

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

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

NOVEMBER 20, 2007

MEMBERS PRESENT: Chairman Charles LeBlanc, Carol Eaton, Alain Jousse, Charles LeMay, Arthur Parrott, Alternates: Derek Durbin, Thomas Grasso

EXCUSED: Henry Sanders, Vice Chairman David Witham

ALSO PRESENT: Lucy Tillman, Chief Planner

I. OLD BUSINESS

A) Approval of Minutes – October 16, 2007

A motion was made, seconded and passed by unanimous voice vote to accept the Minutes as presented.

B) Petition of **Joan Dickinson, owner**, for property located at **137 Elwyn Avenue** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow a 96 sf irregular shaped one story addition connecting a detached garage to the main structure with: a) the garage having a 10'± rear yard where 20' is the minimum required, and b) 31.5%± building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 112 as Lot 48 and lies within the General Residence A district.

Mr. Parrott made a motion to remove the petition from the table, which was seconded by Mr. Grasso and passed by unanimous voice vote.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard Pelech stated that, due to questions raised at the last meeting, the petition was postponed to enable him and Ms. Tillman to look at past plans and files. The history was outlined in the memorandum he had just passed out, which, he stated, legitimized the existing garage. He reviewed the history of the petitions regarding the garage, the building permits issued, the inspections of the Building Inspection Department, and the Board approval for the 16' high garage. It appeared to him that the garage as built complies with what was approved.

Attorney Pelech stated that he believed that, before the question arose at the last meeting, the Board was prepared to grant the variances. He reiterated the variances they were currently seeking, stating that they were not expanding the garage, but simply joining it to the home with an 8' x 12 connector. They would be adding a very small percentage of lot coverage. He hoped that the Board could go

forward and act on the application. He stated that he had gone over all the criteria at the previous meeting, but would reiterate it if the Board wished. He noted that there was no opposition at the previous hearing except for one abutter concerned with a home business use, which was not an issue.

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

Mr. LeMay stated that this had been discussed at some length last month. He agreed with all the comments made by Mr. Witham in his motion and would reiterate some of them. The special conditions are the existing location of the garage and house on a substandard lot. He stated that it was in the spirit of the ordinance to allow the homeowner to get to and from the garage under cover. The size of this addition is minimal and reasonable. He stated there was no benefit to the public that would outweigh the hardship to the owner if the variance were not granted. There would be no diminution in property values.

Mr. Grasso noted that the connector proposed is actually more interior to the lot than the existing house and existing garage, so he agreed with the previous comments and would support the motion.

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

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**II. PUBLIC HEARINGS**

1) Petition of **150 Greenleaf Avenue Realty Trust, James G. Boyle Trustee, owner**, for property located at **150 Greenleaf Avenue** seeking an Administrative Appeal of the Legal and Planning decisions to: a) refuse to accept a Site Plan Application to revise and add parking (to 725 spaces) and add drainage/treatment areas; and b) refuse to issue certain building permits. Such refusals are based on the Departments’ determination that there exists a wetlands violation upon the property precluding site plan review and issuance of certain building permits. Said property is shown on Assessor Plan 243 as Lot 67 and lies within the General Business district.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard W. Pelech stated that 150 Greenleaf Realty Trust was the subject of an alleged violation for cutting trees in the buffer zone. After a number of months, the case was heard by Superior Court. Despite the finding of the Court, included in the packet, that there was no violation of the Zoning Ordinance, the City continues to believe there is a violation. They have appealed the decision to the Supreme Court, where Attorney Pelech believed the chances of success were slim. Bbased upon the continuing allegation of a violation of the Zoning Ordinance, the City will not even

accept the Site Plan Application. Attorney Pelech stated that he and his client have offered to say, “o.k. Your contention is that we’re doing something within 100’ of the wetlands. We’ll maintain a 100’ buffer from all of the wetlands. Just let us go to site plan review.” This would be until the Supreme Court decided whether there was a violation or not. If there was no violation, they would go back to the Board and do something within 100’. If the Supreme Court says there was a violation of the zoning ordinance, then we’re already not doing anything within the 100’. His client would put a potential buffer on their site plan. All they want to do is be able to go forward.

Attorney Pelech stated that they were seeking a consensus to try and work out something so they can go forward. They want to make the lighting dark sky friendly, improve it and make it compliant with today’s standards. They’re not trying to do anything that is contrary to the ordinance.

Attorney Pelech reviewed the various other steps they have taken. He stated that the refusal of the to accept the site plan application and to issue permits is arbitrary and intended to delay the project. He asked to be allowed to start the process and have the City look at drainage and all the other things that site review does. They need to winterize the building and complete the roof. All of the work is inside and none affects the wetlands.

Mr. LeMay asked if it was correct that Attorney Pelech had stated that the plans would show nothing in the 100’ setback.

Attorney Pelech said there would be a white space there. They would leave it in as an existing condition.

Mr. LeMay stated his point was that, even if this alleged violation comes in as if it doesn’t exist and the Superior Court is upheld, his plan wouldn’t cover it. In other words, the plan doesn’t contemplate building or activities in that area.

Attorney Pelech stated only activities that are allowed in that area, such as the detention basin, which the plan now shows within the 100’ setback.

Mr. LeMay asked, to be certain he was clear, if the plan they were presenting would require construction in the setback area.

Attorney Pelech stated, at the present time, yes. What they’ve told the City is they will present a plan that has no issues, or items that are not allowed under the Zoning Ordinance within a 100’ setback until the Supreme Court renders its decision. If the Supreme Court says there is a violation, they will comply.

Mr. LeMay stated, “so then you would revise the plan?”

Attorney Pelech said the plan would be fine. It would already have been approved. If the Supreme Court says there is no violation, then we will go back before the Planning Board to do what we had originally proposed in the 100’ buffer.

Mr. LeMay asked if the Supreme Court had accepted this case.

Attorney Pelech stated they now have mandatory appeal; it is accepted. Conservatively, it will be 6 to 8 months before they render a decision.

Chairman LeBlanc asked, in hypothetical terms, what the effect was of an appeal to the Supreme Court from a lower court on any action.

Attorney Pelech stated it depends on the type of action, but normally the appeal to the Supreme Court doesn't stay the underlying action. What it does is give the losing party a second bite of the apple so to speak. From his and his client's point of view, unless the City can somehow prove a violation, there is none.

Chairman LeBlanc noted that, in the City's memoranda to the Board, it alleges that the work that is to be done on this is placing a garage of some sort to the back which will necessitate working into that 100' buffer.

Attorney Pelech stated that was absolutely incorrect. There are now two garage doors. They are proposing to place 4 more garage doors, for a drive-through service. The doors are 200' away from any wetlands and do not in any way involve them. What the City is saying is they won't issue a building permit for those garage doors because you need to build ramps to get to the garage doors and those ramps will require site plan approval. They agree and present their site plan, stating it doesn't affect the wetlands. Then, the City says it won't accept it as they are in violation of the zoning ordinance. They've been saying that for a year.

Chairman LeBlanc stated that, from Greenleaf Avenue, as you look at the building, there are two doors that go into the building now and asked if the applicants were proposing four on the back side of that building.

Attorney Pelech stated that, as you look at the building coming in off Greenleaf Avenue, there is a garage door in front of you, the service department is on the left and the showroom is on the right. Instead of one garage door, there will now be three there and three on the other side of the building where you drive out.

Mr. James Boyle indicated where the doors currently are located and what they would add. He stated that the pavement went right up to the second door on the Greenleaf side and, to the right, there's a little area of grass that will be paved. There was also a grassy area in the back, to the left of the existing door that will have to be paved. The rest of the areas already have existing pavement.

Chairman LeBlanc asked if there was, then, pavement for the existing door at the back of the building.

Mr. Boyle stated that, facing the building, they propose four doors and three already have paving. In 1965, there were garage doors there so all they're really doing is turning the building back to what it used to be.

Mr. Grasso asked if there is a current plan that lists where the wetlands are and Mr. Boyle stated there was.

Attorney Pelech stated they would be happy to submit it as Mr. Boyle had it in his car.

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

Ms. Suzanne Woodland stated she was the Assistant City Attorney and noted that she had provided in advance a detailed memorandum spelling out the position of the Legal Department and the Planning Department, who were in agreement on the interpretation of the Zoning Ordinance. The memorandum took the Board through the chronology of the situation. It was important to look at this as two separate issues, one relating to the issuance of building permits and one relating to the issue of site plan review.

Starting with the site plan review, there was some discussion as to what this site review application looks like. What can be seen is that there is a substantial expansion of the impervious surface, more paved area. This would be, from what they understand, for the purpose of storing, parking, displaying additional vehicles at the site. Some of that impervious surface does extend, as shown on the existing plan that was presented to the City in October, into what they believe to be the 100' buffer. There are also some drainage structures that are proposed within that 100' buffer. From the departments' perspective, we're looking at a couple of elements here.

Attorney Woodland stated, first that they were terribly disappointed by the decision of the Superior Court. The City of Portsmouth Wetlands Inventory shows wetlands all through the back area of 150 Greenleaf Avenue. That's the premise on which the City began its review. They found wetlands plans. Some plans on file starting in 2003 by Gove Environmental, as well as later plans done by Gove Environmental, hired by Mr. Boyle in September of 2005, showed jurisdictional wetlands in the back of that property at 150 Greenleaf. It wasn't until after suit was brought by the City that Mr. Gove came up with a plan that showed a more limited number of wetlands. She stated that the City had Mr. Mark West, the wetlands scientist who has been doing the Wetlands Inventory for the City, out there. He went on the property several times to define the wetlands and the City thinks they're valuable wetlands. That was the position they have taken all along in this case.

Attorney Woodland stated that, as the Board had heard, the City's appeal to the Supreme Court has been accepted. She declined to speculate on the chances on appeal, but noted that the last time she appeared in Supreme Court for a case related to Mr. Boyle, she lost, although she had won the case in Superior Court. This was on the issue of parking too close to a residential zone. Without making any predictions, she would say that the Legal and Planning Departments are prepared to take this up to the highest court level in terms of how the City's Inland Wetlands Protection Ordinance should be applied.

In terms of the building permit, Attorney Woodland stated that they have tried in the Legal and the Planning Departments to take what they feel is a relatively moderate stance with regard to the issuance of permits. They stand with the language which is in the Zoning Ordinance and which she have cited in her memo. She stated that state law does suggest that the City of Portsmouth is within its rights not to issue building permits for work where there are compliance issues and, in this case, they do have compliance issues. Instead of saying they would not issue any building permit for any work, they've taken a middle ground. Work to maintain the existing section would be permitted. Work related to the proposed expansion would not be permitted until the pending issue is resolved. She mentioned the issue of the bay doors. Adding those doors changes the traffic pattern and necessitates changes to the site to accommodate cars going in and out where presently they do not. The site plan does show a lot of impervious surface and will require technical review of drainage and

to resolve the wetlands issue. There were also a lot of concerns about storm water and they intend to be on top of that issue. From their point of view, it does not make sense for the Technical Advisory Committee and Planning Board to go through and look at a site plan that may become moot by decision of the Supreme Court. The drainage reports are approximately an inch and a half thick and, given that the City feels they have some authority, in the Ordinance and in past practice, to put in abeyance the site review, that is the choice they have made at this juncture.

Mr. Grasso surmised that the City's wetlands boundaries differed from those of the applicants.

Attorney Woodland stated that they didn't delineate the boundaries in terms of setting their own flags. Their wetlands scientists had looked at the flags left on the property after the work was done and the plan that Mr. Gove had done, as a surveyor backdrop so to speak. Mr. West felt he had a good idea of where the boundaries were. Mr. Boyle had a different interpretation.

Mr. Parrott asked if, prior to clear cutting, there had been any attempt by Toyota to reach the City to determine where the boundaries were.

Attorney Woodland stated that the environmental planner and others in the Planning and Legal Departments recommended prior to the clear cutting that, if Mr. Boyle was interested in expanding, he should come in with a site plan. This had been an issue in the trial. She felt it was pretty clear that they made that recommendation to Mr. Boyle.

When Mr. Parrott asked if her answer, then, was "no," there was no serious attempt to establish a mutual understanding, Attorney Woodland responded, "correct."

Mr. Parrott stated that it was his understanding from reading the file that there were two wetland scientists hired by Toyota who came to one conclusion with regard to the so-called "manmade structures" and, on the other side, there were two experts consisting of an independent soil scientist and the City Environmental Planner who came to a diametrically opposed opinion. He asked if this was correct.

Attorney Woodland stated that they may not be diametrically opposed, but the crux of the case revolved around the interpretation and application of a phrase in the Inland Wetlands Protection Ordinance called "manmade drainage structures."

Mr. Parrott stated that, in this case, he envisioned those as some sort of ditches and digging in the ground as opposed to some wood or concrete or something manmade.

Attorney Woodland stated that, from the City's perspective, much of the wet area behind this property does not constitute a manmade drainage structure. There were historical disturbances on the property in that area, including the ditching of a perennial stream, but they were not the typical manmade drainage structures that you might see on a plan such as a swale or detention pond, the purpose of which is to treat the storm water coming off the site prior to entering, in this case, the tributary of a creek.

Mr. Parrott asked if it was correct for him to understand that these manmade structures were not typical.

Attorney Woodland stated that what appears out there, with vegetation, soil and pooling of water, does not look like a typical manmade structure that you would see on a site plan.

Mr. LeMay asked if Attorney Woodland would elaborate on why the City will not examine plans that will not infringe on the wetlands buffer.

Attorney Woodland stated that the plan that was filed doesn't match the infringement on the wetland buffer as they determined it.

Mr. Lemay stated that the applicant was saying he couldn't file his plan.

Attorney Woodland stated they were not accepting a plan for full review because there was an outstanding violation and because it shows impervious surface.

When Mr. LeMay asked if the outstanding violation was the one the Superior Court says was not there, Attorney Woodland stated, "correct."

Mr. Jousse asked if, when an applicant presents a site plan to the board or to the department does the department have a time limit to act on the application, that is to render a decision or start working on it.

Attorney Woodland stated that there may be a time limit, but they turned it around pretty quickly in terms of letting Mr. Pelech know they were not prepared to accept the site plan.

Mr. Jousse stated that was what he was getting at. If the department accepts the site plan, then the department has to make a decision within a certain length of time.

Attorney Woodland stated there may be, but she didn't know the exact length of time.

Chairman LeBlanc asked, in hypothetical terms, what happened to an action when it is appealed to a higher court.

Attorney Woodland stated that there's no order from the Superior Court mandating this or ordering them to do something at this juncture. This was simply round one. They were not in contempt for failing to act.

Chairman LeBlanc asked if they could, in fact, let the procedure go forward through the review process without jeopardizing the court case.

Attorney Woodland stated that would be correct. There would be no prejudice to the Supreme Court appeal if the technical review process and the Planning Board process went ahead.

Ms. Eaton noted that Attorney Woodland had stated that Mark West didn't delineate the wetlands officially, so to speak..

Attorney Woodland stated, "not his own plan."

Ms. Eaton stated that, then, the Superior Court did not see an opposing wetland line.

Attorney Woodland stated that he did not create his own plan, but worked off the plan provided by Mr. Gove. He spent quite a bit of time with the judge reviewing Mr. Gove's plan and identifying where approximately the lines would be. But, the key issue for the judge was the interpretation of the Inland Wetlands Protection Ordinance and manmade drainage structures.

Ms. Eaton stated that they had interpreted it as being more historical than the City's contention.

Attorney Woodland stated that was correct. From the City of Portsmouth's perspective, the application of the ordinance was clear. Historical disturbances are not manmade drainage structures. This interpretation was consistent with other provisions of the ordinance. You look at a property when the application is filed, not what the property was fifty years ago in terms of wetlands.

Attorney Charles Griffin stated that he lives at 210 Hillside Drive and also wished to speak in opposition.

In layman's terms, this would be similar to a football game. Mr. Boyle is asking you to entertain the site review process because he prevailed in a case at the Superior Court level, which would be the first half of play. The Legal and Planning Departments are saying you should allow the second half to be played. He agreed with Attorney Woodland and would be loathe to predict what might happen at Supreme Court. He submitted a petition, signed by 29 homeowners on Hillside Drive, Greenleaf Avenue and Lois Street, requesting that no further action be taken by City until the Supreme Court ruling.

Attorney Griffin stated that he had reviewed the materials in the file and two items stood out. He quoted from an October 30, 2007 letter from Attorney Woodland to Attorney Pelech in which she stated, "There is prejudice to the City in proceeding with site review. The City and its boards may well waste valuable time looking at plans that may become moot by later Court decisions." She noted that the amount of pavement would affect drainage and there was likely to be significant discussion with regard to landscaping/plantings, and the discussion with regard to landscaping would be impacted by the appeal.

Attorney Griffin stated that he believed the City had not been unreasonable in its treatment of Mr. Boyle. The Board would have read Mr. Holden's affidavit which indicates that the City has issued permits to Mr. Boyle to maintain the occupied sections of the building and to maintain the integrity of the building as a whole. Mr. Holden went on to say that the City cannot grant a building permit and related authorizations for expansion into vacant space until the pending violations for clear cutting in the wetlands buffer were resolved.

While Mr. Boyle tends to believe that the issue has been resolved because he received a ruling from the Superior Court, the City's Legal Department and Attorney Griffin were telling the Board that the matter had not been fully resolved and would not be fully resolved until the Supreme Court rules on the appeal. They were the officials in this matter and should allow this game to play to its conclusion and not to declare Mr. Boyle the victor at half time. He stated that, even in the instances when Mr. Boyle has been issued permits, there have been issues. There was a letter also in the file from the City Attorney to Attorney Pelech in January of this year, which says, "I'm putting you on notice that Mr. Boyle's contractor appears to have some difficulty in following the permit. If there are continued difficulties, as indicated in my last letter, the present permit for renovation work will be



suspended.” He concluded that, even in those instances where the city has issued permits, Mr. Boyle has obviously pushed the envelope. He asked that the Board accept the recommendations and advice from the City’s Planning and Legal Departments and preserve the status quo in this matter until such time as the Supreme Court has rendered its decision on this appeal.

Master Daniel Orlando stated that he and his sister spend time in the wetlands. If that wetland it is demolished and replaced by a parking lot, it could affect thousands of animals. It would be very destructive to an ecosystem.

Mrs. Orlando stated they reside on Marjorie Street. Since Portsmouth Toyota moved in, there has been more water in the basement, light glaring in her window and more traffic sounds. She stated that the owner has no empathy with anyone living there. She wondered how the paper street called Joseph Street had changed from residential to commercial. Business should be done where there is business, not where people are living.

Ms. Beth Gross Santos stated that she has lived at 79 Lois Street for 13 years and had never heard any noise until 2 years ago. She felt they were violating the rights of the neighbors. With winter coming, they hear all the noises and see all the lights. She thought she was buying in a residential area, but it’s now turning into a commercial area. She was concerned about the owner’s wish to expand to 725 parking spaces as there’s not that much space in the buffer. As far as drainage, she’s seen the water table coming up and had water damage in the basement she never had before. She stated she was a business person and followed the rules, but she didn’t see their taking responsibility here and showing respect for their community and neighbors.

Mr. Rodney Rodriguez stated that he is the owner at 94 Lois Street. He stated the clear cutting was drastic, over 300 trees, and you can now stand on Greenleaf Avenue and see into his window. He provided pictures of the damage done in the wetlands. If Mr. Boyle needs to redo his roof or fix things things within the building, he should be given a permit. He is diametrically opposed, however to their expansion to 725 parking spaces, to their paving over, to putting in lights and to getting closer to their properties and the wetlands. If this was what Mr. Boyle wanted, he should have gone to the City and done it correctly. He believed they were also in violation of State wetlands laws regarding clear cutting woods within so many feet of a state highway. He stated he does everything in his business so that it does not affect residences but they don’t understand the relationship between a business owner and the neighborhood.

Mr. David Mooney stated he lived at 11 Marjorie Street. He was not against business growing, however, if they expand with more parking spots toward his street, he would hope they would replant and ensure that new lighting is directed only on their property. He stated that this was his childhood home and he was disappointed in them cutting down the trees. He hoped that what was done in the future would improve the neighborhood.

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

Attorney Pelech stated there has never been a dispute in Superior Court as to where the edge of the wetlands were. Mark West testified for the most part that he had no quarrel or qualms as to where the edge of the wetlands were. The issue was whether or not these wetlands were manmade. Mr. West produced a 1943 aerial photo which showed bedding ditches and Mr. West testified that they were manmade and continued to exist on the property. Attorney Pelech stated that was how their case was

made – by the City’s expert. The City’s expert stated that those bedding ditches, which were done by the Conservation Corps in the late 30’s and early 40’s, were manmade drainage structures. The aerial photos in the 40’s, 50’s and 60’s showed those manmade ditches. So the judge, after spending a half a day out there and seeing where they had dug the ditches and listening to all the experts, said they were manmade. That was the issue and not whether the edge of the wetlands was clearly delineated. Manmade drainage structures do not have a buffer and that was what the court found.

Attorney Pelech stated that the City knew absolutely where the edge of the wetlands was. In July, all of the brush, actually a thicket, was cut so that the wetlands could be delineated. The City was there when the brush was cut and saw the wetlands delineation. It was not until the following December after all of the brush was cut, that the trees were cut. Mr. Boyle came to City Hall and he got a permit to cut the trees, an Intent to Cut signed by the Legal Department. Mr. Britz and representatives of the Legal Department and the Planning Department were watching the trees being cut and they never once said you’re in violation. It was not until two days later after the trees were cut, that Mr. Boyle got a letter saying you’re in violation. He maintained that nothing they were doing comes anywhere near the wetlands. They were not proposing anything within the wetlands or in any natural wetlands buffer. He reiterated their offer to do nothing within the 100’ buffer, be they natural or manmade, just let the City accept their application and let them go forward.

Attorney Woodland stated that she didn’t want to retry there the case they tried in Superior Court, but they had a very different opinion on how the evidence unfolded. For the record, they did not issue any permit for Mr. Boyle. There is a form regarding an intent to cut trees. It is a tax form and when Mr. Boyle came in with this form, he was advised not to cut trees within the buffer zone. It is actually legal to thin trees within the buffer zone. That’s good forest management practices. Just don’t clear cut. She didn’t want the Board leaving there that evening thinking that the City had permitted this.

When Mr. Jousse asked if Mr. Boyle had been authorized to winterize the building, Attorney Woodland stated that they had issued permits last year to winterize. Recently, Mr. Boyle had come to the Building Inspection Department with an additional list to winterize further. The Building Inspector went to the site last week to look at the list of items and they decided to see first what the Board would decide that evening. They anticipated that, if the Board decided to affirm the interpretations of the Ordinance of the Legal and Planning Departments, they were prepared to issue permits to allow some additional limited work that the Building Inspector would break down as not related to the expansion.

Mr. James Boyle stated that this was a pretty sophisticated building. They want to improve the building environmentally and found themselves in this position of the City not issuing permits. They had spent a lot of money for a new roof, which contains internal roof drains. If there’s no heat in the building, the roof will freeze, but the City won’t let them bring power to the units. He stated that the integrity of the project going forward is hurt if you have to try and “mickey mouse” things. You may have to do something all over again. They were trying to maintain the structural integrity of the building and the safety aspect. There are steps involved in what it will take to finish the roof properly and it has to be done in sequence. He felt Mr. Hopley had understood the building phase position.

In response to a question from Chairman LeBlanc, Mr. Boyle stated that the proposed winterizing would not include the garage doors in the back of the building.

Mr. LeMay asked why there had been clear cutting.

Mr. Boyle stated that the judge had said there was no clear cutting. Because there was no buffer zone, there was no clear cutting. He stated that he was not the demon he had been portrayed as being. He had done everything by the little green book. He had hired the best experts and maintained he was very concerned about neighbors' property because it affects the value of his property and he would never do anything to diminish the value of his own property. He maintained that the better and more beautiful his property, the better it would be for the whole neighborhood and the City of Portsmouth. He stated that he let the experts do their job and the City officials were out there watching. Because the first company couldn't come, he had gone twice to the City's Legal Department to have them sign an intent to cut form. He maintained very few property owners would do this.

Mr. LeMay stated his question was why it was cleared and not how and Mr. Boyle stated they planned to extend the parking.

Mr. LeMay asked if that was where they were planning on expanding it now and Mr. Boyle stated, "yes."

Mr. Parrott stated that, to help him understand, when every single bush and tree in a given area is cut down to a foot above the ground, that was not a clear cut?

Mr. Boyle stated, "no."

Mr. Parrott stated that to them, as laymen, it was.

Mr. Boyle stated that he wanted them and his neighbors to know that, if they were to drive by that property the day after the machine got rid of all the brush, they probably would have thought it was unbelievable. Someone driving by and viewing the property would think, "this must be a violation – someone should go to jail for this." He stated that the area that was being challenged and what they will be going to court for, was actually the size of the hearing room.

Mr. Parrott stated that he had, in fact, driven by. He had seen an area of "x" size where every single thing was cut down to a foot approximately and Mr. Boyle had said to him there was no clear cutting involved. What he was saying to Mr. Boyle was that it looked a whole lot like clear cutting to him.

Mr. Boyle stated, "no."

Mr. Parrott stated that he had not said on what type of ground it was done. Mr. Boyle had said there was no clear cutting. Mr. Parrott maintained that clear cutting was clear cutting, when everything was gone.

Mr. Boyle stated that he had never heard the term until he read about it in the newspaper. And, there was no buffer zone on that property. A soil scientist and licensed forester did that work. He stated they were experts and wouldn't have done anything that was wrong.

Mr. Rodriguez stated that, in the State statute, cutting 300 trees or shrubberies constituted clear cutting. He had somebody evaluate his property before and after and his property values went down by over \$80,000 because of the noise and the site work.

Mr. Mark Gross Santos of 79 Lois Street stated his children wanted to say something. They stated they live right next to it and don't want the animals they see there to get hurt.

Mr. Gross Santos stated that he also questioned that Mr. Boyle's improving his dealership would add value to his house. If anyone wanted to buy his house now, they would see a bigger dealership.

## **DECISION OF THE BOARD**

Ms. Eaton made a motion to deny the appeal and uphold the Planning and Legal Department decisions, which was seconded by Mr. Jousse.

Ms. Eaton stated that she couldn't speak to the legal battle but, until the legal process was completed and the Supreme Court decision was made, they should go with what the legal counsel and the Planning Department have said. Once that final decision was made, the site plan may be affected so they shouldn't review the site plan now.

Mr. Jousse stated that Mr. Pelech had stated that the Department had 65 days to act on an application they accepted. If the Board were to grant the appeal and the applicant made a request to the Planning Department, the City would have 65 days to make a decision on the application, which just wasn't logical because of the legal decision that was pending. While it was unfortunate that the applicant would have to wait until the court made the final decision, but it was the only common sense thing to do. With all the legal wrangling going on, common sense should prevail.

Mr. LeMay stated that he agreed in general, but was disturbed that the method of code enforcement would result in not issuing basic maintenance permits while waiting for what the Superior Court had to say.

Ms. Eaton stated that was not her understanding of what was going to happen.

Chairman LeBlanc noted that Attorney Woodland had pointed out that there was a pending permit about winterizing and protecting the integrity of the building.

Mr. Parrott stated it was unfortunate that the dispute had gotten to the stage it had. It was very rare for the City to take a case such as this to Superior Court, never mind Supreme Court. There's usually an accommodation and a working out of the issues between the applicant and the City. His conclusion was that the City must feel pretty strongly about this, both from a procedural basis and on the technical facts of the issue. There are a lot of wetlands in the City so he felt it was not a trivial issue and, as has been pointed out, the applicant had availed himself of the opportunity to go to the Supreme Court. This Board should not be given the impression that it was unreasonable for the City to take the same route, which is the system they had. Based on everything that they had heard that evening, it was reasonable that the Board support the City's position at this time.

The motion to deny the appeal and uphold the actions and decisions of the Legal and Planning Departments was passed by a unanimous vote of 7 to 0.

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2) Petition of **Christopher A. Tarry, owner**, for property located at **28 Harding Road** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow an L-shaped 310± sf two story addition with a 25.2'± front yard where 30' is the minimum required. Said property is shown on Assessor Plan 247 as Lot 17 and lies within the Single Residence B district.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard W. Pelech stated that the owner, Mr. Tarry, had submitted a very complete package outlining what they were proposing. The existing home was located within the front setback. They wanted to remove the rear deck, add 7' to the side and run it around to the back where the deck currently sits. This would allow them to enlarge the bedrooms on the upper level. The only area requiring a variance is that within the front setback.

Addressing the criteria, Attorney Pelech stated that the variance was necessary to enable the owner's reasonable use of the property. The only way he can add on to the side and keep the front façade is to have the setback at 25.2' where 30' is the minimum required. There was no other reasonably feasible way to accomplish it. If it were set back so that it was 30', the floor plan of the house would not work and there would be architectural problems. He stated it was consistent with the spirit of the ordinance as the addition was not infringing more than existing building, just keeping it on the same plane. He stated that there was no hardship on the owner in having to move the addition back that would be outweighed by some benefit to the public. This was a very minimal variance request. He stated that the value of surrounding properties would not be diminished in any way. Mr. Tarry had spoken to all the neighbors and there was no opposition.

There was a brief discussion among Chairman Leblanc, Attorney Pelech and Mr. Parrott about where the property line was from the edge of the existing house to the left side. It was 38' before the addition and 31' from which Mr. Parrott concluded that there was still plenty of room.

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

Mr. Parrott stated that it would not be contrary to the public interest as this was clearly an attractive house. The hardship was that setting it back 4' would be difficult to do and there was no compelling reason to do so. A variance was needed to enable the proposed use as it was obvious from the layout how the room would fit into the existing structure. It makes sense to do it this way and it was clear from the architectural drawings that there was no other method that could be used. He stated that it was in the spirit of the ordinance to allow homeowners to do what they want for their use when possible. There was no offsetting interest to that of the homeowner. In terms of property values, he

stated that the addition will be similar in style and fit in nicely. Any effect would probably be positive.

Mr. Grasso stated that he agreed with Attorney Pelech that it was an excellent packet. He noted that the house originally sat approximately 25' from the front property line and almost anything he could do would require a variance.

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

Mr. Durbin excused himself at the break for the remainder of the hearing.

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3) Petition of **Scott E. Tetreault, owner**, for property located at **30 Mariette Drive** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow a 12' x 22' one story attached garage with a 4.5'± right side/rear yard where 10' is required for the side and 30' is the minimum required for the rear, and b) 22.9%± building coverage where 20% building coverage is the maximum allowed. Said property is shown on Assessor Plan 292 as Lot 195 and lies within the Single Residence B district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Scott Tetreault stated that they would like to put a garage on the side of the house so that his father would not have to scrape ice off the car. He stated the current positioning of the home does not allow the necessary clearances so they need a variance. He stated that he had forgotten to put in the deck on his application and passed out a sheet showing a small deck in the back.

Ms. Tillman stated that could increase the lot coverage if it was more than 18" high. Mr. Tetreault stated he believed it was not. He responded, "exactly" when Chairman Leblanc noted that there was a shed to the left side of the house and they were going to expand the garage that was there.

Ms. Tillman noted that the petition had to be advertised the way it was as it was a little hard to determine where the side and rear yards were. They sit at an angle. Mr. Tetreault noted that it looks like a baseball field.

Mr. Grasso asked if the house came with a garage and had since been converted to living space and Mr. Tetreault indicated it was still a garage.

In response to a question from Ms. Eaton, he indicated that the deck had been done in 2001. There had been a Board of Adjustment hearing in 2001. When Ms. Tillman indicated it had not been for the deck, he responded that he couldn't speak for that as he wasn't involved.

The issue was again raised of the height of the deck and Ms. Tillman stated that, if it were less than 18", it wouldn't count for setbacks or coverage. She stated they would confirm that.

Mr. Tetreault stated if it was higher, they would take it down.

When Mr. LeMay asked if it was his intention to have a two car garage, Mr. Tetreault stated, “exactly.” He noted that he had one other thing to submit, which was a written statement from the closest abutter who had signed off on the project.

**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. Parrott made a motion to deny the petition, which was seconded for discussion by Mr. Grasso.

Mr. Parrott stated that this was a relatively small lot and, if it were only a garage, he might feel differently, but, as the Planning Department had pointed out, there was already a fair amount of addition on this lot. The back addition takes up a good deal of the backyard. He stated that the closest side setbacks they had in the ordinance are at 10’ and this, at 4.5’ is less than half that and would result in crowding the lot, a little too much development. The side setback was just too close.

Mr. Grasso agreed, stating that the previous addition that required a variance from the Board, along with this one, is just too much.

The motion to deny the petition was passed by a vote of 5 to 1, with Chairman LeBlanc voting against the motion.

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4) Petition of **HCA Health Services of NH, Inc., owner, Independent Wireless One Realty Corporation, and its affiliate, Sprint Spectrum, LP, applicants**, for property located at **333 Borthwick Avenue** wherein a Variance from Article II, Section 10-209 is requested to allow the installation of six additional panel antennas and related base station equipment on the Hospital roof. Said property is shown on Assessor Plan 240 as Lot 2-1 and lies within the Office Research district.

A motion to postpone consideration of the petition until the December 18, 2007 meeting, at the request of the applicant, was passed by unanimous voice vote.

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5) Petition of **Terry Seavey, owner**, for property located at **52 Concord Way** wherein a Variance from Article II, Section 10-206(4) is requested to restore the use of the property back to the original duplex on a 4,791.6± sf lot where the minimum lot area required is 6,000 sf. Said property is shown on Assessor Plan 212 as Lot 9 and lies within the General Residence B district.

Mr. Gregory Smith stated they were trying to get a variance to return the property to its historical configuration as a duplex in an area of duplexes. There was a two car garage on the premises and, as shown in the photograph, there was ample parking on property.

In response to a question from Mr. Grasso, Mr. Smith stated that the two car garage was theirs; the three car garage was not. There was space on the street and next to the garage for winter parking.

**DECISION OF THE BOARD**

Mr. Jousse made a motion to grant the petition as presented and advertised, which was seconded for discussion by Mr. Grasso.

Mr. Jousse stated that the whole Heights area was a different kettle of fish. Some of the property lines go right through buildings. Historically, nearly all of the buildings in that area were either duplexes or larger. This was just restoring the building to what it was originally.

Mr. Jousse stated that it would be in the public interest to add a dwelling unit in the city. The special conditions resulting in a hardship were the location and circumstances of the area. It was built during the war for shipyard workers and was tight and congested. The zoning restriction would interfere with the owner’s wish to simply restore the property back to what it was. He stated that granting the petition would not injure the public or private rights of others and would be consistent with the spirit of the ordinance. Nothing had been presented as to the value of surrounding properties, but he didn’t believe they would be diminished.

Mr. Grasso stated he had seconded for discussion only and wouldn’t support the motion. He noted that both the applicant and Mr. Jousse had described the project as restoring the property in a historic way. This house was vinyl sided and other changes had been made to it. He stated that the parking was really tight, especially in the winter, and another household with 2 or 3 more cars may injure the public and private rights of others.

Chairman LeBlanc stated that there were three parking spaces required for this property, with which Mr. Grasso agreed.

Chairman LeBlanc noted that they have the three spaces, a two car garage, plus others on the property.

Mr. Parrott stated that in this district, the minimum lot area required was 5,000 s.f., so this at 4,791 was undersized for a single residence. In terms of Mr. Grasso’s comments, they look to improve living situations and any lot under 5,000 was pretty small for a single family, let alone a duplex, and he had trouble supporting the motion.

Chairman LeBlanc stated that it would be prejudicial to this property to require the greater area because the Heights is a special area. Most of the lots were small, but he believed this was more in conformance with the area if it were put back to a duplex.

The motion to grant the petition as presented and advertised was passed by a vote of 4 to 2, with Messrs. Grasso and Parrott voting against the motion.

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6) Petition of **Paul H. White, Trustee of the Paul H. White Realty Trust, Janet H. White-Nay, Trustee of the Janet H. White-Nay White Revocable Trust of 1992, Paul H. White and Janet H. White-Nay, Co-Trustees of the Jean H. White Revocable Trust of 1992, owners, and Zachery H. and Nicole R. Gregg, applicants**, for property located at **13 Salter Street** wherein the following are requested: 1) a Special Exception as allowed in Article IV, Section 10-401(A)(1)(d) to

convert an existing 5 dwelling unit apartment building to a single family dwelling and the proposed garage addition to have a dwelling unit on the 2nd floor and, 2) Variances from Article III, Section 10-304(A) and Article IV, Sections 10-401(A)(1)(c) and 10-401(A)(2)(c) to allow: a) a 12' x 30' 2 story addition to the left side of the existing building with a 26'± front yard where 30' is the minimum required, and b) an irregular shaped 683.5± sf attached garage with a 2nd floor apartment to the right side of the existing building with a 16.5'± right side yard where 30' is the minimum required. Said property is shown on Assessor Plan 102 as Lot 28 and lies within the Waterfront Business and Historic A districts.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard W. Pelech stated that this was a large old structure that had been an apartment house for over 50 years and currently contains 5 apartments. This proposal was to change to a single family residence with an in-law apartment over the garage. He stated that the Waterfront Business District has artificially large setback requirements of 30'. He referred the Board to the tax map which showed the majority of the houses on adjoining small lots built on or over a property line. This lot was much larger than the other lots where a 30' side or front setback was certainly not the norm. The proposed front and side yards were certainly greater than those on the surrounding properties. Noting that this home and lot predated even the concept of zoning, anything they could do on the lot would require a variance. In addition to putting in the addition and garage, vehicles would be parking in a lot behind the building.

Referring to the second sheet of packet, Attorney Pelech stated that the existing front yard was currently less than the 30' required. The proposed left side addition was actually set back from the front of the existing home about 2'. The garage was further back and meets front setback, but not the 30' side setback. He stated that the 16.5' setback to the garage would be greater than on the surrounding properties.

In terms of the Special Exception, Attorney Pelech stated that there would be no additional hazard to the public from fire or explosion by going from 5 to 2 units. There would be no detriment to property values as the neighbors would be happy to see less units. There would be no changes to the essential characteristics of the neighborhood. There would be no noise, smoke, or other pollutants generated. With a drop in the number of units, there would be no traffic safety hazards created, nor increase in traffic. The demand will be less on municipal services and, in addition to the grass in the back, they would be putting in a treatment swale for storm water runoff before it goes into the water.

Addressing the criteria for granting the variances, Attorney Pelech stated that the proposed setbacks allow light and air and access for emergency personnel. The variances were needed to enable the property to be used as the applicant wishes. He stated that there was no reasonably feasible alternative, given the special conditions of the property. This was a large house on a large lot which had been placed in a Waterfront Business District where a residential use was not allowed. Although all the properties on that street were residences, they do not have residential setbacks. He stated there would be no benefit to the public in denying the request. He felt the public would be benefited by the applicants working with the Historic District Commission on this old and historic structure. As the Historic District Commission was opposed to a garage and wanted a barn, it was now being redesigned for that.

In response to questions from Ms. Eaton, Attorney Pelech stated that, if approved, parking for the apartment would be in the garage/barn. There was adequate parking for at least two cars.

When Chairman LeBlanc asked how many there would be in the garage, he replied that he wasn't sure under the new design, but thought there would be three. The access to the apartment would be by a stairway inside the garage/barn.

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. Parrott made a motion to take the Special Exception first and to grant the Special Exception as presented and advertised. Ms. Eaton seconded the motion.

Mr. Parrott stated that the move from 5 units to 2 was desirable. He felt that most of the criteria for granting Special Exceptions applied more to commercial properties generating hazards and none of those applied. If there were any change to the property values, it would probably be to the better. He stated that, with fewer cars, the level of traffic activity should decrease. The demand on municipal services would be reduced. The issue of any increase in storm water runoff had been adequately addressed. He felt that the changes covered by the Special Exception would be positive.

Ms. Eaton stated that reducing the units from 5 to 2 was certainly more appropriate to the district and would have less impact. Parking would also be less.

The motion to grant the Special Exception was passed by a unanimous vote of 6 to 0.

Mr. LeMay made a motion to grant the variances as presented and advertised, which was seconded by Mr. Grasso.

Mr. LeMay stated that removing some of the gravel and reducing the number of cars would serve the public interest. The special conditions were obvious from the neighborhood. Most of the other setbacks could be measured in inches and were right up to the property lines. This would be the star of the neighborhood with regard to setbacks. He stated the need to allow this use was clear. It was consistent with the spirit of the ordinance and justice would be served by allowing the restoration of this property within this environment. He stated that the changes would likely have a positive impact.

Mr. Grasso stated that these were minimal requests given the neighborhood and the proximity of other buildings to the property line.

Mr. Jousse stated that he would not support the motion. It appeared that the garage could be located on the other side and moved back allowing ample room. There was plenty of area to accomplish what the applicant would like without seeking relief.

Chairman LeBlanc stated that he agreed.

The motion to grant the variances failed to pass by a vote of 3 to 3, with Ms. Eaton, Mr. Jousse and Chairman LeBlanc voting against the motion.

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7) Petition of **Robert MacDonald, owner**, for property located at **430 Islington Street** wherein Variances from Article III, Section 10-303(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow the following: a) existing two unit building to be expanded vertically with a 7'± right side yard where 10' is the minimum required, and b) a 34' x 60' three story addition for two additional dwelling units to the rear of the existing 2 dwelling unit building with a 9'± right side yard where 10' is the minimum required. Said property is shown on Assessor Plan 145 as Lot 36 and lies within the Mixed Residential Business district.

Attorney Bernard W. Pelech noted that they had been before the Board the previous month, at which time their request for 6 units on the lot was denied. At that time, the Planning Department had pointed out that 4 units were allowed. He stated that the problem was that the existing house does not meet the setbacks so any addition expands a non-conforming use and requires a variance. The existing house was 7' from the right side. They propose to leave the existing house where it is and place the addition 2' back, so it will be 9'.

Attorney Pelech stated that the special conditions of the property were that anything added to existing home will be an expansion of a non-conforming structure so will require a variance. There was no other feasible method to achieve the necessary addition to the home. They can't add a separate, free standing dwelling because that would also not be allowed. Granting the variances would be in the spirit of the ordinance, which allows expansion under certain conditions. Existing properties can go up to 4 units as long provided there is 500 s.f. of gross area per dwelling unit and 1,500 s.f. of lot area per dwelling and we have 4,000 s.f. Most of the surrounding properties were multi-family. He stated that the hardship on the owner was not outweighed by any benefit to the public and the relief requested was minimal. The public interest would be benefited.

There was a discussion among Chairman LeBlanc, Attorney Pelech and Mr. MacDonald about the height of the roof, with Mr. Macdonald stating that the roof of the proposed addition would be approximately 2' higher than the existing roof.

**SPEAKING IN OPPOSITION TO THE PETITION**

Mr. Jeremy Small, representing 410 and 420 Islington, stated that their concerns from last month were still not addressed. Their number one concern was parking. As could be seen in the exhibits he had distributed, spring water extends onto both adjacent properties. Parking out back will add to the drainage problems. He referenced sections of the ordinance dealing with erosion and the flow of water onto adjacent properties. He stated that realtors had advised him that, if this went through, their property value would diminish by 20% to 30%. He stated that 420 Islington is one unit and 410 is 2 units, not four on one lot. Their other concern was the use of the easement. Exhibits C and D showed how the view to the left and right of an exiting driver was greatly diminished.

In response to a question from Chairman LeBlanc, Mr. Small indicated that there is normally parking in front of all the houses. If 430 Islington was going to use the same driveway, he saw a problem. He asked the Board to deny the petition, or table it for site review to look at drainage and parking.

Mr. Parrott asked on what the realtors' opinion as to the loss of value was based and did Mr. Small have it in writing.

Mr. Small stated it was the loss of privacy, as well as the increased traffic. He said he could get a written opinion.

Ms. Rebecca Emerson of Woodbury Avenue stated she was appearing on behalf of Ms. Nancy Emerson of 442 Islington Street. She outlined the reasons why she felt the petitioner did not meet the five requirements for granting the variance.

Ms. Margaret Ryan of Islington Street stated that her concerns remained the building size and the danger of exiting onto and entering from Islington Street. She felt that the new proposal hadn't really made any significant changes that address these issues

Ms. Joanne Chase, of 410 and 420 Islington Street, stated that she has six cars that need to get out in the morning. They have a system that works well now, but she was concerned about the addition of new people, particularly in the winter, with additional snow.

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

Attorney Pelech stated that, with regard to the access, the previous speaker had allowed the applicant an easement with the understanding that there would be no more than 4 units. He noted that she has 6 cars on her property, but has a problem with the applicant's. He stated that he didn't know how the abutters attributed the water to Mr. Macdonald's property. There was always water in that backyard.

Mr. Small stated that their concern was not that it was already there. Their concern was with the parking area and how it will affect additional runoff.

Mr. Macdonald stated that he had a degree in engineering. His property was more than 2' in elevation below their yard and water does not run uphill.

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

#### **DECISION OF THE BOARD**

Ms. Eaton made a motion to deny the petition, which was seconded by Mr. LeMay.

Ms. Eaton stated that in some ways, this was a reasonable request because of the setbacks in the area, but she did not feel the petition met all the criteria, particularly that there was no other reasonably feasible method to achieve the benefit sought. She didn't see the need for this encroachment. There was also a question of diminution in value.

Mr. LeMay stated that most of the issues exist from last month. There were still issues of potential impact on property values, safety and privacy. It was difficult to find justification to meet the five criteria.

The motion to deny the petition was passed by a unanimous vote of 6 to 0.

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Mr. Grasso made a motion to continue the meeting past ten o'clock. There was no second to the motion.

Mr. Jousse made a motion to adjourn the meeting and continue the remaining petitions to the next meeting, which was seconded by Mr. Parrott. The motion was passed by majority voice vote.

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**III. ADJOURNMENT.**

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

Respectfully submitted,

Mary E. Koepenick, Secretary