

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

**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**April 20, 2010**

**MEMBERS PRESENT:** Chairman Charles LeBlanc, Vice Chairman David Witham, Carol Eaton, Thomas Grasso, Alain Jousse, Charles LeMay, Arthur Parrott, Alternates: Derek Durbin, Robin Rousseau

**EXCUSED:** None

**ALSO PRESENT:** Principal Planner, Lee Jay Feldman

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**I. OLD BUSINESS**

A. Approval of Minutes – March 16, 2010

It was moved, seconded, and passed by unanimous voice vote to accept the Minutes as presented.

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- B) Petitioner: J. P. Nadeau  
Property: 187 Wentworth House Road Assessor Plan 201, Lot 12  
Zoning district: Waterfront Business District  
Request: **Amend the Variance** granted January 19, 2010 to establish two (2) residential uses where residential uses are prohibited by allowing the two residential structures currently existing on the lot to be moved to another location on the lot as shown on the plan submitted with the application, and amend the stipulation attached to the variance, both in accordance with the submitted revised plan. Section 10.440, Use #1.10, Section 10.513, and Section 10.334.

Mr. J. P. Nadeau stated that he was appearing for Witch Cove Marina LLC. He referred to the variance granted on January 19, 2010 to relocate the two existing buildings noting that, at that time, the plan showed the two buildings with a slight encroachment into the 100' tidal buffer. As they would recall, by moving the two buildings to that location, they became more conforming as to setbacks. The proposal then went to the Planning Board for a conditional use approval. The Board expressed the opinion that it didn't meet the criteria so they went back to the engineers who relocated the buildings so that they did not encroach

into the tidal buffer although there would not be as much light between them. That left them with the need for an amendment to the variance that the Board of Adjustment granted so they could be placed in the new location as the January 19<sup>th</sup> approval said “as shown on the plan.” He stated that the plan at that time showed them encroaching into the tidal buffer. The new plan showed the new location which still met the property boundary setbacks.

Ms. Rousseau asked if they currently had an active application before the Planning Board and Mr. Nadeau stated that, after a meeting with Mr. Sullivan and Mr. Feldman, it was necessary to withdraw the application. In response to further questions, he stated that his intention was to hopefully move the two buildings as shown on the plan. They couldn't be moved to the location originally approved by the Board because, as could be seen in the plan presented in January, the front porch of the building encroached into the buffer and, for that reason, could not receive Planning Board approval for a conditional use permit. Rather than challenge that determination, they came back before this Board for an amendment. He stated that, at the January 19, 2010 meeting, one of the Board members had said the buildings could be aligned differently, but their then purpose was to give a reasonable space between the buildings. When Mr. LeMay asked how much space there would be, Mr. Nadeau stated he would not sure, probably about 5'. Mr. LeMay stated he didn't know how they would be maintained and Mr. Nadeau replied that the spacing did allow sufficient room for maintenance.

Mr. Parrott stated that, following up on Mr. LeMay's question, previous editions of this drawing had dimensions from the corner of at least one of the buildings to a fixed point. This had no dimensions at all and it bothered him as he didn't know what they were being asked to approve. The tidal buffer setbacks were indicated but those were not fixed points and this was not a surveyed plan. If the amendment were to be approved and the building inspector was told to enforce what was approved, the first question would be where the buildings were relative to each other and to a fixed point on the ground.

Mr. Nadeau responded that there had been multiple plans by engineers, all stamped. They had a full scale plan prepared by engineers which showed setbacks and buffers and would be submitted to the Planning Department if their request were approved. Mr. Parrott stated that he understood but reiterated that the plan before them had no dimensions or fixed point reference and they couldn't approve what they couldn't see. Mr. Nadeau stated that this was no different from the plans submitted in January which had a 1" to 40' scale. He offered to go and get the plan if they wanted to postpone the hearing to later. Mr. Parrott explained that his insistence was due to the many plans provided of the property to the Board all of which had at least a dimension from the houses to a fixed point where this had none.

Chairman LeBlanc stated that a solution might be that, if there was a motion to approve, it could be made conditional on a plan being submitted with dimensions from a corner of the property to a corner of the house. Obviously, if they didn't approve it, the point was moot..

Ms. Eaton noted there was a difference between a surveyor and a land surveyor and Mr. Nadeau stated that the plans had been approved by both. Ms. Eaton continued that they couldn't see the exact distance between the two houses and the front looked like it

encroached. Mr. Nadeau stated that Chairman LeBlanc's suggestion made sense because they would provide all the information.

When Mr. Jousse asked why they had to move both buildings, Mr. Nadeau stated that both were in the heart of the marina area and they were trying to free up that area for when boats were moved in and out. Unfortunately that necessitated going before multiple boards and they had been in this process for a full year now. They had even proposed destroying one of the buildings. Now, all they wanted to do was what they started in April of 2009 which was move the two buildings.

Ms. Rousseau asked if the applicant was fine with continuing with the stipulation that said that if there were any change to the structures or they were deemed structurally unsound to move as they were, the granting of the variance would be null and void. Mr. Nadeau stated they also had before them that evening a request for reconsideration and rehearing and it depended on how the Board ruled on that. If the Board had a rehearing and there was an approval, then there would be a change to the roofline of one of the buildings. He did not know where that sat but the motion was also before them. He thought it would have been reasonable to request the ability to either relocate and/or rebuild them in their position. They were existing residential buildings so they shouldn't be deprived of their use. He had every confidence they were not going to collapse and they want to move them.

#### **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 announced that Mr. Witham had recused himself for the two petitions regarding 187 Wentworth House Road and Mr. Durbin would be sitting in.

Ms. Eaton made a motion for discussion to grant the petition as presented and advertised, which was seconded by Mr. LeMay. After a short discussion with Chairman LeBlanc, Ms. Eaton added that her motion was made with the stipulations that a land survey and boundary survey stamped by a licensed land surveyor be presented to the Planning Department within 24 hours. This should include the boundaries with the location of the house and evidence that it did not encroach into the setbacks or buffers shown on the plan. Mr. LeMay agreed to the stipulations.

Ms. Eaton stated that she was particularly interested in a survey of the setbacks because it looked like the house was right on it and she would like to see evidence that there actually was no encroachment into any of the buffers shown on the plan. Ms. Eaton stated that she was concerned about the separation between the buildings and wasn't sure if that was a Planning Board issue but she would like to know what the separation was and it was not apparent from this plan. The way it was shown, the houses did meet requirements. The request was to move to another location and change the Board's stipulation from the previous approval that the houses had to remain in the same location. She stated that, with

the stipulations and meeting the setback and wetland buffer requirements, she felt that they had met the intent of the ordinance and that granting the petition would not be contrary to the public interest. There would be no benefit to the general public if the petition were denied and there was no evidence that the value of surrounding properties would be diminished. The hardship in this case was related to the buildable area on the lot itself. They were actually improving the situation by moving the structures.

Mr. LeMay stated that he agreed and added that his comments, made at the January 19, 2010 meeting when the initial variance was granted, still stood.

Chairman LeBlanc stated that all the Board was being asked to approve that evening was the new location of the residential buildings. Everything else stood as originally approved and stipulated.

The motion to grant the amendment to the original variance as presented and advertised, with the stipulation that a boundary survey stamped by a licensed land surveyor be submitted to the Planning Department within 24 hours of the meeting showing dimensions for the position of the residential structures and evidence that they were not encroaching into any of the buffers or setbacks as shown on the plan, was passed by a vote of 6 to 1, with Mr. Grasso voting against the motion.

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C) Motion for Reconsideration and Motion for Hearing (Rehearing) re. 187 Wentworth House Road

Mr. Jousse made a motion to deny the request, which was seconded by Mr. Grasso.

Mr. Jousse stated that there were two criteria for granting a rehearing, that the Board made an error in the application of the law or that the applicant had submitted new information which was not available at the time of the original hearing. Neither applied in this case so the Motion for Rehearing or Reconsideration should be denied.

Mr. Grasso stated that he agreed.

The motion to deny the request was passed by a unanimous vote of 7 to 0.

Mr. Witham resumed his seat and Mr. Durbin returned to alternate status.

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D) Case # 3-6  
Petitioners: Sureya M Ennabe Rev. Trust & CN Brown Co.  
Property: 800 Lafayette Road Assessor Plan 244, Lot 5  
Zoning district: Gateway

Requests: **Variance** to allow off street parking spaces between the principal building and the street right-of-way  
**Section 10.1113.20** Location of Parking Facilities on a lot  
(*This petition was postponed from the March 23, 2010 meeting*)

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

Attorney Peter Loughlin stated that he was there with Kevin Moore of CN Brown and Tom Saucier of SYT Design. He reminded the Board that they had been before the Board on November 17, 2009 seeking three variances having to do with the location of the canopy, the side of the building and relief from the 100' setback from the tidal marsh. The Board unanimously granted all the relief. The relief from the tidal marsh was required by the then zoning ordinance which required a 100' setback. The only thing they were proposing to do differently at that time in the first 50' was to take out the pavement. He stated that he had submitted two documents, the first of which showed the site as it was now with pavement behind the building. He noted that all the pavement within 50' of that property line would be removed. Attorney Loughlin noted that they had considered in 2008 replicating what had been there before which was a car wash and convenience store with a new canopy. After meetings with the Planning Department, they had eliminated the car wash and as much pavement behind the building as possible. He stated that, subsequent to the November meeting, the Planning Department advised that the new zoning required a conditional use permit to do in the 100' setback area what they had just received approval to do. While they didn't necessarily agree, the applicants had gone to the Conservation Commission over several months who recommended the conditional use and were in favor of the relief the applicants were seeking that evening.

Attorney Loughlin stated that their next step was to go to pre-TAC and were told that they were also bound under the new parking ordinance prohibiting parking between the roadway and the building. The applicant's contention was that this was a convenience store and they needed parking where people could see it. He stated that the two hand-drawn plans he submitted as his second exhibit attempted to show what it would take to comply with the new zoning ordinance. No matter what configuration they attempted they ended up with pavement in that 50' strip. The options he depicted would comply with the new ordinance but would violate the conservation setbacks. Attorney Loughlin stated there had been some mention that there were other places with parking on the side, but he didn't feel those had a lot to recommend them and would result in a sea of asphalt. This proposal had a remarkable reduction in the amount of impervious material and effort to comply with the setbacks for the Shorelands Protection Act. Referring to the latest plan on display, he stated this was the variance relief they were requesting.

Attorney Loughlin stated that their letter of February 24 spelled out why they felt they qualified for relief. Addressing the criteria, he stated that granting the variance would not be contrary to the public interest. He understood the purpose of the ordinance the way it was written but didn't feel it would work because of the shape of the lot. Many of the places with parking on the side had much wider lots. He stated that there were no basic zoning

objectives which would be violated. This was a use in place for over 30 to 40 years and they had moved the activity as close to the road as possible. Attorney Loughlin stated that the spirit of the ordinance was observed by eliminating a sea of asphalt. During the public discussion about this portion of the proposed new ordinance, they were talking about shopping centers and places where there was a long expanse of pavement and then the building. He wasn't sure the drafters had thought about how it would apply to existing businesses, especially this area of Route One. In the justice test, there would be no benefit to the city in denying the variance, but there would be a negative impact on the landowner and the environment. The value of surrounding properties would not be diminished, Attorney Loughlin stated. The new proposal would add landscaping and improve the entire area. He stated that there were special conditions resulting in a hardship. The properties on either side did not have the environmental issue of having a marsh behind them so that pavement was eliminated and there was no driveway around the back to cut into. There was no fair and substantial relationship between the ordinance and its specific application to this property. This was a lot developed long before present zoning and, while they had required some variance relief, that type of use at that location had always been permitted. The use was reasonable one and had been performed in the same manner for decades except that the proposal would result in less pavement, more landscaping, and less traffic and impact on the marsh with the elimination of the car wash. In response to a question from Chairman LeBlanc, he confirmed that the proposal was depicted on site plan #3.

### **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**

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

Ms. Eaton stated that this was actually a fairly simple request. The new ordinance changed the parking requirements and would move it to another location on the property. She felt the property had special conditions as a good piece was in the tidal buffer zone, where the parking would be forced to go. Keeping the parking toward the front of the building would be in the spirit of the ordinance and better for the environment. This redevelopment of a commercial site would improve the property values by refurbishing the site and returning it to a use suitable to the area.

Ms. Eaton stated that granting the variance would not be contrary to the public interest as the site would be improved in a way which was better for the marshlands. Considering the site and the commercial nature of the area, she felt that the spirit of the ordinance would be served by granting the request. Justice would be served by allowing the site to be redeveloped without infringing on the interest of the general public. She stated that the value of surrounding properties would probably be increased. The hardship was that the ordinance would prevent the site from being developed and she was not sure what else could be done.

Mr. Grasso stated that this request was to re-establish a use. Given the tidal waterway behind the property, he agreed that parking in front of the building was preferable.

Mr. Witham stated that he fully supported the intent behind creating the Gateway District but agreed with the presenter that it was geared toward large plazas and improved streetscapes. He felt a convenient market should be convenient. When the Board had met with the City Planner, it had been mentioned that it might be necessary to go back and tweak some things in the new ordinance and they were seeing some of the things that needed to be tweaked.

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) Case # 4-1

Petitioners: Worth Development Condo Association

Property: 103-131 Congress Street Assessor Plan 126, Lot 6

Zoning district: Central Business B

Request: **Rehearing:** of the February 16, 2010 Board of Adjustment decision on a variance to waive the parking standards for a restaurant in the Central Business District

Chairman LeBlanc announced that this was a rehearing of the February 16, 2010 Board of Adjustment decision on a variance to waive the parking standards for a restaurant in the Central Business District.

### SPEAKING TO THE PETITION

City Attorney Robert Sullivan stated that, before deliberations on this matter, he wanted to place into the record of the meeting advice which he was about to give to the Board. The petition they were about to hear asked two questions of them. First that they grant a variance and, secondly, that they declare a portion of the City's Zoning Ordinance unconstitutional. His advice was with regard to the second question and it was the following. State law enumerated the powers of the Zoning Board of Adjustment. Nowhere in state law was the power to overturn or find any portion of the zoning ordinance as being unconstitutional enumerated. He, in fact, believed that the duty of the Board of Adjustment was quite different.

They were obligated to accept the presumption that the Zoning Ordinance was valid. They were obligated by law to follow that Zoning Ordinance and those things remained true until such time as a court should overturn all or any of the ordinance. He stated that Attorney Shaines and he had discussed this second question. Attorney Shaines believed that it was

necessary to put it in his motion for rehearing in order to preserve that issue should the case go beyond the Board into the court system. Attorney Sullivan agreed with him on that point and was stating for the record that, by placing the constitutionality issue in this motion for rehearing, Attorney Shaines had preserved that issue if he wished to move to the court with it. However, because the Board of Adjustment did not have the authority in his view to make that constitutional ruling, his advice to the Board was to disregard the question, not to conduct the hearing on that question and not to make any decision on that question.

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

Chairman LeBlanc then asked the petitioner to come forward.

Attorney Robert Shaines stated that he was appearing for Worth Development Corporation and would run through the points of the motion for rehearing, which included the reason why a variance was in order from the parking requirement of the ordinance in the Central Business District B. He noted that the City Attorney had just addressed the issue that they could not consider the constitutionality questions. However, the NH Supreme Court had ruled that, if an applicant didn't raise those issues before the Board, they could not raise them later should a court appeal be necessary. To preserve the rights of the applicant, they had included the constitutional issues in their motion for rehearing and, if the Board would agree, he would not read the constitutional issue, but just raise that they felt that the ordinance as presented was unconstitutional under both the state and the federal constitutions. Attorney Shaines stated that he knew the Board was obliged to carry out the advice of the City Attorney but asked that they at least acknowledge that the constitutional issues had been raised before them. They clearly wanted to preserve those issues because they felt they were paramount in this case.

Chairman LeBlanc asked if he could have the Board's approval for what Mr. Shaines was asking - that the issue had been raised and the Board would not deal with it. When Mr. Grasso stated, "agreed," Chairman LeBlanc asked if he wanted to make that a motion and Mr. Grasso stated that he did. Mr. Parrott seconded the motion. With no response to Chairman LeBlanc's call for any discussion, the vote was called and the motion was passed by unanimous voice vote.

Attorney Shaines stated that Worth Development was a member of the Worth Condominium Association and it owned the parcel in question, called 102B by the post office and shown as 1-2B on the condominium plan. This parcel was a unit within the Worth Condominium building and had no land attached to it so it had no area which could be used for parking. Under the zoning ordinance, Attorney Shaines stated, if you were going to open a restaurant in Central Business B, it called for a parking space for every 100 s.f. This unit was 3,050 s.f. so that it would call for roughly 30 plus parking spaces which were not available. He noted that Worth Development had previously owned the adjacent parking lot which had 123 spaces. Under the prior ordinance, there were certain parking credits given to Worth as a result of that ownership. While there was some question of whether it was 26 or 83 or whatever, he maintained there were a number of spaces still in reserve as of December 31, which disappeared with the enactment of the new ordinance.



Attorney Shaines stated that, under the existing ordinance, an owner or an applicant who wanted to establish a ground floor restaurant could make an election – don't have a restaurant or buy off the spaces at \$5,000 per 100 s.f. He added that the City Council recently enacted a revision to the ordinance which made it \$2,000 per 100 s.f. He stated that the ordinance provided for a second floor restaurant at \$2,000 or \$5,000 per 1,000 s.f. For a basement restaurant, there was no parking fee so they felt the ordinance was discriminatory in that respect.

Attorney Shaines stated that the variance they were requesting would not be contrary to the public interest for two reasons. Restaurants contributed to the vitality of the Central Business district and were allowed uses within that district. Citing articles in the New Hampshire Constitution, he stated that the requirement that only new restaurants needed to provide parking was without any rationale and was a violation of equal protection under the law. This was singling out a use for different treatment. He stated that granting the variance would be in the spirit of the ordinance and justice would be done. The parking lot previously owned by the applicant had been donated to the City after a long term lease and the City had the enjoyment of that lot. For the City to deny a permitted use of the building because of lack of off street parking was an injustice. He stated that surrounding property values would not be diminished. Restaurants had existed prior to the ordinance, legal conforming uses with no requirement for off-street parking like other permitted uses in district. He referenced comments made at the last meeting from speakers talking about the value of restaurants to the district. They now had the most prosperous downtown he had seen in his lifetime and he would hate to see this denied because of some perception of the parking requirements between 6:00 p.m. and 8:00 p.m. He noted that the busiest time for restaurants was before and after when the Music Hall was busy.

Attorney Shaines stated that there was a parking study on the City's website which showed a need for 840 additional spaces downtown in order to be adequately covered. This wasn't the fault of a new restaurant. Parking was infrastructure and was as vital as the sewer and drainage systems and the utility lines. That was something that the City should provide because it collected taxes for those items. As it was, with the parking fees collected by the City, there was something like a million, three hundred thousand dollars paid in to the City coffers and the general fund from parking revenues. He reported on a meeting of the Planning Board's Parking Committee which, he stated, was going to have some profound recommendations that parking be a separate institution in the city and that the revenues go for parking. He stated that parking wasn't just for the benefit of those people in business and he listed other types of people who benefited.

Attorney Shaines stated that the undue hardship was simply that there was no place to create parking in a building for a condominium unit. It simply didn't exist. Calling it a tax, he cited comments made by a former Planning Director that the parking impact fee was proposed as an impact fee under the impact fee statutes in New Hampshire. Attorney Shaines read 674:21(V) of the statute noting that parking was not included as one of the items upon which an impact fee could be imposed and maintaining that items not included in the legislation were specifically excluded. Attorney Shaines stated that the Planning Director, Mr. Taintor, at the same meeting took the position that this wasn't an impact fee, but the previous Director stated that was how it was adopted. Attorney Shaines concluded

that, if it was an impact fee, it was directly contrary to state statute and asked the Board's consideration of that point. By virtue of the condition of the property, the fact that there were 128 spaces attached to this building up until a few years ago when the lot was deeded to the City, and the fact that the ordinance singled out ground floor restaurants for this disparate treatment, Attorney Shaines asked that a variance be granted from the parking requirements of the ordinance.

Ms. Rousseau asked if they were asking for a variance from three different parking requirements and to essentially get to zero spaces required for the property and Attorney Shaines stated, "yes." When Ms. Rousseau commented that it wasn't clear in their paperwork, he stated that was because they concentrated on constitutional issues which, Ms. Rousseau continued, they didn't really need to deal with as they would deal with the variance. Ms. Rousseau stated that, as she listened to him speak, it sounded like his building was really a nonconforming commercial building that should be grandfathered. When Attorney Shaines stated it was a conforming use building, she stated that the building itself didn't conform to current zoning regulations and Attorney Shaines stated that it couldn't as it was built in 1973.

Ms. Rousseau stated that this reminded her of residential buildings which were also nonconforming. It sounded like they were being penalized by the City to be a nonconforming property. If this were residential and they had different owners changing over in a nonconforming residential building, would they be penalized because it was a nonconforming building. She could see his argument. It was not only a penalty for nonconformance, over which they had no control as, in her opinion, they were grandfathered, but also tremendous hardship to the property owner as well. Her question to him was wouldn't he see this as potentially being a nonconforming issue – that they were grandfathered? Attorney Shaines stated that he understood what she was saying but it was conforming as to use, nonconforming perhaps as to area because it had no parking, in which case the Boccia standard would be used. They were entitled to a variance under the Boccia standard because they couldn't create land when there isn't any.

Chairman LeBlanc asked if the spaces he had said the new restaurant proposal required was 32 and Attorney Shaines stated he thought 30 and a half. They kept getting different versions from the Planning Department. Mr. Feldman stated that, if they looked at the standard as one parking space per 100 s.f., and there was 3,050 s.f., it would be 31 parking spaces. Also under the ordinance though, the first 4 parking spaces were exempt, so the actual number was 27. He confirmed for Chairman LeBlanc that the relief being sought that evening was 27 spaces.

#### **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. Grasso made a motion to approve the variance to waive the 27 required parking spaces, which was seconded by Ms. Eaton.

Mr. Grasso stated that the applicant was in front of them to put in a restaurant which was an allowed use. As it was a condominium and condominiums didn't have land associated with them, the parking requirement for this specific place where the restaurant was proposed was impossible to do. He stated that the variance would not be contrary to the public interest. This was an allowed use and there were other restaurants in the area that apparently were functioning well. Special conditions existed so that literal enforcement of the ordinance resulted in unnecessary hardship. Again, there was no land associated with a condominium so parking spaces couldn't be created.

Mr. Grasso stated that the zoning restriction as applied interfered with the landowners reasonable use. Again, the restaurant was a reasonable use as it was an allowed use. Because the parking requirement enacted at the beginning of the year went to ground floor restaurants made this restriction unfair. There was no fair and substantial relationship between the general purposes of the zoning ordinance and the specific restriction on the property. The property, again, was set up as a condominium and he felt that was basically a hardship on the applicant. The variance would not injure the public or private rights of others. This was downtown and they were talking about 27 parking places. Other businesses were surviving in the general area with existing parking. He stated that granting the variance would be consistent with the spirit of the ordinance and substantial justice would be done by allowing a restaurant to go into the space. He felt there would be no diminution in the value of surrounding property values.

Ms. Eaton added that the proposed use was a reasonable one for the property and special conditions existed because of the lack of means to provide parking associated with this building.

Chairman LeBlanc stated he would not support the motion. He didn't think they had the right to do away with this parking requirement for restaurants. It was in the ordinance and if anyone had been so interested, they could have gone to the hearings and spoken against it when this was brought forward. Even now, they could come to the Planning Board and ask that it be changed or go to the City Council and have them change it. He felt the benefit of the parking fee was to help the entire city deal with the issue of cars.

Mr. Parrott stated that he had made the previous motion with respect to the fee and that was with his understanding that when it was \$1,300, people seemed to live with that. Bringing it to \$5,000 made it unreasonable and didn't seem to take into account the realities of the economics. He thought the principle of the impact fee was sound but the amount was not reasonable. The other factor of course was the fact that this property, as they had heard several times, at one time had parking spaces associated with it and those were voluntarily given up. They couldn't go back in time but as it was a voluntary decision to do away with those associated parking spaces but he disagreed with the amount of the assessment.

Mr. Witham stated that he had the same concerns as the Chair. On a personal level, he felt this aspect of the zoning ordinance was archaic but he was struggling with his role being to

enforce the ordinance whether he agreed with it or not. He hadn't found the wiggle room to jump on board and waive the requirement. He felt he had to uphold the zoning ordinance and one of the criteria dealt with the purpose of the ordinance as it applied to this specific application which he understood was an impact fee to help pay for future parking spots. In this instance he didn't feel like they would be granting relief because a petition met the criteria but that they would be waiving the ordinance altogether.

Mr. LeMay stated that he would support the motion. He thought there was substantial justice in waiving this. He couldn't imagine a way in which this particular ordinance could be more specifically aimed at an individual type of business. It was much too specific to be fair in any sort of way and he couldn't get around that. It clearly created a hardship. He had not problem with impact fees but felt they should be applied a little more broadly in order to be fair.

Mr. Jousse stated that, since this ordinance as he understood it, was really aimed at the hours between 6:00 p.m. and 8:00 p.m., it would have helped him make a decision if they outlined the availability of parking spaces during those hours, even in the overhead parking lot. He believed that his role on the Board was to comply and enforce the City ordinances and whether he agreed with them was immaterial. He stated that to totally waive the parking requirement was a bit much and he would have liked to have seen somewhat of a compromise between the 27 that were required and zero. As it stood right then, he would not support the motion.

Mr. Witham asked Mr. LeMay to rephrase his comments one more time because he had almost gotten him to that position as well. Mr. LeMay stated that this was almost like spot zoning and he felt it was a deeply flawed piece of the ordinance. Again, he didn't object to impact fees, but he did object to them going right between the eyes of somebody who opened a specific sort of business on a specific floor. He understood that they all had to support the zoning ordinance and their obligation was to believe they were all valid. He thought that they were for the most part but he could stipulate that this was valid and that it was also grossly unfair.

Ms. Eaton stated that, for her, the Board could grant a variance and it was to her for providing parking spaces where they simply could not be provided. She agreed with Mr. LeMay and, if this same use here was an office, you'd have the same amount of people sitting there. How is that restaurant obliged to pay more? As soon as the small restaurants in downtown changed ownership, what restaurant could physically provide parking anywhere in that block. Although it was not their question, how could a small business owner ever pay that fee. She stated that they needed parking and a way to raise money to produce it, but she felt this was an inappropriate way and unfairly harmed specific business owners so the Board did have a right to grant a variance to the parking requirement.

Chairman LeBlanc added that he thought, by granting, that they would affect the rest of the city adversely and that was not a good thing to do.

The motion to approve the variance to waive the 27 required parking spaces as presented and advertised was passed by a vote of 6 to 1, with Chairman LeBlanc voting against the motion.

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2) Case # 4-2

Petitioner: Harborside Associates, L.P.

Property: 100 Deer Street (formerly a portion of 195 Hanover Street) Assessor Plan  
125, Lot 1

Zoning district: Central Business B

Requests: **Appeal:** from a Planning Board decision on the interpretation and application of parking space requirements, requesting the Board of Adjustment to reverse the February 18, 2010 decision and remand the matter back to the Planning Board.

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

Attorney Chris Mulligan stated that he was there for Harborside Associates at 250 Market Street with an appeal of a February 18, 2010 Planning Board approval of an amended site plan dated January 18, 2010 and presented by Parade Residence Hotel. He stated that the site plan was amended to change a previously approved site plan from retail space to 11,437 s.f. of conference space and also to reconfigure a previously approved restaurant on site. He stated that the abstract of the site plan that was before the Planning Board in February was what he had just passed out and what he had just provided was the part of the site plan which detailed the parking requirements for the application as submitted to the Planning Board. Their position was that the amended site plan required the application of the zoning ordinance as it existed on January 1, 2010, when the new zoning ordinance changed the parking requirements. Attorney Mulligan stated that their position was that the application before the Board calculated the parking requirements by using parking credits under the old ordinance which they could see in the squiggly lined block that provided for the parking calculation.

Attorney Mulligan stated that the existing pre-amendment site plan configuration would have been exempt from changes in the parking requirement effective in January but not the amendment. He referred the Board to Attorney Springer's submission in which he cited Section 10.1111.10 of the zoning ordinance which provided that the parking requirements went into effect for changes in use after the effective date of the ordinance. This was important because the new ordinance eliminated carrying forward parking credits, which was what the applicant relied on before the Planning Board with the amended site plan.

In addition, Attorney Mulligan stated, the application amended what was existing approved retail space and converted it to some 11,000 s.f. of conference space. A "conference center" was not a defined term under the zoning ordinance although it did appear in Section 10 under the parking requirements. Because this was a ground floor use, the applicant would not be required to provide parking for any ground floor use except for restaurants. The term "restaurant" was a defined use in the current ordinance, defined as an establishment in which

food is prepared on the premises and served to customers. He stated that the site plan, both original and as amended, included an actual restaurant as defined by the applicant. Their position was that the conference center as submitted there also met the definition of an establishment in which food was prepared on the premises and served to customers. He felt that there was functionally no difference between the ability to have a large restaurant in a space and serve food and what they had in this situation. Because a conference center was not defined and the term restaurant included an establishment in which food was prepared, they maintained that this conference center was subject to the restaurant parking requirement and a calculation needed to be made based on the current parking calculation for restaurants on the ground floor. Attorney Mulligan reiterated that this was a change in a previously approved use that was applied after the effective date of the current ordinance and should comply with the current ordinance. They were asking that the Board remand this matter back to the Planning Board to require the applicant to submit parking calculations using the zoning ordinance in effect January 1, 2010 and also to calculate the parking required for a restaurant in which it considered 11,000 s.f. of conference center.

Mr. Witham stated that he had a hard time following Attorney Mulligan's point. He understood that the property received approvals and, in terms of the parking requirements, the appellants were taking the position that the conference center parking requirements should use the restaurant standards. Attorney Mulligan indicated that was correct. Chairman LeBlanc interjected that was because it was changed after January 1<sup>st</sup>. He thought was the crucial part they needed. Attorney Mulligan stated that the site plan application was amended and there was a second site plan that was submitted and approved after January 1<sup>st</sup>. Mr. Witham stated so this was a grey area where a conference center wasn't specifically spelled out and Attorney Mulligan stated it was not specifically defined in the ordinance and the way they met the parking requirement for the conference center was by using the old ordinance which allowed them to carry forward credits. When Mr. Witham asked who he represented, he stated that he represented Harborside Associates, the owner and operator of the Sheraton up the street.

Mr. Jousse asked how the state law 674:39 came into this. Did they throw it out the door? Attorney Mulligan responded that, yes, they probably did and asked if Mr. Jousse could refresh his memory on 674. Mr. Jousse cited portions of the relevant section indicating that an approved site plan shall be exempt from all subsequent changes in site plan review regulations and zoning ordinances for a period of four years after the date of approval. Attorney Mulligan stated that he thought that the law which applied was the one in RSA 676:12 (VI) which provided that you were immune from subsequent changes to the zoning ordinance only if your application was submitted and accepted, not approved but accepted, before the ordinance went to notice and eventually was adopted. What he believed Mr. Jousse was talking about was a site plan that had already been approved. He didn't have the statute front of him that Mr. Jousse cited, but he believed the distinction was that what he had cited had to do with an approved plan and he would agree that, if the site plan was approved and not amended, that would probably be the case.

Ms. Rousseau stated that maybe Mr. Feldman knew about the Planning Board and how they deliberated this piece and arrived at a decision. Why would this particular amended application, dated January 18, 2010, be subject to old ordinances and not the new? Mr.

Feldman replied that he did not staff that Board and was not at the meeting where it was determined but he thought that the section of the ordinance that Mr. Jousse had initially cited, 674:39, four year exemption, was the section which was being considered because it was not a new site plan application which was in front of the Planning Board at the time. It was an amendment to a previously approved subdivision application for which they had an active building permit. There was someone else there that could speak to that position for the other side. Ms. Rousseau asked if they didn't think it was a substantial change with their amendment and Mr. Feldman replied that it didn't differentiate between substantial changes and minor changes. It was an active building permit, an active application, that had a four year exemption. Ms. Rousseau asked, "even if it recharacterized the use?" Mr. Feldman stated that state law didn't say anything regarding that.

Mr. Parrott noted that Attorney Mulligan had said several times that the ordinance didn't define conference centers but he suspected there were other terms that weren't defined and Attorney Mulligan just stated it and didn't appear to draw any conclusions from it. What was the importance of that, if the ordinance didn't define it? Attorney Mulligan responded that the importance was that some other use as defined in the ordinance would cover the conference center use and they suggested that the definition of restaurant, as previously stated, covered the definition of a conference center. There would be a restaurant at this site and, he believed it was made clear in the Planning Board submission that food would be served, not only in the restaurant but also within what was now on the site plan as the conference center. He maintained that the definition of restaurant also applied to the conference center. Mr. Parrott stated that, then, his position was that there was no functional difference between a restaurant, which as Attorney Mulligan had indicated, had a pretty well defined function and where tables were all set up and covered most of the floor most of the time, and a conference center, where things were moved around and the floor was open for meetings and not covered with tables. Mr. Parrott stated he would disagree with that, if that was what Attorney Mulligan was saying. Attorney Mulligan confirmed that was what he was saying and he was basing that on the wording of their ordinance as it defined restaurants.

Ms. Eaton stated that with a conference center, she thought of meeting rooms. Perhaps food was served in the conference area, perhaps not. Perhaps you would eat off-site. A restaurant had a concept of turnover, usually several times in a serving period whereas she didn't see a meeting room as being that way. She was usually sitting in one all day and he didn't see a difference there? Attorney Mulligan stated that he would not argue there was distinction between a restaurant and a conference room as they were commonly understood. However, he believed the ordinance and the way it was drafted defined one to subsume the other. That was their position and why they were asking for that relief. Either way, the ordinance as it was written and amended in January was the one that should apply and the parking calculation which should be adopted.

Ms. Rousseau asked if he was there because this would be potentially a competitor and did he see them as having an unfair advantage regarding the parking requirements versus the Sheraton and what they've been required to provide for parking. Was that what this issue was about? Attorney Mulligan stated that his client was an abutter and had rights and was committed to seeing to those rights, but there was no question that his client had an interest

in the City maintaining parking in the way that businesses... Ms. Rousseau completed his sentence, “have always done it? So in some way, they felt that they (Parade Residence Hotel) had an advantage, a break in some way from the requirements. Attorney Mulligan stated that everyone should be playing by the same set of rules and those were that now there was a new parking regime in town and, if there was going to be a new business in town, they had to meet that parking change.

Mr. Witham stated that he seemed to be hinging on his definition of customer at this point because you had an eating establishment, you served food. To him a conference center, if it was a wedding, there was probably one Dad (scattered comments, “or Mother”) paying for it all whereas with a restaurant everyone was paying for their own meal. He just saw it totally differently and they were trying to rely on this definition and he was having a hard time wrapping his arms around it. Attorney Mulligan stated they were all driving there, though.

Chairman LeBlanc stated that he had a different outlook on this and he was looking at the “Wherefore” at the end of their submission, which read, “Wherefore, the Petitioner respectfully requested that the ZBA order the Planning Board to reverse the February 18, 2010 decision, and remand the matter back to the Planning Board, for the correct parking requirements and calculations.” Essentially what the Board was being asked to do was overturn a Code Official’s opinion and that was the heart of the matter, whether it was a conference center or not was irrelevant to what they had to deal with at that moment. It was the decision that the Planning Board came to that was at error in the appellant’s view and he was sure that the other side of this story would have a different opinion. This completely eliminated whether it was a conference room or a restaurant. What they were looking at was whether the Planning Board made a mistake when they granted that parking consideration or not. Attorney Mulligan stated he agreed with that. Mr. LeMay asked if he was saying that they should have reconsidered under 674:39. Maybe he could restate his point. Chairman LeBlanc stated that his point was that the Planning Department had said that they deal with active building permits under the aegis of the four year indemnification; that they can’t be affected by changes in the ordinance. When Mr. LeMay asked if that was the key point, he stated it was and it eliminated altogether whether they thought it was a restaurant, a conference center or some other use.

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

Attorney McEachern stated that he was representing Parade Residence Hotel, LLC, the owner of the property. He stated that this appeal should fail for two reasons. The first was that the development was grandfathered by state statute and he distributed copies of the statute. RSA 674:39 which provided that every site plan approved by the Planning Board “shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, impact fee ordinances and zoning ordinances for a period of four years after the date of approval provided that active and substantial development toward building had begun on the site by the owner within 12 months of the date of approval.” Effective June 12, 2009, the legislature amended this language to enlarge the period to begin active and substantial development and that was Paragraph V of the statute and it increased it from 12 months to 36 months. In this case, he stated, the property received site plan approval on September 18, 2008 and began construction last summer, well within the three-year period.



For that reason, it was their position that the site plan approval was under the zoning ordinance in effect at that time.

Attorney McEachern stated that they should have received in their packet a memorandum from the Planning Department which stated that it was the department's policy in a situation such as this, where a site plan had been approved and a subsequent amendment came back before the Planning Board, that the request for the amendment was treated under the prior zoning ordinance which was in effect when the site plan was granted. There were a couple of reasons for this, one that it was consistent with statute and, particularly in this case, they were dealing with what in essence was a very small change to the site plan. There was an interior use in the building which had changed from retail to conference center and two minor outside changes to the property, which were not appealed, that were requested by the applicant based on this change to the proposed use.

Attorney McEachern stated that, as a result of the amendment to the site plan changing the proposed use, there was a change to the parking calculation and the Planning Department employed the prior scheme under the old ordinance to calculate the unmet parking need. There was sufficient credit available to meet that need and it was deemed to be satisfied. He posited, what if they applied the new zoning ordinance. What if it did apply and there was no grandfathering? He directed their attention to Section 10.1115.60 which stated that the requirements of this section should not apply to any existing uses on a lot but should apply to any change or expansion of existing uses. He stated they were not talking about an existing use. They had a use that was approved under a site plan but no Certificate of Occupancy had been issued for that property. He maintained it was not an existing use.

The second reason that this appeal should be denied, Attorney McEachern stated, was that even if the new zoning ordinance were applied to the site plan and this went to the issue of what was a conference center and what was a restaurant, there was no parking requirement for first floor conference centers in the Downtown Overlay District. Section 10.1115.20 provided that there was no parking requirement on a ground floor use other than a restaurant use in the Downtown Overlay District. The appellants' response to this clean pronouncement in the ordinance was to claim that a conference center was a restaurant. The problem with this approach was that they were dealing with a section of the ordinance that focused on the word, "use" and "uses" and they had a zoning ordinance that identified conference centers and restaurants as separate and distinct uses. The Table of Uses in the new Zoning Ordinance, at Section 10.440, identified conference centers as a distinct use in Paragraph 10.60 under the category, "lodging establishment," whereas the restaurants were identified as uses in Paragraphs 9.20 through 9.60 under the category of "Eating and Drinking Places." If the drafters of the ordinance had intended conference centers to be restaurants, they could have done that. In interpreting, the Board had to be guided by its plain and unambiguous meaning which, in this case, identified a conference center as a use unto itself, separate and distinct from any restaurant use. To rule otherwise would amount to throwing the written word out the window.

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

Attorney Mulligan stated in rebuttal that the statute that was handed out, 674:39, on which Mr. Jousse had questioned him, again provided that the site plan approval should be exempt from subsequent changes in the zoning ordinance. It did not provide that every subsequent amendment to the site plan was therefore exempt. To the extent that that was what the Planning Department had issued in its memo, they believed it was an error and that it was appropriate for the Board to remand this back to the Planning Board to correct that error.

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

**DECISION OF THE BOARD**

Chairman LeBlanc stated there was a request before the Board to remand a decision back to the Planning Board and this could be done if the Board felt there had been an error on the Planning Board’s part when they reached that decision.

Mr. Jousse made a motion to deny the appeal and let the Planning Board decision stand, which was seconded by Ms. Eaton.

Mr. Jousse stated that the Planning Board did their job and applied the law.

Ms. Eaton stated that it was not a variance so she would not address criteria.

Mr. LeMay stated that a plain reading of RSA 674:39 from the planning and land use regulation book differed slightly from everything they had been given that night and he felt that it was clear in the introduction that the purpose was to prevent ex-post-facto zoning laws to be enacted on somebody’s land which already had a permit in place. It was supposed to prevent zoning being changed after people had started their task. He thought that, once you open the door by changes of use, defined within the ordinance where a use wasn’t there before as envisioned in the permit, you become subject to the restrictions on that use that were in effect when made your application. He didn’t feel that having a permit in place provided an open door to zoning that you didn’t ask for when you got your permit, so he would not be supporting the motion.

Mr. Witham stated that the point raised was that they should be sending this back to the Planning Board for them to define a conference center as a restaurant and to impose a parking fee. Even that on its own, he didn’t feel, had any legs to stand on.

Ms. Eaton added that she didn’t think evidence was presented that would support remanding back to the Planning Board because they hadn’t been dealing with the active building permit and didn’t know the changes in the site plan specifically. She felt the Planning Board was the keeper of that knowledge and it was their place to make that determination.

The motion to deny the appeal and to let the Planning Board decision stand was passed by a vote of 5 to 2, with Messrs. Grasso and LeMay voting against the motion.

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## 3) Case # 4 -3

Petitioners: Michael G. Williams & Laura J. Williams

Property: 52 Suzanne Drive Assessor Plan 292, Lot 25

Zoning district: Single Residence B

Request: **Variance(s)** to construct a 6' x 25' front porch. Section 10.321 to allow the enlargement of a nonconforming structure; Section 10.521 Table of Dimensional Standards to allow a 22 foot front yard setback in the SRB zone where 30 feet is required

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Michael Williams stated that they were requesting consideration for the removal of a 6' x 6' front stoop and replacement with a 6' x 25' farmers porch. Their property was approximately 8,840 s.f. in a zone where the current requirement was 15,000 s.f. and compounding the situation was that the residence was built 28' from the front setback. They had previously received approval for some necessary improvements and the new siding would require replacing the stoop. They were also requesting relief to help buffer the sun which beats down on the picture window shown in their exhibit. Mr. Williams stated that they were not encroaching on any of the abutting neighbors and felt that by increasing the value of their property, it would also increase that of the abutting properties. Referencing submitted photographs of nearby properties, he indicated a similar situation to theirs. He stated they were only asking for a slight increase in the setback to allow greater enjoyment of the property.

In response to a question from Chairman LeBlanc, Mr. Williams stated that the stoop would be 22' from the property line. They also have a rear deck in the works which, with the proposed porch would only amount to 17.8% coverage. In response to a question from Mr. LeMay and Mr. Witham, he stated the step in the sketch would need another step to make it 20' from the property line instead of 22'. Mr. Witham commented that the first two steps were below the height requiring setback relief.

**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. Witham.

Mr. Parrott stated that this was actually a fairly modest proposal and, overall, was pretty consistent with the neighborhood. He didn't feel the public interest would be harmed by this replacement. There were sound reasons for the request, making the property more functional and livable, which would be in the spirit of the ordinance. In the justice balance test, there was no overriding concern of neighbors or the general public arguing against granting the variance. He stated that the property was consistent with the neighborhood and

parking or other issues were not going to be affected so there would be no diminution in the value of surrounding properties. The hardship in this case would be that denying the variance would be denying the applicants a reasonable use of the property. The special condition was that the structure was built prior to the 30' setback now in effect.

Mr. Witham stated that the intent of a front setback was to protect the right of way. They were dealing with an open porch which would have less impact to the closest public right of way, which was the sidewalk. He felt the intent of the ordinance was met as the sidewalk appeared to be beyond the 30' with the street another 10' away.

Mr. Jousse asked if the maker and second of the motion were amenable to a stipulation that the porch remain unenclosed or open and Messrs. Parrott and Witham agreed.

The motion to grant the petition as presented and advertised, with the stipulation that the porch remain unenclosed, was passed by a unanimous vote of 7 to 0.

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4) Case # 4-4

Petitioner: Eugene C. Bergeron

Property: 796 Sagamore Ave Assessor Plan 223, Lot 3

Zoning district: Single Residence B

Request: **Variance(s)** to construct canopies over utility tanks & controls. Section 10.321 to allow the enlargement of a nonconforming structure; Section 10.521 Table of Dimensional Standards to allow a building coverage of 24.3% where 20% is allowed

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Wendy Welton stated that she was the architect for the project and felt the submitted materials told the story pretty well. This was an existing nonconforming building on a small piece of land which was converted to three apartments from a boarding house years ago. When the current owner purchased it, it was in pretty poor shape. What they were requesting today was to put covers over propane tanks and mechanical controls. She listed the other locations which were considered and why they had to reject them.

Mr. Parrott asked the dimensions of the proposed roof and Ms. Welton stated it was one continuous roof totaling 45'2" along the building and extending out 3'5". When he asked what it would look like, she referred the Board to the submitted page three. She noted there were three portions of the roof, the first two covering the tanks with removable panels and the third piece for the controls. She confirmed there would be three solid sections going down to the ground and screw on panels instead of doors. The foundation would be poured concrete. She noted that the interior of the building was not flat on grade and there was a crawl space on the ground floor. They did not want the oil tanks inside the ground floor.

Mr. LeMay asked if they have to unscrew the panels to fill up and Ms. Welton stated it would be on the outside. That was why the propane was under the roof but not enclosed as

the fill was different. In response to a question from Chairman LeBlanc, she confirmed they do not have city sewer but there was a new septic in the back.

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

Distributing some photographs, Mr. Tom Bonito stated that he was appearing on behalf of his mother whose property abutted this. He stated that he worked with the owner over the years in support of sewer projects to prevent sewerage leaking onto her property and causing distress to his mother. He listed all the things that had happened in the past which he felt negatively affected her property and cited a wall which collapsed and presented a safety hazard. He felt that, if the proposal were granted, the view would be unsightly from her back yard. He noted the listing of the property as being in Single Residence B when there were three apartments and questioned whether they were zoned for a three family.

Mr. LeMay asked if Mr. Bonito was telling them that there were code violations there with building codes and so forth, citing the example of the wall that Mr. Bonito had described. Mr. Bonito stated that it was his experience that there probably were violations and he was not sure that the structure would conform to the parameters set forth. This was going to give his mother another eyesore to look at. Mr. LeMay asked, then, if this became covered and enclosed, it was going to be worse than it was currently. Mr. Bonito stated that there was already a nonconforming structure on the property which they could see a bit of in the pictures. The septic tanks were not in his mother's view because of a wall. It was hard for him to envision what the structure would look like but it seemed unsightly to him.

Chairman LeBlanc asked if there was a boundary dispute and Mr. Bonito said a survey had been done and the concrete wall appeared to be on the boundary line. The retaining wall after the first four courses of stone sloped down and was on his mother's property. Mr. Parrott stated that it seemed to him that the new roof and structures were on the side of the property along the eave line and he didn't understand how his mother, in the back, could even see the new structure, except the end of one. Mr. Bonito stated that he didn't know what the structure was going to be. In listening to the presentation, his vision was it would be a roof line coming out of the building. Mr. Parrott said it was out of the side. When Mr. Bonito asked how high, Ms. Welton pointed out on a plan the roofline and the location of his mother's house. Mr. Bonito stated he believed it would be in her view. He just didn't have confidence in the owner to abide by the parameters set by the Board.

Mr. Tom Stuart stated that he was also an abutter. He couldn't add more to what the previous abutter said except that what had been done to-date exceeded the property that the applicant owned. Yet, if what he was proposing came to be and improved the appearance of the back of the lot and the previous speaker's mother was benefited, he was o.k. with it.

### **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. LeMay

Mr. Witham stated that, first, he could sympathize with the abutters' concerns. He drove by the site every day and never knew what the retaining wall was for. What they had to deal with as a Board that evening was not what the property owner had done in the past or how he was as a neighbor or what someone thought he might do based on what they granted. What they had before them was a request to enclose equipment and tanks and the variance itself was for a half percent increase in the existing lot coverage. Based on the facts and what was before them, he felt this was a variance they could grant with such a minimal increase in the coverage. The increase was not for a great room or anything that would produce light or glare onto abutting properties but simply to enclose items the neighbors probably would not want to look at. From his knowledge and the photographs, he was not convinced that this would be noticeable from speaker's mother's house. They might wish that the wall looked better and didn't encroach on that property, but that was not before them.

Addressing the criteria, Mr. Witham stated that granting the variance would not be contrary to the public interest. The canopies came off the face less than 3 and a half feet and sloped down. He felt that the spirit of the ordinance in this respect was lot coverage. They were 4.3% over what was allowed but only a half percent over that existing. This was nothing which would produce noise, light or glare to affect abutters. Substantial justice was done in this situation because there would be no benefit to the public in denying. He saw no reason to believe that surrounding property values would be diminished with regard to this 3.5' bumpout. He stated that it would be an unnecessary hardship to deny the variance. Looking at what they were trying to accomplish in the zoning ordinance, he didn't feel that was violated. The proposed use also was a reasonable one. The alternative was to leave all these elements exposed which would be more unsightly and would negatively impact values.

Mr. LeMay stated that Mr. Witham had covered everything well and he had nothing to add.

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

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5) Case # 4-5

Petitioners: Robert L. Leahy & Amy B. Leahy

Property: 260 Aldrich Road Assessor Plan 166, Lot 12

Zoning district: Single Residence B

Request: **Variance(s)** to construct a 15' x 16' pergola attached to the right side of the existing garage. Section 10.321 to allow the enlargement of a nonconforming structure; Section 10.521 Table of Dimensional Standards to allow a building coverage of 25% where 20% is allowed; Section 10.572 to allow a 5 foot setback where an accessory structure shall be no closer to the side or rear property line than 75% of the height or 10 feet whichever figure is greater.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. David Calkins stated that he was there from Alternative Solutions on behalf of the owners. They felt that this proposed addition would not be contrary to the public interest and wouldn't be visible to other than the direct abutters. Mr. Calkins stated that they would be repairing the existing garage and doing extensive landscaping. They had sat down with the abutters, whose letters of support were included in the packet. He stated that this was a pergola, basically an open structure with no walls or massing, which would have limited impact on abutters views or line of sight. The construction would be appealing and would serve as an additional area in which the owners could entertain and enjoy their property. They had considered a deck but felt that would impact the architectural effect of the house and green space. They decided on the pergola as a nice design element over the patio. He stated that the plan allowed a great deal of flexibility and, if it did not suit the needs of a future homeowner, it could be removed without altering the garage or landscaping.

Mr. Calkins stated that this improvement could only help surrounding areas, not in a dollar amount but in enjoyment of the family and neighbors. Justice would be done by allowing the property owners to continue to invest in their home and enjoy and better utilize the land. Addressing the criteria dealing with literal enforcement or the ordinance resulting in a hardship, he stated that literal enforcement would not allow them to have a garage or a house as orientated on the lot, or even a usable yard. They were asking for additional 4% in building coverage but it would be for an open structure. They were simply asking to build upon a nonconforming structure in a way that would be flexible for future use. He maintained that the use was a reasonable one because the area was used as a patio and that use would not be altered just enhanced.

Mr. Grasso asked if they were relocating the garage in any way and Mr. Calkins stated they were not. The garage was sitting on this lot and currently slightly on their neighbors. Mr. Grasso stated that was his problem. Mr. Calkins stated that the garage was leaning and the concrete was cracked and described what they had already done which would be followed by pouring a new floor over the existing footing. The structural integrity of the building had not been compromised.

Mr. Grasso asked if the Board could consider an application where the building was not entirely on the applicant's property. Chairman LeBlanc stated they could if the application was said to alleviate the problem. Mr. Grasso stated that one of the direct abutters noted in her letter that it was on her property. Ms. Eaton asked if they had a legal agreement or right of way for that and Mr. Calkins responded that they had discussed it. The understanding basically was that the garage preceded both homeowners and was an eyesore not to mention being a drainage issue for that abutter so they had come to an understanding that, once the garage was repaired, then the landscaping on their side would be restored, the fence put back up and life would go on. In a sense it was a win-win for them.

Mr. Grasso stated that he was surprised that a building permit was already in existence and wondered why that garage was not brought onto the property in its entirety. He felt they could go forward with the pergola but this was a concern. Mr. Calkins stated that, if they were to tear down the garage, they would be in front of the Board for a number of variances

and this seemed to be the path of least resistance. From a framing sense, it was fine and this seemed to please all parties.

Ms. Eaton noted that the memo indicated that the setback was 5' or 75 % of the height, which looked like it was 8'10". Somewhere over 6' was the setback that they could meet without requiring a variance. She asked if they had not chosen to do that. Mr. Calkins asked if the verbiage also stated 75% of 10', which was greater. When Ms. Eaton confirmed it did, he stated they would have to meet the 10'.

Mr. Parrott commented that the aerial maps done years ago were notoriously inaccurate which led him to wonder if it was over the actual line or not. He asked if there had been a survey done. Mr. Calkins stated not to his knowledge. They had taken care to look for markers and pins but they were difficult to locate. He felt they had a good understanding of the layout. Mr. Parrott stated that, if they chose to go ahead, one way to address the issue was to get a survey.

Mr. Feldman agreed that the aerial mapping that many folks used was not 100% accurate. In terms of a survey, in the case of a garage being repaired and not torn down or relocated, there was no requirement for a survey for a permit to be issued. With the pergola on the other side, there was also no reason to stipulate a survey at that time because that line was not impacted. When Mr. Grasso noted that the pergola was being attached to the garage, Mr. Feldman stated that, from their perspective, it was on the other side. Mr. Grasso stated that there was a signed statement that the garage was on the abutter's property and Mr. Parrott commented that there was no survey or basis for that statement either. Chairman LeBlanc stated that, in essence, this was not a zoning violation they had to deal with since there was a permit given to rebuild the structure in the same position. That eliminated the necessity of their involvement although apparently the garage was over the property line. The pergola in question was far enough away so that the property line issue did not come into play.

Mr. LeMay asked what other siting alternatives were considered and Mr. Calkins responded that they had started with a deck and given lot coverage and the orientation of the house, it was transformed into the pergola and the patio. The patio being under 18" did not require a permit or any zoning. As far as alternatives, the patio would be there to be used in that location which was why they submitted for the pergola. In response to questions from Chairman LeBlanc, he confirmed that the pergola would not have a roof and would be open to the sky. Mr. Parrott commented that it would have a partial roof, two sticks across the top.

Mr. Feldman stated that there were two definitions that they should not get mixed up. One is the definition of a structure which he read from the ordinance as "any production or piece of work artificially built up, or composed of parts and joined together in some definite manner. Structures include but are not limited to buildings, fences, signs and swimming pools." The other definition that they were looking at was open space and that would be anything open to the air.



Ms. Eaton asked if a shed could be 5' from the property line and Mr. Feldman advised it could if it were less than 100 s.f. in size. Greater than that, it had to be 10'.

Mr. Bernard Pelech stated that he lived at 175 Thaxter Road. He had lived there for 40 years and the garage predated him. He believed that the property line shown in the aerial photograph was wrong. He felt the owners had done a wonderful job with the property and vigorously supported the petition.

### **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. Witham.

Mr. Parrott stated that he would like to address the valid issue of the property line. His position was that the Board couldn't be expected to guess where the actual line was and, until a survey proved a violation, there was no violation no matter what this map showed. The map was notated that it was not a survey and only showed the approximate locations of property lines and features. In terms of the Board's action, it could not be assumed to be correct or incorrect. It would be different if this was something which was going to project onto the apparent property line, but they were dealing with the other side of the garage. If the Board chose to grant the request, it would not be concerned that it would be over somebody else's property line.

Mr. Parrott stated that granting the variance would not be contrary to the public interest. The owners had done their due diligence and talked to the neighbors, who represented the public interest. The pergola would be in the back corner of the lot and not interfere with anybody. It would be in the spirit of the ordinance to allow people to improve their property without injuring the rights of anyone else. He stated that, in the justice test, there was no overwhelming public interest to argue against granting the variance. Regarding property values, given the arrangement of the neighborhood and how the properties related to each other, property values would not be harmed in any way and might be somewhat enhanced. Addressing the hardship criteria, Mr. Parrott stated that having a pergola was not a necessity but the owners wanted to improve the value of their property and had good arguments to placing it there and why other locations would not work as well architecturally.

Mr. Witham added that the owners did have a valid building permit to repair the garage and there was no need to go back and challenge that at this point. They were looking at a 4% increase in lot coverage for a structure which was as open as you could get and he didn't see any adverse impact to the abutters who seemed to be in support. Mr. Witham stated that this petition brought up a point he had made with regard to the overviews the Board received. They had started to note that if a structure was nonconforming, a variance was also needed to enlarge it. What he had noted was that the addition itself could conform in every way but

the applicants had to come for a variance because one element of the existing building was nonconforming, which he felt was a bit of a slippery slope. He understood why it was in there but, again, the pergola could meet every criteria and would still need a variance because the garage was nonconforming.

The motion to grant the petition as presented and advertised was passed by a vote of 6 to 1 with Mr. LeMay voting against the motion.

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Mr. Witham made a motion to suspend the ten o'clock rule, which was seconded by Mr. Jousse and approved by unanimous voice vote.

Mr. Grasso stepped down for the following two petitions and Mr. Durbin assumed a voting seat.

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- 6) Case # 4-6  
Petitioners: T-Beyar Realty, LLC and Fitness Dynamics  
Property: 141 Banfield Road, Unit 1 Assessor Plan 254, Lot 2  
Zoning district: Industrial  
Requests: **Special Exception**, Section 10.440 Use Table 4.40 to allow a Health Club of up to 2,000 square feet in the Industrial zone

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech stated that he would present the same criteria for this and the following petition. Chairman LeBlanc stated that they could hear the arguments as holding for both, but they would have to vote on the petitions separately.

Attorney Pelech stated that 141 Banfield Road was a mixed use building for which variances had been approved in the past. The predominant use was as a warehouse with some 70 parking spaces. He did not know how the two businesses before them that evening located there but he was made aware of them in February or March. The owners received a letter from Mr. Feldman and they said they had filed an application but he was not sure what happened to it. Attorney Pelech stated that these uses were permitted by special exception in the Industrial District. He distributed a handout for each business. Both had classes at 6:00 in the morning and 6:00 at night, with one at noon. Fitness Dynamics had an average of 7 students per class and the jiu jitsu 10 students, so there would be no parking problem. These were good uses because of the class times involved which were when the warehouse uses were closed.

Addressing the special exception criteria, Attorney Pelech stated these were nonhazardous uses and there would be no danger from fire or explosion or the release of toxic materials.

There would be no change in the essential character of the neighborhood. One side was a construction company and nothing between this building and Peverly Hill Road. There was nothing across the street except a cemetery and behind it was an industrial use. These uses would not result in any diminution in the value of surrounding properties or affect other uses in the building. He stated that there would be no creation of a traffic safety hazard or increase in congestion. He reiterated the class sizes which might be slightly bigger on the weekends, but that would be when the other uses in the building were closed. As a result of these uses, there would be no additional demand on municipal services. No excessive demand for water, sewer, police, schools. He didn't even think they had showers. He stated that there would be no increase in storm water runoff onto adjacent properties or streets as the uses were contained within the building.

**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 reiterated that the Board would be voting separately on the two applications and called for a motion on the Fitness Dynamics petition.

Mr. Parrott made a motion to grant the petition as presented and advertised and Mr. Witham seconded the motion with the stipulation that a building permit be obtained within 30 days. Mr. Parrott agreed to the stipulation, adding that he would also like the Planning Department to direct a full inspection by the code enforcement officer as it would be well for the owners and the City to confirm that all of the other uses were proper. Chairman LeBlanc agreed this should be done, but not tied to the approval for these particular applications. Mr. Parrott withdrew his stipulation and just requested that the department do so. Mr. Witham agreed.

Mr. Parrott stated that they had heard the discussion of all the different uses and the concerns that might arise from those particular uses and he thought that these were pretty benign uses in an established building with plenty of parking. Certain effects such as noise or smoke which could come from certain kinds of uses were just not going to happen because of the nature of those particular uses. The bottom line was that he felt the special exception criteria were all satisfied.

Mr. Witham stated that the fact that only a special exception was needed meant that this was an allowed use and he felt that the criteria set forth were met.

The motion to grant the petition as presented and advertised, with the stipulation that a building permit be obtained within thirty (30) days, was passed by a unanimous vote of 7 to 0.

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- 7) Case # 4-7  
Petitioner: T-Beyar Realty, LLC and Seacoast Brzilian Jiu Jitsu  
Property: 141 Banfield Road, Unit 7 Assessor Plan 254, Lot 2  
Zoning district: Industrial  
Request: **Special Exception**, Section 10.440 Use Table 4.40 to allow a Jiu Jitsu Studio of up to 2,000 square feet in the Industrial zone

### **DECISION OF THE BOARD**

Mr. Witham made a motion to grant the petition as presented and advertised. When Mr. Feldman asked if it would be with the same stipulation as the previous application, Mr. Witham stated yes. Mr. Parrott seconded the motion with stipulation.

Mr. Witham stated that he would like to carry forward the comments made in the motion to grant the previous application and Mr. Parrott agreed.

The motion to grant the petition as presented and advertised, with the stipulation that a building permit be obtained within thirty (30) days, was passed by a unanimous vote of 7 to 0.

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### **III. ADJOURNMENT**

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 10:15 p.m.

Respectfully submitted,

Mary E. Koepenick  
Administrative Clerk