

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

7:00 p.m.

CITY COUNCIL CHAMBERS

February 21, 2006

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

MEMBERS EXCUSED: None

ALSO PRESENT: Lucy Tillman, Chief Planner

Chairman LeBlanc called the meeting of the Board of Adjustment to order at 7:00 p.m.

I. OLD BUSINESS

A) Approval of Minutes - November 15, 2005

The motion was made, seconded and passed unanimously that the Minutes of the November 15, 2005 meeting be accepted as presented.

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B) Request for One-Year Extension of Variance granted March 22, 2005 for property located at **176 Sherburne Road.**

A motion was made by Mr. Berg, seconded by Mr. Jousse, and passed by unanimous vote of 7 to 0 to grant the Extension through March 21, 2007.

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C) Chairman LeBlanc announced that the petition of the Mark H. Wentworth Home for Chronic Invalids for property located at 346 Pleasant Street had been withdrawn.

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D) Request to Appeal the Decision of the Historic District Commission on February 1, 2006 for property located at **99 Bow Street.**

Chairman LeBlanc stated that this was an appeal to the Board of Adjustment of a Historic District Commission decision and Ms. Tillman clarified that the consideration should be of procedural matters only.

Approved April 18, 2006

## **DECISION OF THE BOARD**

Mr. Berg noted that what the Board had was a list of accusations from those appealing with no reply.

Ms. Tillman stated that the Board received all that had been presented to them for materials.

Mr. Berg made a motion to deny the appeal of the decision of the Historic District Commission. He stated this was just a list of accusations with no back-up. Without evidence of an error, he didn't see any reason to go further.

Stating that he had attended the meeting of the Historic District Commission when the decision was made, Mr. Witham noted the proposal had been before them for six months. The public had a chance to speak and their opposition, if any, was heard. Some of the opposition was due to losing views of the water, which isn't in the purview of the HDC. He felt the petition had received a fair and thorough review and stated he would support the motion.

Mr. Parrott stated he was concerned that the material presented was from one group only and, if the Board is considering an appeal, he would have liked the opportunity to have a response from the opposing side. Apart from that, it is just unsubstantiated allegations.

Mr. Jousse stated he could not support the motion as it stands. Before he could make a decision, he would like to review either copies of the tapes or minutes of the hearings.

The motion to deny the request for an appeal of a decision of the Historic District Commission passed by a vote of 4 to 3, with Messrs. Jousse, Holloway and Parrott voting against the motion.

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II. PUBLIC HEARINGS

1) Petition of **Nicholas and Elda R. Ciani, owners**, for property located at **60 Mill Pond Way** wherein a Variance from Article III, Section 10-302(A) was requested to allow an irregular shaped 2 story addition to the rear of an existing single family dwelling with a 14'9 7/8"± rear yard where 20' is the minimum required. Said property is shown on Assessor Plan 143 as Lot 7-3 and lies within the General Residence A district.

Mr. Jousse stepped down for this petition.

SPEAKING IN FAVOR OF THE PETITION

Mr. Nicholas Ciani stated that he and his wife propose building a two-story addition on the rear of the existing dwelling. The lot coverage will be within the allowable limits, but a corner of the addition will intrude into the rear setback.

Addressing the points needed for a variance, he stated the proposed addition would not affect traffic or any other aspect of the public interest. The special conditions include the irregularly shaped lot and the orientation of the dwelling on the lot which makes it impossible for them to

achieve their objective without intruding into the setback. He described other alternatives they had considered, but had to reject as unacceptable. He stated the intrusion of the addition would not affect the open area, air circulation and light exposure of the adjacent property owners. He felt that as both the public and abutter's interests are served, that would be sufficient justice and that the addition would not diminish the value of abutting properties.

Stating he was concerned about future overcrowding, Mr. MacCallum indicated he had a question for the Planning Department about the possibility of sub-division and residential construction in the open area to the rear of the property. Ms. Tillman noted that nothing is currently planned or is before the Board. Chairman LeBlanc stated the Board has to deal with what is in front of them at the moment, not with possibilities in the future.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Marchewka outlined the following as the reasons for granting the petition:

- This is a minimal infringement into the setback which will have no negative impact on the public interest or abutting properties.
- The house is situated to the side of an irregular lot, making constructing an addition difficult without intrusion into the rear setback.
- The applicants demonstrated other options they explored without finding a reasonably feasible alternative.
- The percentage of land coverage will be within the limits set by the ordinance.

In seconding, Mr. Berg stated this was a good compromise between the zoning ordinances and what the owners want to do. Mr. Witham also stated he would support as the infringement into the setback was less than the size of a sheet of plywood. Mr. MacCallum noted that he disagreed with the Chairman and that the Board serves as the guardians of the future with respect to overcrowding. He would, however, support the motion as the setback will be barely affected and there is little likelihood of further development to the rear of the property line.

A motion to grant the petition passed by unanimous vote of 7 to 0.

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2) Petition of **Michael P. Rainboth and Annemarie Howe, owners**, for property located at **122 Newcastle Avenue** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow: a) a 312 sf irregular shaped two story addition with a 4'± right side yard where 10' is the minimum required, b) a 14 sf one story bay addition with a 9'8"± front yard where 30' is the minimum required; and, c) an 8' x 16' shed and a 146 sf irregular shaped open deck with all said additions creating 23.9% building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 101 as Lot 27 and lies within the Single Residence B and Historic A districts.

Mr. Parrott advised he would be stepping down for this petition.

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

Anne Whitney stated she is the architect for the project, identified the items in the Board packets and handed out another exhibit which showed a little more detail of the neighborhood. She stated that this is a small residence which has had no renovations for over fifty years. The applicants would like to add some space on the first floor, which addition would encroach in a setback. She outlined the flow of living space and roofline issues she had to consider and noted that, with other options, they would have to totally rearrange the house.

A good part of the residence is within the side setback, which would put most additions into the setback. She noted the proposed relocation of the existing shed to bring it wholly onto the property and more in conformance with zoning.

Ms. Whitney indicated the site plan, on which she had filled in the building structures in the neighborhood, noting that many overlap the right setback. The lots are long and narrow. The Single Residence B zone requires 15,000 s.f. and most of these lots are about 6,000 s.f. The addition would allow a much needed third bedroom and would total just over 2,000 s.f. They would not be making the non-conformity any worse than it already is.

She noted the neighbor to the west had some issues with the restriction of sun to their property, which they had taken into consideration. She stated there would be no restriction in the winter and, from March to October, no restriction after 10:00 in the morning.

In response to a question from Mr. Berg, she confirmed it is now a two-bedroom, one bath structure of 1,400 s.f. approximately. Chairman Leblanc asked if the property had been surveyed and she answered, “No.” He asked if there was any conflict with where the lot line is located. Ms. Whitney responded that it was not clearly defined. If it was surveyed and showed it was within the boundaries, it would be a 6’ setback.

Annemarie Rainboth stated she had another letter of support to pass around. She stated they had approached the one concerned neighbor to explain the project and felt they had addressed their concerns. They don’t want to distress neighbors and worked to have a design compatible with the neighborhood. They would just like to have a small addition as have other neighbors.

Sandy Trefethen of 49 Ridges Court stated that the setbacks and addition would be consistent with many others in the neighborhood. He’s been affected by construction on all sides and things have not been better or worse – just changed. He felt the petition met all five of the requirements necessary and urged the Board to grant it.

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

Attorney Charles Griffin stated he represents Geraldine Gori who owns 112 Newcastle. He referenced the packet which he had passed out before the meeting began and stated their opposition was based on the grounds that granting the petition will diminish the value of the

Gori's property and will not be in the spirit of the ordinance. The petitioners have not demonstrated unnecessary hardship and granting the request will not result in justice. He stated the Gori's have owned their home for a number of years and like to sit in their sunroom and watch the sunrise as shown in several photographs in the packet. A two-story addition will limit their ability to do so and decrease the amount of sunlight in their home.

He stated that, in Devaney v. Town of Windham, the Supreme Court held that construction which blocked sunlight and a view of the water resulted in diminution in value of the property. Granting an addition this size will not be consistent with the spirit of the ordinance because light and air will be decreased and affect the Gori's lifestyle. Referencing the drive side elevation, he pointed out the five windows that look out onto, and into, the four season room of the Goris, creating privacy issues.

Attorney Griffin stated that there are no special conditions of the property creating a hardship. The applicant's property is Lot 27 on Exhibit 6 and a number of the properties shown on that sheet also do not meet the ordinance. His clients felt that a reasonable alternative would be to locate the addition off the side and not the back, reducing the extent of the variance. This was discussed with the applicants who were not amenable to the suggestion. He outlined various alternative scenarios which could be explored by the applicants as shown on Exhibits 7a, b, and c. Exhibit 8 shows there is ample space off the side to locate the addition.

Attorney Griffin maintained there is an element of self-created hardship as the property was purchased last June and the applicants were aware of the limitations of the structure, but purchased anyway. His clients are simply asking petitioners to move the addition so all can enjoy their properties. He concluded that the petitioners have not met the burden of proof necessary for a variance.

Mr. Berg questioned the dating on the photograph showing the sunrise and Mr. Gori indicated it was taken three days before the hearing. There was a brief discussion of where the sun shines through and the differences at other times of the year.

Mr. Berg referenced the sun chart plan submitted by Ms. Whitney and asked Attorney Griffin if it reasonably reflected the view from the sunroom. Attorney Griffin did not know and referred to Mr. Gori.

Mr. Berg stated that it appeared from the chart that anything the applicants do would block the sun until six or seven in the morning, even a table with an umbrella. Attorney Griffin stated they had no objection to a deck. It is the combination of closeness and the height of the addition that is causing concern.

Mr. Berg noted that, in the summer months, the entire house already blocks sun from five to six a.m. Attorney Griffin allowed that may be the case, but his clients are mostly looking out into the applicant's back yard.

Mr. Berg noted the court case cited by Attorney Griffin, which also mentioned views of the water, sunset and the sun. He was trying to see how the addition would decrease the amount of sunlight in the house when they were only talking about blocking the sunrise for a portion of the year from a single room in the house

Attorney Griffin maintained they were also talking about other issues.

Mr. Emilio Gori introduced himself and his wife, Geraldine. He stated that the sun is important, but also, when you enter the driveway, it is like an alley. They like the sunroom and the view. This will close it in, restricting the view, plus no sun. They will be looking at a wall with five windows which will look into their room. This would disturb them and decrease the value of their house.

In response to a question from Chairman LeBlanc, Mr. Gori stated the applicants' foundation is 4' from the property and, if they build the addition, it will be only 18' or 19' from their sunroom. He concurred with Mr. Berg's conclusion that, if the plan shows the house overlapping onto their property and it is actually 4' away, then the distance from the setback may actually be 7' to 8', and not the 4' the applicants stated.

Mr. Jousse asked Mr. Gori if he was aware that the addition could be moved easterly about 6' and they would still be faced with a two-story addition with five windows. Mr. Gori said he hoped that might make a difference.

In response to a question from Chairman LeBlanc, Mr. Gori indicated the winds come from the direction of the water and his windows can be opened.

Mr. MacCallum asked what the percentage of coverage was currently and Mr. Berg stated that the difference in percentage of coverage if they moved the addition was about 1.3% and they would still require a variance.

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

Ms. Whitney stated the petitioners would be happy to change the configuration of windows on the side in question. She noted all of the properties along Newcastle have the same hardship and, referencing a previous question, asked if it would make sense to table the petition in order to have the property surveyed.

In response to a question from Mr. Marchewka, she stated that, in locating the addition they had to deal with a certain kind of structure and roof lines. They also need the approval of the Historic District Commission and already had a work session with them. They had been looking at a number of alternatives to best integrate the addition.

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

### **DECISION OF THE BOARD**

Mr. MacCallum made a motion to deny the petition, which was seconded by Mr. Holloway for discussion.

Mr. MacCallum stated he agrees with much of what Attorney Griffin presented. The hardship was self-created, if any, which means the applicant bears a higher burden of showing why their petition should be granted. The parcel is relatively small with a relatively large structure, in a similar neighborhood and his concern is overcrowding of the land. The two setback

requirements would be contrary to the spirit of the ordinance and also the public interest. They are proposing coverage where it would be most offensive, particularly to an abutter, who spoke against the petition.

Mr. Holloway stated he also agreed with Attorney Griffin and will support the motion.

Mr. Marchewka stated that just because the applicants purchased the property only a short time ago, doesn't mean this is a self-created hardship and they are within their rights to put an addition on their house. They looked at alternatives and also have to deal with the Historic District Commission. If the addition were moved back, it would have virtually the same impact on the abutters. He didn't see much difference between what they would be allowed to do by right and what they're asking to do.

Mr. Jousse stated he would support the motion as the applicants could achieve what they want, except for lot coverage, by placing the addition within the setbacks. He believed it was a somewhat self-inflicted hardship

Mr. Berg disagreed that the hardship was self-imposed. He took issue with the statements that the addition could easily be moved elsewhere as they are in the historic district and have to deal with roof lines. None of the alternative scenarios posed by the opposition located the addition in back. They could build within the setbacks and still block the sun which is the abutters' concern. He won't support the motion.

Chairman LeBlanc clarified that the current lot coverage is 20.2% so anything they do would require some sort of relief from this Board, adding that, if they could avoid encroaching in the setbacks, it should be done.

Mr. Berg stated he was not maintaining that an addition could be built that would not require a variance. The floor plan can't be made to flow and he doesn't believe it would be what the HDC would want.

Mr. Witham stated the point for him was that it would have a negative impact and possibly diminish values. He thought there could be some flexibility in the design although it would remain a roof line challenge. It comes down to the last of the criteria and he didn't feel that had been met and they need to respect the abutters' desire for enjoyment of their property.

A motion to deny the petition was passed by a vote of 5 to 2, with Messrs. Berg and Marchewka voting against the motion.

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3) Petition of **Duane A Date Jr., owner**, for property located at **61 Colonial Drive** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow an 11'6" x 12' one story addition creating 23.3% building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 260 as Lot 90 and lies within the Single Residence B district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Duane Date stated that they wished to build a family room but could not do so without a variance.

In response to questions from the Board members, Mr. Date stated they didn't just build the room over the deck because they would like it a little larger and confirmed the existing steps were coming down.

Mr. Witham stated he had calculated the existing steps to be 14 s.f. and the applicant was only adding 18 s.f. so it was just a 4 s.f. increase.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Witham made a motion to grant the petition as presented and advertised, which was seconded by Mr. Parrott.

He stated this was a minimal request. The purpose of lot coverage requirements is to prevent overcrowding. This addition is to the rear and middle of the house with minimal impact on abutters and no diminution in value. The following were the reasons stated for granting the variance:

- The necessity for lot coverage relief is due more to the small size of the lot than the modest dimensions of the addition.
- The location of the addition to the rear middle of the house will have minimal impact on abutters.
- The addition would be only slightly larger than the existing approved deck.

Mr. Parrott stated the addition was virtually in the middle of the lot with no effect on neighbors. The actual dimensions are very modest and only slightly bigger than the deck already granted.

Mr. Marchewka stated that they were essentially building over the existing deck.

A motion to grant as presented and advertised was passed by a unanimous vote of 7 to 0.

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4) Petition of **Spiro Davis, owner**, for property located at **25 Woodworth Avenue** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow an 8' x 19' two story addition with a 17'± front yard where 30' is the minimum required. Said property is shown on Assessor Plan 232 as Lot 71 and lies within the Single Residence B district.

**SPEAKING IN FAVOR OF THE PETITION**



Mr. Spiro Davis stated that his house existed on the lot prior to the zoning and is positioned well into the setbacks. The roofline, traffic flow and headroom were all considerations, but they primarily need space to put in stairs. Allowing for the design of the stairs makes the location such that it falls into the setback. They can't find a better place for the stairs. The other layouts, particularly involving cutting into the roof line, were cost prohibitive.

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

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

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

He noted that the addition would fit within the existing shape and improve the flow of the house. He saw no conflict with the public interest or impact on surrounding properties. He stated the petition should be granted for the following reasons:

- This is a modest addition which will intrude less into the front yard setback and be less non-conforming than the existing house.
- Other alternatives were considered but were cost prohibitive.
- The location of the house on the lot predates the zoning ordinance and all other requirements of the ordinance are met by the addition.

It would be consistent with the spirit of ordinance as nothing has really changed and allow the homeowner to maximize the potention of their home.

Mr. Marchewka stated the addition affects no one other than the homeowner. He is within his rights in terms of lot coverage and the choice of location makes sense the way the house is laid out.

Chairman LeBlanc noted that the house is currently 12' off the property line and the addition is set back further.

A motion to grant the petition as presented and advertised passed by a unanimous vote of 7 to 0.

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5) Petition of **Carolyn Chase, owner**, for property located at **1000 Islington Street** wherein a Variance from Article III, Section 10-302(A) was requested to allow 1,010 sf dwelling unit on the 2nd floor of the existing building on a lot having 11,064± sf of lot area in a district where 15,000 sf is required. Said property is shown on Assessor Plan 171 as Lot 10 and lies within the Single Residence B district.

Mr. Berg stepped down for this petition

SPEAKING IN FAVOR OF THE PETITION

Ms. Carolyn Chase stated she wanted a variance for a two bedroom apartment on the second floor converted from the current business use. The only problem is the 15,000 s.f. lot requirement. The neighbors have much smaller lots. She stated it would be in the spirit of the ordinance to convert the use to residential.

In response to questions from Mr. MacCallum and Chairman LeBlanc, Ms. Chase stated they are not going to increase the footprint and there will be no structural changes to the exterior. There is one business downstairs now which will remain a dental office.

Mr. Parrott noted the numerous variances granted for this property over years and asked how many different uses there were now.

Ms. Chase stated she believed one was for the dental office downstairs and a veterinary operation upstairs, which never happened. She has had her dental practice for six years with no one upstairs.

Noting the long list of variances granted for the property, Mr. Parrott asked if it had ever been a veterinary clinic and Ms. Chase responded that it had been applied for, but they never purchased the building. The most recent use of the office was the United Way.

Ms. Tillman stated that, if the current petition is granted, it would supersede the previous one and the Board could make that a stipulation.

Mr. Parrott stated he was not sure the Board had the authority to eliminate variances, but assuming that was the case, they were supposed to find a hardship demonstrable in the land and he didn't see that one had been presented. In the Single Residence B district one residential use per lot of 15,000 s.f. is allowed and the applicant was requesting two uses on a sub-standard lot.

Ms. Chase stated that it's the most reasonable use of the property without an increase in parking. The upstairs is not presently in use and it would allow some extra income with no change in the structure.

Mr. MacCallum stated it was his understanding that, with respect to older variances, you either use it or lose it.

Ms. Tillman stated that the Variance lapses if not used within one year.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. MacCallum made a motion to grant the petition as presented and advertised, which was seconded by Mr. Marchewka.

Mr. MacCallum stated that, if the second floor is used as a residence, it will be more in conformance with the ordinance. The past variances are in the past and the only question is whether conversion to residential would be contrary to the public interest and it would not. The hardship is that the building is already there. To use as the ordinance requires, would mean tearing down the building, which is not reasonable. Justice would be done because the use would be more consistent and the conversion would have a neutral effect on property values.

Mr. Marchewka agreed that this is really a commercial lot in a residential zone. It conforms to the neighborhood and allowing a portion to be used as residential neither diminishes the value of surrounding properties nor is out of character for the neighborhood.

The motion to grant the petition as presented and advertised passed by a unanimous vote of 7 to 0.

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6) Petition of **Benoit R. and Andrea M. St. Jean, owners**, for property located at **54 Humphreys Court** wherein Variances from Article IV, Section 10-402(B) and Article III, Section 10-302(A) were requested to allow an irregular shaped 380 sf one story detached garage with: a) an 11'± left side yard and a 1'± rear yard where 10' is the minimum required, and b) 33.1%± building coverage where 30% is the maximum allowed. Said property is shown on Assessor Plan 101 as Lot 46 and lies within the General Residence B and Historic A districts.

After a brief discussion of whether Fisher vs. Dover applied, and whether the petition was substantially the same as that heard previously, the Board decided that ruling did not apply and they could move forward with the petition.

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

Mr. Roe Cole stated he is the builder and noted that the garage had been there since 1940 with no impact on the neighbors. There is a spot of land next to it which no one has claimed and the applicants have actually maintained. Any maintenance to the garage would be on this spot so it would not be done on anybody else's property.

He stated the garage would not injure the public or private rights of others. In response to the Board's previous comments, they are bringing the wall in 5' from the rear property line and reducing the scope to try to reduce the square footage while maintaining some kind of storage space. The total proposed lot coverage would be over 30% by just 380 s.f., 165 s.f. over what is currently there. They feel the hardship that has been created for them lies in the poor condition of the current garage and the fact that there is no other place to situate it. The current footprint is only large enough to accommodate a sub-compact car.

In response to a question from Mr. Witham, Mr. Cole stated the back of the garage is a retaining wall which needs to stay. They'll try to save what's there for the foundation. They're tearing down the wood structure, not the foundation. They would add to what is there, keeping the foundation.

Mr. Marchewka asked if the portion that is back only a foot from the property line is a retaining wall and Mr. Cole stated, “yes;” even if they took out the garage, they would have to keep the wall.

Chairman LeBlanc asked about the storage space, which appears to be a leanto.

Mr. Cole stated the green outline on sheet 2 represents the footprint. They have not worked out the details regarding storage, but would work with the Historic District Commission regarding details.

Mr. Parrott noted that the scope of work stated it would occupy the same footprint as the existing garage, or 215 s.f., and Mr. Cole stated that was correct. Mr. Parrott also noted that the new footprint was 380 s.f. and asked how that was the same footprint. Further in the scope of work, it mentions adding “very little new footage to an existing footprint.” If the new footprint was 380 s.f., he didn’t feel that was very little. Mr. Cole clarified that they are occupying the same space, but extending into the addition and adding on 165 s.f.

Mr. Parrott stated that the text specified exterior storage, which to him meant exposed to the sky which this does not appear to be.

Mr. Cole responded that the designated area was storage, but was closed so the neighbors would not have to look at the lawn equipment. He noted they came back after the last meeting and had reduced the scope to a slightly larger one car garage from a two car garage and were asking for room to open car doors and have some storage space. The garage which needs to be taken down is undersized and they are trying to make more usable space. With any other option, the applicants lose their entire back yard.

Mr. Parrott asked if it was correct that the existing garage was 10 feet wide and the proposed was 17 feet wide and Mr. Cole said it was correct at the front, but then it jogs in at the rear.

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

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

Chairman LeBlanc noted for the record that he believed that, in reading the petition, he read 11’ plus or minus, and it is actually 11”.

Mr. Witham made a motion to grant the application as presented and advertised, which was seconded by Mr. Berg.

Mr. Witham stated he had voted against the previous petition because of the 11” dimension, but last time, the applicants were tearing down the structure and putting in a new foundation and bigger garage. With this petition, they are proposing just tearing down the rotting structure and not putting up a two car garage. The foundation is staying in place. The new part is now 5’ from

the setback which, for this zone, is fairly consistent. It butts up against a steep slope and a former blacksmith shop.

He did not feel it was contrary to the public interest to replace a wall in the same location, only extending 30” in front. In the rear, there is ample setback for maintenance. Regarding lot coverage, 3% over is very minimal. The special conditions are that the applicants cannot rehab what exists and slightly expand it without encroaching. The only other method would be to move what’s there and that is not feasible. He didn’t see where there would be any diminution in property values and noted that the tree being saved was an advantage. He concluded that while the 11” setback remained, this was still a very different proposal.

In seconding, Mr. Berg stated he had no problem with their building within the existing setback of one foot from the rear and 11” from the side. The property would never be conforming unless everything was torn down and rebuilt. It makes sense to use the retaining wall. The rear setback relief is further from the line than the existing building.

Mr. Parrott stated that, while it appeared to be a good faith effort, he had a problem with the 11” setback. The Board has consistently denied when maintenance has to be done on the property line if there are other alternatives.

Mr. Witham agreed that they had voted against petitions with such a close setback, but he doesn’t think the applicants should be forced to move the garage in what he views as a repair situation.

Mr. Parrott stated the point was they could move the side wall to give more room for access.

Mr. Witham agreed but it could be a \$2,000 expense to cut in where there was no foundation. Mr. Parrott stated the applicants had not made that claim.

A motion to grant the petition as presented and advertised passed by a vote of 6 to 1, with Mr. Parrott voting against the motion.

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7) **Petition of Nash Family Investment Properties, owner, Smuttynose Brewing Company, applicant,** for property located at **225 Heritage Avenue** wherein Variances from Article XII, Section 10-1201(2) and Section 10-1201(3)(f)(1) were requested to allow: a) a 19’ one way travel aisle for 90 degree angled parking spaces where 24’ is the minimum required, and b) off-street parking 69’ ± from property zoned residentially where 100’ is the minimum required. Said property is shown on Assessor Plan 284 as Lot 1 and lies within the Industrial district.

SPEAKING IN FAVOR OF THE PETITION

Attorney Pelech passed out a compilation of two tax maps and indicated where Smuttynose Brewery was located. The proposed parking spaces have been sketched in. Nothing is being changed with regard to the pavement, which has existed since the mid-70’s. The site has also remained unchanged with regard to the parking. He indicated an area that was never striped, although vehicles parked there, and an area which was striped. As far as this proposal is

concerned, the City would like to see the parking comply with the zoning ordinance and see the actual striped spaces. Parking requirements for the site are 48 spaces, which are indicated on the plan. The closest parking space is approximately 800 feet from the most rear Patriot's Park building. He indicated other features on the handout, including an area of substantial wetlands and a green buffer.

Attorney Pelech stated the parking spaces, which are needed to make up the required 48, are some 69' from the Garden Apartment/Mobile Home zone and the ordinance states they should be 100' away. If they were, the loading berths could not be used.

The second variance they are requesting deals with the travel aisle. He pointed out where parking spaces currently exist and the 19' travel aisle between the parking spaces and the edge of the pavement. Currently there is two way traffic. They are proposing to make a one-way drive-through, for which they received unanimous a recommendation from Traffic and Safety. A variance is needed because the zoning ordinance says that, if you have a 19' travel aisle, the spaces have to be angled and these are 90 degrees.

He stated the special conditions are that the building predates the 100' setback requirement from a residential area. They are stuck with this configuration and there are no reasonably feasible alternatives. A variance would not be contrary to public interest as the traffic plan is safer and better and has the approval of the Traffic and Safety Committee. The area at the back would not be developed due to the wetlands so literal enforcement of the ordinance results in a hardship. The intent of the ordinance with a 100' buffer is to ensure that non-residential parking areas do not interfere with residential users. The nearest residential use is over 800' away, which would have the same effect as a 100' buffer. The changes would be a great improvement to the site, taking a lot of outdoor storage inside and improving the appearance, so there would be no diminution in the value of surrounding properties.

Chairman LeBlanc stated that the street number for the building was not on the building or on a sign, although Mr. Eggleston, the proprietor, believed it was.

Mr. Berg noted that there were 29 parking spaces indicated along the back and he wondered what was there now. Attorney Pelech stated it was an unmarked parking area.

Mr. Berg asked, if on the other side where the 19' travel aisle was requested, they were really asking to make official what was being done unofficially now. Attorney Pelech replied that this was due to the proposed expansion and the increased footprint of the building dictates that they must comply with the requirements of the ordinance including striped paved parking spaces. The only place to show them is at the back, which is within the 100' from a residential requirement.

Mr. Marchewka asked why an approximate 700 s.f. minor expansion triggered requirements for parking spaces.

Ms. Tillman explained that the site plans approved by the Site Review Committee in the mid 80's showed a paved area at the back, but no parking, that being on the left and right. The travel lane was two way. The proposal now is to make a one-way travel path through the site and adjust parking spaces from parallel to perpendicular. They propose using an area which is

paved, but was never on an approved plan as a parking area, and that area is less than 100' from a residential use. They're not changing the paving, just the use of that paving area.

In response to questions from Messrs. Jousse and Parrott, Attorney Pelech indicated the 14 spaces on the north side of the building are perpendicular to the building and not angled because they exist in that configuration now. He was assuming that Mr. Chagnon had drawn the 29 new spots to the rear to the proper scale, the standard 8 and a half feet by 9 feet. They haven't finished with Site Review and all the details will be finalized.

Chairman LeBlanc and Ms. Tillman indicated there was a typical space dimensioned on the plan, but Mr. Parrott stated he could not find. His point was that the new 29 spaces are not dimensioned.

Ms. Tillman stated it was on the plan as a typical space.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

A motion was made by Mr. Marchewka to grant the petition as presented and advertised, which was seconded by Mr. Parrott.

Mr. Marchewka stated they were just legitimizing what had been going on for years when they did not have the requirements in place today. The parking seems to be laid out correctly with the issue being the setback from a residential zone. He stated the variance should be granted for the following reasons:

- The building and pavement predate the setback requirements.
- The property satisfies all zoning and parking requirements other than the setback requirement from a residential area.
- There is no other way to provide the required parking without variances.
- With the wetland area at the back providing a buffer, the building is actually 800' from residences with no danger of intrusion on public or private rights.

Mr. Parrott agreed, stating that they are talking about providing a buffer between commercial and residential, which will be provided by the nature of the land, which precludes further development.

Chairman LeBlanc asked the maker and second of the motion if they would agree to a stipulation which was that a conforming sign indicating the street number be posted on the property and they agreed.

A motion to grant the petition with the stipulation passed by unanimous vote of 7 to 0.

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A motion to suspend the 10: 00 rule passed by unanimous voice vote.  
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Petition of **Advent Christian Church, owner, Nextel Communications, applicant**, for property located at **634 State Street** wherein a Special Exception as allowed in Article II, Section 10-206(25) was requested to allow a 38” wide x 95” long by 87” high generator including diesel tank on a 5’ x 10’ concrete pad to service a previously approved Nextel antennae at the church. Said property is shown on Assessor Plan 127 as Lot 23 and lies within the Apartment district.

Ms. Marie Burbank stated she was representing Nextel. The Board had previously allowed a wireless communication facility at the site. She pointed out the church on the plan and the white fence housing an air conditioning unit. Nextel proposes adding a generator next to the fenced-in area which would be used in emergency situations. The generator would be on a concrete pad surrounded by plantings to match the existing ones as much as possible.

In response to questions from the Board, Ms. Burbank stated the emergency generator would only be for the Nextel equipment and only run when power was needed, although it would be run for test purposes.

Mr. Jeff Steinberg stated the test runs would be once a week for a half hour and the schedule could be adapted to the church and abutters requests. The noise level, under load, would be 70 decibels, comparable to the idling of a school bus. Ms. Burbank stated that the wall and vents would be insulated making it sound proof.

There was a brief discussion of how and at what height decibel level readings would be taken under the ordinance, with Chairman LeBlanc noting that emergency power equipment is exempt, so this will not apply.

Mr. Berg noted there was going to be a 228 gallon diesel tank and asked what type of protection it would have. Ms. Burbank stated there would be a 333 gallon tank underneath the generator. It is a U.L. listed fuel tank taking regular diesel fuel. The tank has a two wall system which is more substantial than something found on residential property.

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

With no one rising, the public hearing was closed.

Mr. Berg moved to grant the special exception as presented and advertised.

Mr. Berg stated that he would like to add the stipulation as recommended by the department, which is that the sound absorbent inner sheathing be installed as indicated in the applicants’ plans.

Mr. Marchewka asked if they should also add a stipulation on when tests should be done.

Mr. Berg indicated that he did not feel that strongly about that stipulation and he felt the applicant made it clear that he was willing to work with the neighbors. After Mr. Steinberg agreed that they would do so, Mr. Berg indicated there was no need for a stipulation.

Mr. Berg stated that he felt the petition met all of the standards required for a special exception. There is no hazard to public or adjacent property from potential fire or explosion as it is just ordinary diesel fuel in a stronger tank with more protection. Any detriment could come arguably from noise or exhaust. The system will only be tested for a half hour each week and the applicant has offered to do the test at the least objectionable time. There is no traffic or safety hazard, increased demand for municipal services, or storm water runoff. Any ambient aspects are addressed by the sound proofing, the arbor vitae that will be planted, and the fencing that will be installed. This will be a very unobtrusive addition to the property.

Mr. Marchewka agreed with Mr. Berg and had nothing to add.

A motion to grant the petition with the special exception passed by unanimous vote of 7 to 0.

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**III. ADJOURNMENT**

A motion was made, seconded and passed to adjourn the meeting at 10:15 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary