands / mean high water line. Item 3) In June 2002 a building permit was issued to convert a screened porch and deck to living space. The screen porch converted to living space had a cropped corner to accommodate an existing tree. Subsequently the tree was removed and the cropped corner was extended and enclosed. The Application seeks approval for the enclosure of the corner. The plan submitted shows this Item as being 81' from salt water marsh wetlands / mean high water line. Item 4) In 2003 the Applicant received approvals to construct an 8' x 14' deck with a 4' x 4' platform and steps to the ground. Due to the geographical features on the ground, the steps and platform were configured in a manner different from plans submitted. The Applicant seeks approval of the platform and steps as they are presently configured in this Application. The plan submitted shows this Item as being 67' from salt water marsh wetlands / mean high water line. Item 5) During the renovation of the Applicants home, a new bow window was installed in the kitchen. The bow window makes no contact with the ground. The Applicants seek approval of this bow window. The plan submitted shows this Item as being 60' from salt water marsh wetlands / mean high water line. Said property is shown on Assessor Plan 204 as Lot 14 and lies within the Single Residence B district. Case # 9-2

**ITEM 3**

Chairman LeBlanc stated that there was some evidence present that would imply that the case Fisher v. Dover would apply and asked if there was anyone who wished to speak on the application of said case to Item 3 of the petition.

**SPEAKING IN FAVOR OF ITEM 3**

Attorney Bernard Pelech spoke on behalf of the owners, Lawrence and Ruth Gray for the petition. In dealing with Fisher v. Dover as it applies to Item 3, it was Attorney Pelech's understanding based on conversations with Assistant City Attorney, Suzanne Woodland, that someone would make the argument that the Board not hear Item 3 as the issue of the case controls. Attorney Pelech stated that the said case does not apply to Item 3 and it should be heard as Item 3 has been materially changed in that it is a different proposal and that there have been changes in the zoning laws since the application was heard in 2002. As such, he stated that the case does not apply and the Board should therefore hear Item 3.

Chairman LeBlanc asked if there were any questions from the Board.

Mr. Jousse asked how the measurements of distance from the proposed items to the mean high water line were taken; how the whole process was gone about.

Attorney Pelech introduced Adele Fiorella, a wetland scientist from NH Soil Consultants who performed the measurements.

Adele Fiorella stated her qualifications. She stated that with respect to Item 3, from the highest observable tide line, best shown on the wetland plan submitted by Millette, Sprague and Coldwell, the enclosure of the corner is 81feet and from the mean high water, is 97.7 feet. She reiterated that the mean high water mark takes an average of all high tides.

Chairman LeBlanc asked if there were any further questions from the Board.

Mr. Berg asked Ms. Fiorella if her technique used to measure was the accepted technique or if there were other techniques that could have been used to produce a measurement.

Ms. Fiorella answered that there are other techniques but the method she used is the common practice.

Chairman LeBlanc asked Attorney Pelech about the plan submitted with the May 30<sup>th</sup> application. He asked what was existing in the corner of the deck that was cropped off.

Attorney Pelech answered that the corner had been squared off.

Mr. Jousse asked why the tree was removed.

Attorney Pelech said that the tree had been removed prior to that application because it was too close to the deck and it was overgrown.

Don Cook of D.D. Cook Builders, Inc. attested to the same and pointed out that the idea for removing the tree was his due to his concerns of it causing significant damage to the home in the future.

Chairman LeBlanc asked if there was anyone who would like to speak in opposition.

### **SPEAKING IN OPPOSITION TO ITEM 3**

Attorney Ralph R. Woodman spoke in opposition on behalf of his clients, Marvin and Norma Lesser, being direct abutters to the Grays. He asked the Board to look at Plan No. 3 where he indicated that the plan was the third exhibit that was attached to the February or late January Zoning Board of Adjustment Application. He stated that the Board had been told flat out by both the representative and the expert that

the Grays incorrectly used the highest observable tide line. He asked the Board to look at the line in Exhibit 3 submitted in February 2001, that goes from the corner of the deck to the existing wetlands which stated it was 82.5 feet and noted that NH Soil Consultants had made mistakes. He cited the zoning ordinance governing the issue and said that there was nothing new about the wetlands and thus, nothing had changed in the application. He asked the Board to look at the demolition plan and note the tree that was marked “to be removed”. He noted that the reason for removing the tree was so that they could gain 18 inches to square off the deck. He showed the photos of the tree taken before the application was submitted before it was removed. He also pointed out to the Board that there were a ton of leaves on the tree and thus, was not dead. He stated that the application requesting the variances was the exact same thing as originally heard before the Board on two separate occasions. He reiterated that after the Board denied the variance, a building application was filed requesting permission to convert a screened porch and deck into living space and were allowed to do so. He stated that as far as the change in the zoning ordinance for the City of Portsmouth, that there have been no changes in this regard that would help the applicants.

Mr. Witham corrected Attorney Woodman in that he erred in stating that Attorney Pelech had said there had been a change in the zoning ordinance as Attorney Pelech had stated that there had been a change to the zoning laws for the State of New Hampshire.

Attorney Woodman apologized and stated that the Supreme Court probably did not have in mind that every single time they change the definition of hardship that someone who had applied for a particular project would come in and apply for it all over again. He reiterated language from the case Fisher v. Dover and that of Attorney Loughlin that there was no change at all and was the same thing applied for as before.

Chairman LeBlanc asked if there were any questions from the Board.

Attorney Pelech reiterated that the zoning laws have changed and that alone gave his clients the right to seek approval from the Board and that the statement made by Attorney Woodman earlier was inaccurate. He remarked that Attorney Woodman stated the Grays not 10 days after being denied the variance sought a building permit to perform the work anyway and he pointed out that at the time of denial there were a few items that were never distinguished or separated and therefore, there was only one blanket vote cast. However, the problem the Board had with granting the variance was not the closing the corner but that the deck would have a roof and a screened porch beneath it due to runoff water, which the applicants then removed the roof and the variance was granted.

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

Chairman LeBlanc asked if there was anyone else who would like to speak to, for or against.

Larry Gray, the homeowner/applicant spoke on behalf of his petition. He made the statement that he was confused about the opposition to his petition. He remarked that when they initially proposed the project, they had sent out abutters’ notices and at the meetings, neither the Lessers nor the Powers came. He noted that they went through Roger Clum and Lucy Tillman at the City of Portsmouth and were informed that everything they were doing was correct according to their plans.

Chairman LeBlanc asked if there was anyone else who would like to speak to, for or against.

Ms. Fiorella wanted to respond to Attorney Woodman's comments regarding his Exhibit 3, the existing features plan dated December 30, 2002 in that there was nothing new about the wetlands and she verified that was an accurate statement. She further stated that what was depicted on the plan were three wetland boundaries which were delineated by NH Soil Consultants using the top of bank, highest observable tide line and edge of wetland. She stated that none of the boundaries had changed but the point was the mean high water by definition was different than any of those boundaries and at that time, mean high water was not something within either state or city jurisdiction and therefore was not needed to be shown on the plans.

A Board member asked if that was in the ordinance back in the 90's and Ms. Tillman stated that was it in the ordinance in 1995.

Mr. Witham stated that Attorney Woodman presented that it should be measured from the salt water marsh wetland or the mean high water line, it should be measured by either one or the other according to the zoning ordinance and asked Ms. Fiorella if she had a different take on that.

Ms. Fiorella replied that the ordinance is specific to Sagamore Creek.

Mr. Witham asked if she cited the wrong body of water for that measurement.

Ms. Fiorella thumbed through the zoning ordinance and cited the section/article that Mr. Witham was referencing (i.e. Section 10-614, Item 7A, Little Harbor and Sagamore Creek).

Mr. Witham stated that Ms. Fiorella measured from the mean high water mark and Attorney Woodman's measured from salt water marsh wetland or mean high water mark.

Attorney Pelech stated that Ms. Fiorella's measurements were taken from the mean high water mark of Little Harbor as shown on the plan.

Mr. Witham asked if that was different from the saltwater marsh wetland measurement.

Ms. Fiorella stated that was correct.

Attorney Pelech stated that it was different from the measurement shown on the plan, they did not take a measurement from the saltwater marsh wetland but from the mean high tide.

Mr. Witham noted the ordinance states one or the other and asked if they knew the measurements from the salt water marsh wetland.

Attorney Pelech answered no, that they did not take those measurements.

Ms. Fiorella stated that would be coincident with the delineated highest observable tide line as shown on the plan.

Mr. Jousse stated that what he had heard sounded like the measurements that were taken were totally irrelevant to the City ordinance.

Ms. Tillman agreed.

Mr. Jousse stated that the City gives certain criteria, either or and what NH Soil Consultants did was use a different benchmark.

Ms. Tillman stated mean high water.

Chairman LeBlanc clarified that it is either or, either salt water marsh wetlands or the mean high water line of Sagamore Creek.

Mr. Marchewka asked who chooses, assuming it's the greater.

Chairman LeBlanc stated that most ordinances call for the greater.

Mr. Marchewka asked which one was greater.

Ms. Tillman stated that was what the applicant was supposed to tell us.

Mr. Marchewka reiterated, which was the greater distance, the mean high water mark or the edge of the wetlands?

Ms. Fiorella stated that the distance was from any of the building components to the mean high water which are longer distances than from the salt marsh edge.

Chairman LeBlanc stated the salt marsh edge was the line delineated on the plan which was used by the State.

Ms. Fiorella answered that was correct.

Chairman LeBlanc stated that the State also uses as their criteria for defining an area in protection was the highest observable tide line.

Ms. Fiorella answered that was correct.

Chairman LeBlanc asked if that was same with the salt water marsh area.

Ms. Fiorella stated that was correct.

Chairman LeBlanc asked if there were any other questions.

Mr. Berg reiterated the remarks made by Ms. Fiorella earlier about the definition of the mean high tide being a point further out from the land then the highest observable tide, therefore the ordinance states the setback has to be either the close point or the farthest point.

Chairman LeBlanc stated that the distance from the areas the Board were discussing was 81 feet.

Mr. Marchewka asked if the 81 feet was from the salt marsh, which Chairman LeBlanc confirmed.

**SPEAKING TO, FOR, OR AGAINST THE APPLICABILITY  
OF FISHER V. DOVER TO ITEM 3 OF THE PETITION:**

Chairman LeBlanc asked if there was anyone who wished to speak to, for or against the applicability of Fisher v. Dover.

Attorney Woodman stated that the purpose and intent of the ordinance was that intertidal shoreline areas represent an important natural resource and the protection of these areas are a continued City priority and that being said, to read the ordinance fairly the mean high water mark would not be chosen as being the standard for determining if something was 100 feet, the salt water marsh wetlands would be used.

Seeing no one rise, Chairman LeBlanc ruled the public hearing closed.

### **DECISION OF THE BOARD ON ITEM 3**

Mr. Marchewka asked Ms. Tillman to clarify what was sought in the original application, if it was to demolish the deck and rebuild.

Ms. Tillman answered that the permit received in 2002 was the demolition for the existing 9.6 foot by 36.75 foot deck and screened porch and to construct a new enclosed living area in its place plus, the construction of a 14 by 8 foot attached additional new screened porch.

Mr. Marchewka asked if they were going to demolish what was there and rebuild and that is what was denied?

Ms. Tillman answered the variance was denied by the BOA on February 19, 2002.

Mr. Marchewka stated after that, the applicants converted the existing deck which they did not need the variance for.

Ms. Tillman stated the next application was a request to convert the screen porch and deck into living space.

Mr. Marchewka stated that the reason for tonight's meeting was to grant a variance for what was approved by the building department on the squared off corner.

Ms. Tillman stated that was correct.

Mr. Marchewka asked how the determination was made that the applicant had to come back for a variance for something that had already been approved.

Ms. Tillman referred the question to David Holden.

Mr. Holden replied that the application they reviewed could be granted and that they were not aware of the letter from D.D. Cook Builders, Inc. outlining their aspects of the approval they granted as there was no increase on the footprint. He added that the issue at the moment was whether Fisher applied.

Mr. Marchewka stated that he was just trying to determine whether the application before the Board was materially different from the previous and therefore, make a determination of whether the case at hand applied.

Mr. Steven Berg made a motion to accept the application for a variance on Item 3, hearing it, because the case of Fisher v. Dover did not apply.

Mr. Marchewka seconded.

Both Mr. Berg and Mr. Marchewka felt there was a material change and therefore Fisher v. Dover did not apply.

Mr. Jousse felt it was essentially the same application as heard before. An encroachment into the wetland is still an encroachment and he did not support the motion.

Mr. Witham did not support the motion.

Mr. MacCullum supported the motion.

Chairman LeBlanc called for a vote on the motion that the case Fisher v. Dover did not apply and the motion passed with a 4-3 vote with Mr. Jousse, Mr. Witham and Mr. Holloway voting in the opposition.

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

Attorney Bernard Pelech spoke in favor of the petition on behalf of the owners, Lawrence and Ruth Gray. He stated that Item 1 was similar to Item 2. He noted that Item 1 was the most recent construction, which was the second floor rounded deck. On June 24, 2003, the Board granted a variance for two decks, one above the other. Two days after there was a letter submitted by Attorney Woodman indicating a request for rehearing and a subsequent appeal. On June 30, 2003, Lucy Tillman signed off on the building permit and David Holden on July 15, 2003. The permit was issued on July 15, 2003 and the decks were constructed per the plans on file with the Inspection Department. There was a letter received stating that there was a need for a variance issued by the Board of Adjustment for the second story deck due to different dimensions built than what was previously submitted to the Board. The only difference was that it stuck out an extra foot and was rounded and pervious, 20 feet above the ground. He asked what the impact on the buffer would be considering the previous statement since the deck was in the buffer and not the wetlands. He further stated that no one was trying to “pull the wool over anyone’s eyes” due to the minor changes in dimensions.

Item 2 was no longer needed for consideration.

Item 3 was the squaring off of the deck, which had been discussed in lengthy detail at the beginning of the meeting and did not need further elaboration, however, again, Attorney Pelech stressed that there was no intention by anyone involved in the project to deceive any City Official with regard to what was being constructed.

Item 4 was before the Board due to the change in the design of the platform and steps that were previously approved by the Board in 2003 due to geographical features of the ground. He stated that the applicant was before the Board to seek approval for the platform and the steps as they were currently configured. What was previously approved was a 4 by 4 platform and 5 steps coming down, curving to the left and exit onto an existing stone wall. The reason for the change was partly due to the unsafe conditions of the stone wall. It was not firm enough for the stairs to exit onto them. So the steps were built straight down

onto a base of stones and not onto the wetland area versus what was approved. He further stated that the steps as currently figured ended up being further away from the water than what was proposed.

Item 5 was determined that it was within the wetlands buffer and there should have been a variance sought from the Board of Adjustment according to Roger Clum and Lucy Tillman from their site walk of the property. There was a building permit issued and the window was depicted on the plans submitted, however, the bow window made no contact with the ground. He noted that there was no issue with the bow window until the site walk as the window was well documented on the plans that were submitted to the City.

Attorney Pelech asked the Board to vote on each item separately and reiterated why each item and they were before the Board currently. He further stated that there were special conditions to the property and according to the new changes in zoning laws due to the Supreme Court interpretations in recent cases such as Boccia, these items proposed for variances would not be contrary to public interest nor the spirit or intent of the ordinance, would not diminish surrounding property values, they were a reasonable use of the property, given the history, substantial justice would require the granting of the variances and the variances would not injure the public or private rights of others.

Ms. Fiorella further reiterated her services performed further supporting Attorney Pelech's statements in that there were no encroachments into the fresh water wetlands, tidal wetlands, no storage or materials which indicated respect of the environment, the condition of the buffer area before construction was either bare land, landscaped land or grassed and after said construction, the land remained in the same conditions and, therefore the buffer still had the ability to perform the same functions it had performed prior to the construction, and the salt marsh area is still intact. Based on the changes made to the house there was no indication of changes to the buffer or the wetland, no indication of changes to the wetland boundary and no fill of the wetlands and the buffer still functioned as in the past and was therefore, in keeping with the ordinance.

Chairman LeBlanc asked if there were any questions from the Board.

Mr. Jousse asked for an explanation why the whole project was not submitted altogether.

Mr. Gray said it was Millette's decision to do it that way.

Mr. Berg asked Ms. Fiorella about the buffer area and clarified that they did not want to impede the natural flow of rain water both when it hits the ground and as it's hitting the ground, and that was one of the reasons why they do not want an overhang.

Ms. Fiorella stated that is correct.

Mr. Berg stated therefore if something was a surface that allowed water to seep through would be better than something that did not and likewise, something that was higher from the ground and less likely to block rainwater, would be preferable to something that was on the ground.

Ms. Fiorella answered that the concern was water quality. She stated that if you have an impervious surface which rain is hitting and is not hitting the ground, you have runoff and if that surface is clean, such as a roof for instance, the water runs off the roof into a gutter and away from the building causing no erosion, however if it is going down the side of a driveway with no shoulder then there is a different situation. She added that pervious would be preferable to impervious.

Mr. Berg asked in the case of the bay window, if it was better to have it up off of the ground then on the ground.

Ms. Fiorella answered yes.

Mr. Berg questioned since rain rarely falls in a straight line it would be better to have something higher to allow more rain surface to fall, like the deck, the materials allow the water to fall through and it is higher up off of the ground which makes it have a more positive effect.

Ms. Fiorella stated that if you have no contact with the ground surface with your structure, overhanging, then regardless of the height you are not decreasing the permeability. Decks are more permeable because they have a slotted base and the window doesn't have any water flow through.

Mr. Berg questioned the stairs and the stones involved, whether the stones allow water through or not.

Ms. Fiorella did not recall the material used.

Mr. Berg asked someone to answer the question.

Mrs. Gray answered that the steps were built with stones that hook together but the very edge, top has cement to hold in place.

Mr. Berg said the bottom two steps allow water to flow through.

Mrs. Gray said yes.

Roger Clum, the Assistant Building Inspector for the City of Portsmouth spoke. Mr. Clum stated that Mr. Pelech was incorrect about the bow window. The site plan submitted for the garage addition, which should have shown the bow window at the time, did not.

Mr. Jousse asked Attorney Pelech where the consistency was with the plans submitted. He noted that the site plan submitted to and reviewed by David Holden and Lucy Tillman which contained setbacks did not contain the bow window and that the floor plans submitted to and reviewed by Roger Clum did contain the bow window. He stated that he wanted to believe that there was no deception but it was quite a coincidence and ironic that this had happened with all of the requests.

Mr. MacCallum asked Attorney Pelech how he would defend his clients' actions on Item 3 against what Attorney Woodman is saying.

Attorney Pelech answered that his clients did know what they were doing however they had a meeting with Lucy Tillman about it and both, her and David signed off on the permit saying that the conversion was allowed and they relied on that.

Mr. MacCallum asked Attorney Pelech to correct him if he was wrong but the building permit did not say anything about the rounding off a corner and cutting down a tree.

Attorney Pelech remarked that again, it is subject to interpretation. Don Cook submitted a plan that asked if they could round it off and Mr. Clum did not recall whether there was any consensus or agreement that they could or could not square off the corner.

Mr. MacCallum asked if that was the job of the building inspector to ensure the construction was identical to the plans.

Attorney Pelech answered that he assumed so but he couldn't answer for Roger.

Mr. MacCallum asked Attorney Pelech what exactly the dispute was all about.

Attorney Pelech said that he wished he knew. He remarked that there were no objections when his client's submitted their first application to build a two car garage which encroached upon the 100 foot buffer significantly and their second application which was denied had no objections either. He stated that Attorney Woodman only became involved in 2003 and it has been in litigation ever since. He suggested that maybe the Board should be asking the parties what the big dispute was about.

Mr. Jousse stated that the tree was there in August 2001 and that it was removed around the time of the first application, which was submitted in February 2002 for the deck. He stated that the pictures that were submitted date before 2001 because in 2001 there was an enclosed porch that was adjacent to where that tree was and therefore, the pictures were old.

Chairman LeBlanc requested Mr. Clum to come to the podium. Chairman LeBlanc asked if part of the process of issuing a Certificate of Occupancy is to examine the construction in relation to the plans that were submitted.

Mr. Clum answered absolutely.

Mr. Berg asked Mr. Clum if he uses the site plan and measures the setbacks when he inspects a location before issuing a Certificate of Occupancy.

Mr. Clum answered that he usually measures the setbacks at the foundation stage, which is the beginning of construction. He further stated that when plans are developed especially when a variance is required, no one will hire an architect to develop architectural drawings when all is required is a site plan to go before the Board of Adjustment because if denied, they have wasted their money on those drawings.

Chairman LeBlanc asked if there was anyone else who wished to speak in favor of the petition. Andy Kaplan of 70 Currier's Cove spoke on behalf of the petition. He remarked that they were two houses over from the Grays. He stated his credentials and gave his impression of the current dispute. He felt that this was a reoccurring issue. He noted that back in June 2001 prior to any of this, there was a meeting of the Currier's Cove Association, all of the neighbors, to discuss the Gray's proposal to add-on to an existing structure in a form or fashion that was different than that what was finally approved and built. He presented a letter he wrote to all of the members of Currier's Cove Association and read it aloud to the Board. He basically gave a background of the existing dispute and supported the Grays.

Chairman LeBlanc asked if there was anyone who wished to speak in opposition to the petition.

Attorney Woodman spoke for the Lessers. He passed out to the Board a memorandum from his office on the matter. He reiterated that the tree was removed and the porch was not enclosed until the May 2002

permit. He noted that the Grays could have converted the outdoor deck into enclosed living space with no problem but opted to go before the Board, twice, to rebuild the deck. He noted that the reason they were before the Board was to expand the area of the deck by squaring it off, cut down the tree and expand the deck which had been denied twice in 2002 and then the building permit was issued ten (10) days later. He read the description of work from the building permit application and pointed out that the word “convert” was used and explained to the Board what “convert” meant to him. He felt that the word “convert” meant to convert on the same footprint. He again reiterated that Mr. Clum issued the permit for the applicants to “convert screened porch and deck for living spaces.” He stated that Mr. Clum never gave the Grays permission to expand, go in the area where the maple tree was and the Grays knew they did not have permission. Attorney Woodman stated that the reason everyone was before the Board currently was because there were apparent divergences at the Gray residence between the construction depicted on the approved building permits and the construction actually performed. He said that the five areas that were outlined and the five areas that were originally requested for “retroactive variances” were being asked for because the City of Portsmouth had determined that the five areas were all areas where construction took place without having a permit. He quoted a section of the zoning ordinance (protection of intertidal wetlands) for which a variance is sought. He cited the *Boccia* case and remarked that it’s interpretation had been misconstrued, particularly in the case at hand, to mean that since the applicants’ property and proposed construction was within the 100 ft. buffer zone of the intertidal wetlands that it created special conditions and therefore, met the hardship standard. He further quoted the opinion of *Boccia* and read “as stated in the *Bacon* special concurrence, the landowner must show the hardship is a result of the unique conditions of the property and not the area in general.” He basically pointed out to the Board that the ordinance was not being enforced, the applicants knew what they were doing, they had submitted plans for retroactive approval and built without permits and changed the design of the plans originally submitted and therefore, built something completely different than what was supposed to be built. He said that the integrity of the Board was at stake when people like the applicants are allowed to get away with things like the matter at hand. He felt that if the Board granted the applicants’ request for retroactive approval then the Board would be encouraging people to ignore the zoning ordinance and build wherever they want to with total disregard for the Board’s decision. He read aloud to the Board his memorandum that was previously submitted and proposed questions to consider relative to the construction performed. He asked the Board if they conclude that the City was correct, then he pointed out to them that there would be no hardship, only a hardship that the applicants created for themselves.

Mr. Berg asked Attorney Woodman how any of the construction that was performed was a bad thing, as they sit currently (i.e. the deck, the bay window, the steps, etc.).

Attorney Woodman stated that assuming that the Board didn’t care about the construction performed was conducted illegally, all of the construction was performed within the wetland buffer zone and may have a negligible effect on the wetlands.

Mr. Marchewka stated that there may have been discrepancies with obtaining the permits but that they did obtain permits.

Attorney Woodman said that if the Board wanted to go against what the City attorney said, that’s their prerogative, but reiterated that the City’s attorney stated that the building exceeded what the approved permits were for and that was why they were there before the Board.

Chairman LeBlanc asked if there were anymore questions from the Board. Seeing none, Chairman LeBlanc asked if there was anyone else who wished to speak in opposition of the petition.

Jim Gove of Gove Environmental Services, a certified wetland scientist for the State of New Hampshire, spoke in opposition of the petition. He went over his credentials and started off by showing a picture that he took on June 14, 2004 which showed some of the areas of discussion from the current petition. He noted that on the surface there does not appear to be any encroachment in the wetland area however, it would take a number of years before the degradation would occur and become visible. He pointed out that NHDES permit filed by the applicants did not have a current site plan at the time it was submitted and said that could change the circumstances stated on the permit. He also noted a number of other houses around the subject property that were situated within the same constraints of the wetland buffer zone.

Mr. Berg asked if the specific improvements made to the house degraded the wetland area.

Mr. Gove answered that in his professional opinion, those specific improvements could not be able to be made whether they would be degraded or not.

Mr. MacCallum asked what property Mr. Gove was on at the time of him taking the pictures he presented to the Board.

Mr. Gove answered the Lessers.

Chairman LeBlanc asked if they were taken at high tide.

Mr. Gove said it was approaching high tide.

Mr. Berg asked about the close-up aerial photo and asked him to show where the Lessers' dock was.

Mr. Gove said he could not, that it was not there.

Mr. MacCallum asked how far away he was from the subject property when he took the picture.

Mr. Gove answered about 150 feet away.

Mr. MacCallum asked to have a closer look at the photo in question. He rhetorically asked Mr. Gove if the Lessers' dock looked straight into the back of the Grays' house from 150 feet away what the issue was considering one of the neighbors' testimony earlier stated the Lessers' concern was privacy from the Grays' house over to the Lessers' house if they built a dock, they could stand with a telephoto lens and see into somebody's bathroom.

Mr. Gove replied that he couldn't address the neighbors.

Mr. MacCallum said he didn't have to.

Mr. Jousse asked if someone needed a permit to put a dock into the wetlands.

Ms. Tillman answered yes.

Mr. Jousse asked if that required a variance.

Ms. Tillman said no and referred to the ordinance.

Chairman LeBlanc asked if there was anyone else that wished to speak to, for or against the petition.

Mr. Steve Tober of the Woodlands spoke on behalf of the petition. He mentioned that he had been friends with the Grays and Don Cook for almost 20 years. He asked for the Board to help grant the requests of the Grays and put the matter to bed. He pointed out the rhetorical question posed by Mr. Witham earlier in that Mr. Witham sensed some sort of deception on the part of the applicants and he felt that was unfortunate that sort of image had been portrayed. He said that he had been an observer of the Grays' project and posed the question of what possible purpose would the applicants have to intentionally deceive the Board when all they wanted to do was construct some stairs, install a deck and a bow window. He noted both the Grays' professions and Don Cook for being a well-established, reputable contractor and stated that neither the applicants nor Mr. Cook were out to deceive the Board. He stated that the time chosen to perform the projects also had occurred at the same time that the Lessers were already antagonistic towards them. He posed the rhetorical question of why and how would they deceive anyone when they were being watched so closely while the project was underway. He thanked the Board for their time and asked that the variances be granted.

Chairman LeBlanc asked if there was anyone else who wished to speak to, for or against the petition.

Attorney Pelech submitted some additional material to the Board and presented photos taken this last summer from the upper level deck of the applicant's home and the lower level deck on the steps going down to the ground. He showed the steps and noted that they are deceiving as it was taken with a telephoto lens. He noted the stone wall, which was about 85 feet away from the deck and its position in relation to the Lesser's property. He pointed out that the close-up aerial photo was taken before the Grays' garage was built and it does not show the Lessers' dock. He presented two letters, one from Mr. Kaplan and the second from Mr. Levinson of 90 Currier's Cove, a couple of the abutting parties. He read both letters to the Board and pointed out their mutual support of the Grays' petition for retroactive variances. He went over the permit approved in 2002 by the NHDES and offered a copy to the Board for the record. He further noted to the Board that the letter by Attorney Sullivan had been requested by him personally for a reference point of what each of the violations were so that he could rectify them. He thanked the Board for their time and requested that they put an end to the matter by granting the requested retroactive variances.

Attorney Woodman spoke against everything Attorney Pelech had said in defense of both his and his clients' intentions and actions and basically stated that they were blinding the Board with fiction.

Attorney Pelech was very upset at the accusations made by Attorney Woodman and asked as a favor to him, that any of the City's staff involved in the matter (i.e. Mr. Clum, Attorney Sullivan, Lucy Tillman, David Holden, etc. which were all present at the current meeting) to verify that the conversation with Attorney Sullivan was true and that he had personally requested Attorney Sullivan to write him the letter indicating the violations.

Chairman LeBlanc asked for Attorney Sullivan to please come to the podium. Before he rose, Planning Director Holden advised that he was present at the meeting and Attorney Pelech did ask for a letter. Attorney Sullivan concurred.

Chairman LeBlanc declared the Public Hearing closed.

## **DECISION OF THE BOARD:**

Chairman LeBlanc noted that, as had been requested, the Board would rule on each item separately.

Motion – Item 1)

Mr. Steven Berg made a motion to grant the variance as presented and advertised, which was seconded by Mr. Robert Marchewka.

In making his motion, Mr. Berg referenced the standards under the *Boccia* analysis as follows:

The variance will not be contrary to the public interest, in this case, protecting the wetlands. We heard one soil scientist stating that there had been no observable impact and a second soil scientist saying the impact by each one of these four items and the four items in total cannot be measured. In fact, the statement by Atty. Woodman's and the neighbor's own scientist is that there is no measurable impact.

Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship and an area variance is needed to enable the applicant's proposed use of the property. Approximately 2/3 of the property is in the designated buffer area, which was created after the house was constructed. He felt a special condition affecting the property is that there are some very similar inland wetland protection ordinances which make exceptions to the rule for existing homes. No exception was included in this particular rule for some reason.

The benefit sought by the applicant cannot be achieved by some other method reasonable feasible for the applicant to pursue other than an area variance. Mr. Berg indicated that what matters was that the architects or the homeowners or the builders felt that a slight rounding of the deck would either improve the utility of the property or the appearance/aesthetics of the property and he did not disagree with them.

The variance is consistent with the spirit of the ordinance which is also addressed in his comments on the public interest. There is another section of the zoning, he believed Article VI that allows for small and reasonable expansion of existing properties so Mr. Berg felt the spirit of the ordinance was met.

Substantial justice would be done by granting the variance. Mr. Berg stated that what's there is there and forcing the residents to alter a deck and rip out a window isn't justice and the public wouldn't gain by having construction equipment marching through for demolition and repair.

The value of surrounding properties will not be diminished. Mr. Berg stated that there really had not been any testimony from the opposition and, as an appraiser, he agreed with Attorney Pelech that there really is no impact. He also mentioned the point raised by the soil scientist about the importance of surfaces allowing water to flow through, which the deck does. With the deck in the air, rain can circulate under so the purpose of the wetland buffer, which is to allow the circulation of water and the flow of ground water will not be impeded.

In seconding, Mr. Marchewka noted that it appears that what was built was not exactly as had been proposed - maybe someone knowingly built it bigger but he thought it probably was a mistake or oversight. Whatever it was, he stated it is such a minor difference that he didn't know why they were there except that the abutters do have the right to question what is existing there. There is a minor discrepancy between foundation plans and construction plans, with the foundation plans not showing a bumpout and Mr. Marchewka stated he could see how that could happen. There were building permits issued so he felt everything was done in accordance with what seemed to be the correct way to go about

constructing this home. Mr. Marchewka agreed with Mr. Berg's comments with regard to special conditions and substantial justice and felt the motion should be supported.

Mr. David Witham added that he felt, rather than the applicants being deceiving, that the plans are deceiving. He spoke of the process of site plans being approved and then moving to the building department where they wait for the building plans. He didn't feel it was the task of the Assistant Building Inspector to cross-reference each plan with the site plan. While he wasn't claiming it was deceitful, the different plans had subtly different facts. He agrees pretty much with everything that was said with regard to item 1), but what he is struggling with is the idea that the benefit, which he sees as aesthetics, can't be achieved by some other method. Part of the issue now is whether to require the applicants to tear something down. If it had come before them as a clean slate, the Board would ask questions such as why the applicants needed to build it this way. He also didn't see the hardship with relation to the setting.

Mr. Alain Jousse stated that he had not supported any variances for this property because a hardship had not been presented to his satisfaction, and still not, but he felt common sense should prevail. There were a whole series of events that he doesn't think were meant to deceive. The impact on the buffer zone is negligible although it is an impact. All of the items are there and he believed more harm would be done to the environment by making the applicants tear down and re-do.

Mr. MacCallum stated he would like to address all four items at the same time to save time. He stated he would be willing to support granting a variance to all four items. With regard to item 3), he agrees with what the Lessers and Powers said, but the bottom line is that the offense to the ordinance by all four items is negligible. Houses here average least 50 yards apart and, in case of Lessers and Grays even farther and there is screening to block the view. He stated he is familiar with the *Bacon vs. Enfield* case and everything Mr. Woodman said about that case is correct. In particular, he is absolutely right about the uniqueness requirement and Mr Pelech is absolutely wrong – that was something in the plurality opinion and carried over into the more recent case of *Boccia vs. City of Portsmouth*. He stated violations in this case were less than in the Bacon case.

Mr. MacCallum remained troubled by Item 3) adding that he was inclined to agree with Attorney Woodman who said that they knew what they were doing all along. Their variance application was denied not once but twice and days later, they applied for a building permit and the bottom line was that the tree was cut down and the corner closed. Mr. MacCallum felt he was giving the Grays the benefit of every doubt on the issue. However, in this case because he felt it would be totally wasteful and unreasonable to require them to tear down the corner of the building. Under the circumstances, he would vote in favor of the variances including item 3) but not without serious reservations.

Chairman LeBlanc said that he had come there that evening with the idea that the Grays had trampled on the dignity of the Board by building these items on their house without approval. However, the case had been made very effectively by their attorney and by the members of the City attesting that evening and he had been swayed and would vote in favor of all four of the variances. He noted that things happen – something may have fallen through the cracks – but they did get the permit that they need, which he felt was the compelling argument.

*The Board voted to grant Item 1) with Mr. Nate Holloway and Mr. David Witham voting against the motion.*

#### Motion – Item 3)

Mr. Steven Berg moved that variance request no. 3) – the enclosure of the deck corner – be granted as presented and advertised. The motion was seconded by Mr. Robert Marchewka.

In making the motion, Mr. Berg referenced all that he said in the discussion of Item 1), stating that all five tests were adequately met. While he agreed with some of his boardmates who expressed a little bit of trepidation, this is one variance where we have to ask the question of what good there is in trying to force them to rebuild a large portion of the property.

In seconding the motion, Mr. Marchewka said he felt that this was a little bit tougher, but it was a fact that there was a building permit issued – no matter how it was obtained. To go back now and try and correct it by demolishing what is built there seemed to him to be a ridiculous solution. He thought it was reasonable to square that off in the first place and remove the tree and it seems like an unreasonable thing to try and correct what's done by cutting off a portion of the house. Mr. Marchewka also noted that maybe the City should look at its process of how they analyze requests for building permits and whether or not they're connected to a variance.

Mr. David Witham indicated he would also support this item as it makes sense to square this off for a number of reasons. He also stated that he believes the City has a very thorough process in place, but it's reasonable for the City to expect site plans to coincide with building plans – that's where all these problems have come from and he felt it is the responsibility of the applicant and whoever is representing him to make sure that it happens, not submitting something, getting it approved in one department and going to the other department and submitting something else. While it's a little bit off the subject, he wanted to address the issue as it's been coming up that evening and he thought the City does a great job. In conclusion, he felt this item met all the necessary criteria.

Mr. Marchewka stated he would like to add that he also thinks the City does a great job and, considering all the building that takes place in this City, there are going to be things that are overlooked for whatever reason. He doesn't think any of the issues were malicious or that anyone dropped the ball, but something is occasionally going to fall through the cracks. In this case, an abutter questioned it so now they're dealing with it, correctly, he felt.

*The Board voted unanimously to grant Item 3) as presented and advertised.*

#### Motion – Item 4)

Mr. Steven Berg moved, seconded by Mr. Robert Marchewka, that Item 4) of the petition be granted as presented and advertised.

In making the motion, Mr. Berg stated that he would like to incorporate everything he said before into this motion. He added that the large coverage that they were talking about – the construction of something different in the wetlands buffer from what was proposed - is largely permeable surface. Also, as was originally approved, we heard testimony that the stairs couldn't be built that way – they could not be brought out onto the existing wall because it would not support the weight. Those are the issues that make this a little different from the others, but he still believed that all the criteria for the five variance tests applied.

Mr. Marhewka agreed. He stated it had been pointed out that they weren't able to curve the stairs and he didn't see how it impacted anything. There was a rock wall there and there are rock steps there so he saw it as a very minor change.

*The Board voted unanimously to grant item 4) of the variance request as presented and advertised.*

Motion – Item 5)

Mr. Steven Berg moved that the petition be granted as presented and advertised to permit the construction of a bow window as shown in the photographs. The motion was seconded by Mr. Robert Marchewka.

Mr. Berg, in making the motion, stated that all of the arguments made so far also apply here. Noteworthy differences are that this does not touch the ground so it is an overhang. He referenced their discussion about the second floor deck and that the spirit of the ordinance allows small overhangs up to 30 inches so it's not without reason that this issue would come along and to make somebody remove a bow window to flatten the house is just preposterous.

In seconding, Mr. Marchewka agreed that he could see how this could happen –it was a mistake and whose mistake, he did not know, but he felt they should live with it.

Mr. Witham noted that they had a site plan and this is something that should show up on that plan and he felt it was irresponsible on their part to submit to the City a site that does not show that. He didn't feel that the argument that, at this point, the applicants shouldn't be made to tear something down, should be part of the discussion as the Board is supposed to be looking at the request as if it hadn't happened. He indicated he would not be supporting this item as he didn't see any hardship and didn't see it as a bow window, but a curved wall with a bank of windows and much more substantial than a bow window. The only benefit is that the applicants can fit a nice round table in there and he didn't feel that qualified as a hardship.

*The Board voted to grant item 5) of the petition as presented and advertised, with Mr. Nate Holloway and Mr. David Witham voting against the petition.*

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**III. ADJOURNMENT**

*It was moved, seconded and passed to adjourn the meeting at 12:30 a.m.*

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Respectfully submitted,

Christina Staples, Acting Secretary  
Mary E. Koepenick, Secretary

cs/mek