

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

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

August 17, 2010

MEMBERS PRESENT: Carol Eaton, Thomas Grasso, Alain Jousse, Charles LeMay, Arthur Parrott, Alternate: Derek Durbin, Alternate: Robin Rousseau

EXCUSED: Chairman Charles LeBlanc and Vice Chairman David Witham

ALSO PRESENT: Principal Planner, Lee Jay Feldman

I. FIRST ORDER OF BUSINESS

Principal Planner Lee Jay Feldman opened the meeting by announcing that both the Chair and Vice-Chair were absent that evening so that a Chairman needed to be elected to preside. Mr. Jousse nominated Mr. Parrott to serve as Chair for the evening, which was seconded by Ms. Eaton and approved by unanimous voice vote.

Ms. Rousseau asked to bring up a matter to the Board before it reviewed the cases for the evening. She stated that, in the packets for the week there was a different arrangement to each of the cases. The City of Portsmouth had not only listed the criteria that needed to be addressed for each variance, but they also listed the City's position on each of the variance criteria. She indicated she had a bit of a problem with that. She read some examples from the departmental memorandum, stating that she felt that they were manipulating the position of the Board in advance. She stated this was a quasi-judicial Board which needed to be as fair and balanced as possible in its decisions, listening to the applicants' and abutters' positions, as well as members of the public, and then making a fair decision. She didn't think that the City of Portsmouth should be taking a position in advance on the variance criteria and, as she stated, telling the members in advance how to vote on each of the criteria. She asked for the thoughts of the other members as to what was in the packet and whether a motion was needed or just to simply ask the City of Portsmouth to no longer comment on each of the variance criteria.

Mr. Parrott noted Ms. Rousseau's comments and asked if anyone would like to briefly speak to the same point.

Mr. LeMay stated that he had mentioned this before and felt it was inappropriate for the Department to put forth arguments or recommendations that could clearly prejudice positions or considerations of the Board on documentation of this nature. He had no problems with background, previous history, or any important subtle points that might have come through the

office that the members may not have picked up, but he did not want to see the judgments on each of these things. He felt it was the Board's job.

Mr. Jousse agreed. He also felt there might be a problem if something like this continued and it went on to Superior Court. He would prefer not to have any recommendations of that type. He had no problem with the sections on zoning issues and additional facts, but found the review of the criteria a little sticky.

Ms. Eaton thanked Ms. Rousseau for bringing this up as she had the same questions and it did seem inappropriate to her. She also questioned the legality of it. She liked to have the facts and the background and documentation of the records to which the members should refer. She also liked receiving the intent of the zoning so that the members could keep that in mind, along with the master plan if that applied.

Mr. Durbin concurred with all the comments and thought there was a difference between facts and recommendations which could create a problem judicially if something were to face a challenge at some point for the City.

Mr. Grasso agreed with Mr. Durbin's last comments. No matter which was the members decided, if there was a local abutter or other member of the public who felt that a particular thing hadn't gone their way, he thought doing the notes in this manner puts the Board's judgment and decision in jeopardy.

Mr. Parrott stated that he had a little different view of this and didn't feel quite as strongly as everyone else does because he looked at them as staff recommendations. The members were the deciding body, obviously, and the staff did very valuable work for them. Nonetheless, they had different roles. While arguably in a new format, he felt that much of what was placed in the packets was pretty factual. He agreed that some of it was argumentative, he agreed, but to his way of thinking it was just a staff recommendation and he guessed he didn't feel quite as strongly about it as everyone else.

Mr. Rousseau asked what the next step was in this process. Mr. Parrott indicated that Mr. Taintor would receive the Board's comments and he could review the tape for the details. Ms. Rousseau maintained that, ultimately it was not his decision but the Board's to make.

II. PUBLIC HEARINGS

1) Case # 8-1

Petitioners: Gordon C. Clark & Carol L. Clark

Property: 28 Rockingham Street Assessor Plan 144, Lot 12

Zoning district: General Residence C

Request: To allow construction of a new home with the following variances from Section 10.521 Table of Dimensional Standards:

- Variance to allow a 7'± right side yard where 10' is required
- Variance to allow a 15' rear yard where 20' is required

SPEAKING IN FAVOR OF THE PETITION

Attorney Timothy Phoenix introduced himself and the petitioners seating in the audience, Gordon and Carol Clark. Ms. Clark was a designer and a draftsman by training and had prepared many of the plans. He stated that most of information to be discussed was in the packets provided but he had two submissions which he handed out to the Board. The Clarks were the owners of the property at 28 Rockingham Street which, he believed, had been a vacant lot since 1964 when the home on it was removed. The lot was about 50' on the front and rear and about 70' deep, so it was relatively narrow. The petitioners desire to build a relatively small home. As shown on plan A-101, the lot was about 3,877 sq. ft. and the home was going to be about 1,331 sq. ft. which consisted of a 28' x 34' New Englander style house similar to many in the neighborhood, a 20' x 22' single car garage and a 20' x 8' connector. There was also a survey showed the lot itself and the proposed home superimposed on the lot.

Attorney Phoenix indicated they needed a sideline and a rear variance. The sideline requirement was 10 feet in this area of the City and they were asking for 7'. According to the diagram, there was approximately 8' from the property line along this entire length of the home except for a small, roughly one-foot jut out, where there was going to be the backside of a fireplace. Because that area was about 5' to 6' wide and was about a foot closer, the application had to be filed at approximately 7' from the sideline. The rear required 20' and as seen, the reasonably sized house with the garage and the connecting area, took it to 15' from the back lot line. They were asking for a relatively modest 5' variance. They were hoping that the Board would agree that this sort of application and intention to build a reasonably sized home on one of the small lots in Portsmouth was exactly why the variance provisions of the Ordinance existed. Attorney Phoenix indicated on the plan on display the area where the house would be located, noting that every house on the map he handed out would today not meet the zoning requirements for setbacks. Some were actually encroaching. Although these other nonconforming houses were not a reason to grant a variance, it did demonstrate a generalized trait in this area because all the lots were created and the homes built long before zoning existed.

Attorney Phoenix stated that what they were trying to accomplish by requesting these variances, and they had tried to keep them as minimal as possible, was shown on his other handout which showed the floor plan, the driveway, the garage and a car in scale size. The driveway from the property line to where the house would begin is 14'. It was designed with a 10' travelway with 2' on either side for some shrubbery to give a setback for the neighbor on one side and from the house on the other side, and to pile snow during the winter, etc. As noted on the handout, the distance from the property line on the left side, the bottom side, was approximately 20' 8" from that property line to the edge of the garage. With an average car of 15' to 17', they wanted to be able to pull into the driveway, make the turn and park one of the cars in the garage. This would avoid stacking cars. They thought on balance that their request allowed them to 1) build a reasonably sized home in keeping with other homes in the neighborhood, and 2) be able to park their cars off the street, get one into a garage where it's not getting rained on while avoiding having to back out into the street and therefore be a safety issue. Attorney Phoenix stated that, at the rear, they believed the house was reasonably sized at 28' x 34'. As seen in the floor plan, the back entry way from the garage and the garage was what takes them closer than 20'. If you looked at the lot behind it, the area that was closest was the area where the buildings on the lot behind them were the farthest away.

Addressing the criteria, Attorney Phoenix stated that granting the variance would not be contrary to the public interest. They felt it was in the public interest for a property owner to enjoy the reasonable use of their own property with a modest home in keeping with other homes in the area. Balancing all the factors, they felt this was reasonable. He pointed out that, while the Ordinance allowed a height of 35', they had kept the house to 32.5' to allow light and air. There was also additional space on the side where they were requesting relief because the neighbor's house was on the far side of the lot with a driveway. They didn't believe that moving the house 1' or 2' in either direction was going to negatively affect any neighbors' air, light, space, etc. He stated it would also not be contrary to the public interest because it would allow cars to be parked in the driveway or in the garage and go back out with probably a couple of point turns, but would prohibit backing out into the street which they felt was a public safety issue.

Attorney Phoenix stated that granting the variance would observe the spirit of the ordinance. This is the only undeveloped lot in that general neighborhood. The spirit of the ordinance is to protect people's safety, their light, their air, their ability to move, see and move around freely on their own property and/or, on the other side of the coin, to use their own property without harming or infringing the rights of the public or the rights of others. For the reasons already stated, they felt these relatively minor variance requests do meet and observe the spirit of the ordinance.

The third requirement is that granting the variance will do substantial justice. They believe the benefit to the applicant will outweigh any potential harm to the public. 2' to 3' of relief was small but if they moved it over that same distance, it was critical in having the space to put in a driveway, for snow removal and, most importantly, a turning radius for cars to get in and out of the garage.

The fourth requirement is that granting the variance will not diminish the values of surrounding properties. Attorney Phoenix asked the Board to consider this very carefully. One may or may not argue that building a house on a vacant lot next to you when you've had the enjoyment of that vacant lot for years devalued your property, but there was going to be a house on this lot no matter what. So the issue is whether having the house two feet closer than the Ordinance allows on one side and five feet closer in the back will diminish the values of surrounding properties. They felt that given the fact that at least every house on that tax map is within the current setbacks and/or encroaches, similar to neighborhoods all over town, the values of the surrounding properties will not be diminished. This will be a new construction yet in keeping in design and style of what is there. So for those reasons they believe strongly that granting the variance will not diminish the values of the surrounding properties.

Addressing the new hardship test, Attorney Phoenix stated that the property has special conditions that distinguish it from other properties in the area and owing to those special conditions, a fair and substantial relationship does not exist between the general public purposes of the ordinance provision and the specific application of that provision to the property. Also, the proposed use is a reasonable one. They believe this property does have special conditions. It's only 50' wide and 75' long and a house was going to be placed on it. He suggested that a 28' wide house is about the minimum you can have today for a reasonable width of a house. That width drives how much of the front lot line is going to be covered by house. They are asking that it be slid over 2' or 3' to accommodate a driveway. The property was also unique because it is the only lot in that general neighborhood that has no home on it and therefore it is a clean sheet. They are looking at what to put on it that meets the requirements of the ordinance yet still give a reasonable use of the property

by the owners. Attorney Phoenix stated that the 10' setback is to try to create air, light, space and keep a bit of distance between neighbors where possible so that people have room to move freely. What the Ordinance is trying to protect is protected by what they are doing, particularly when you compare this project with all the other homes in the neighborhood. The ordinance even stresses "use." He assumes this means the use of the property as a residence. It is a residence, in a residential neighborhood, surrounded by residences, so the use is reasonable and if "use" is interpreted to mean the use of the variance, they thought the use for the home, for the driveway, for the garage are all reasonable under the circumstances, both for the sideline and rear setbacks.

Ms. Rousseau stated that she thought Attorney Phoenix would know, in Portsmouth the new houses are not considered the "best on the block." She'd say the oldest houses are considered the "best on the block." She noted that she did not see how having a garage meets a hardship test. Regarding the hardship criteria, she couldn't see why you wouldn't have reasonable use of the property keeping the setback in place without a variance. It seemed to her that the applicants were arguing for a garage instead of just backing out like most of the people in the City do. Why is that such a hardship? Attorney Phoenix responded that a garage is not required anywhere, but in today's day and age, most people want to have a garage. It enhances the use of their home to have their car covered and he thought having a driveway you can get into and out of without backing into a busy public street was worth doing, although it might be done all over town. He stated that one of the goals of the Ordinance is always to get more and more compliant and make things more and more safe as we go through time. In addition, while not necessary, a garage was what the owners want and he believed the Board should balance what they want to do – the reasonable use of their own property to do with as they wish – against the Ordinance requirements. When Ms. Rousseau asked if he would agree that the hardship criteria as the Board had to look at it was not "nice" to have but "have" to have, Attorney Phoenix disagreed. A brief discussion followed about the hardship standards and the reason for setbacks as it related to this petition

Mr. Grasso stated that Mr. Parrott had read into the record that the second variance request was for 15' where 20' is required but on sheet A-101 that Attorney Phoenix handed out, it appears the setback is going to be 13' 9 1/8". Would he elaborate as to which one is correct? Attorney Phoenix noted Mr. Grasso was correct and that he would have to defer as he didn't prepare either of these. He asked Ms. Clark to address that. Mr. Parrott asked that be held for now as there may be other similar questions. Messrs. Jousse and LeMay indicated they had the same questions.

Mr. Jousse noted that on A-101, the dwelling is 55'9 3/4" and on the plan just handed out, it's 56'2 1/4". In addition, the second floor on the driveway side is growing by one foot as you go up one flight of stairs. On the first floor it's at 34 feet and the second floor it's at 35 feet. The Board is asked to approve as presented and advertised and there is a lot of conflicting information on these and he didn't know which one was correct.

Mr. Parrott asked the applicant to address those dimension differences, because it was obvious that what was advertised and presented was different than what they had in front of them for the evening. Attorney Phoenix apologized in not pointing it out when he handed them out. Ms. Clark prepared the plans and he wished her to address those issues, but if the Board is so inclined to grant the variances, they would have to be granted as advertised, with the 17' and the 15' and not anything less. Mr. Parrott indicated that would be fine.

Ms. Clark indicated the original plan showing the first and second floor were only presented to show the turning radius because it wasn't explained in the footprint. That is also what they would build. These original plans were revised a little bit because some of the dimensions were like "3/4" "1/4" so it really was the original and that is what they are asking for, on the original plan. Mr. Parrott stated for clarity that the applicant was asking for 15' on the rear and 7' on the right side. Ms. Clark indicated that was correct.

Ms. Eaton stated the information the Board has indicates it is a 1,331-sq. ft home. It looked to her like it's over 2,000 sq. ft. Can they clarify the square footage of house? Attorney Phoenix stated that, again, he would have to let Ms. Clark address the total. As he said, he had just gotten involved in this and the square footage he was referring to was the square footage as referenced on the Planning Dept. memo, unless that memo intended to reflect the first floor ground coverage. Ms. Clark indicated that number did reflect the footprint of the building on the lot. It is a two-story building. And in answer to Mr. Jousse's question which she hadn't addressed, the second floor overhangs one foot. The overhang can be seen on the front and side elevations. Ms. Eaton stated that the garage is really not just a garage, as the master bedroom is on top of the garage. Ms. Clark confirmed that was correct. Attorney Phoenix clarified for Ms. Eaton that the building permit application that was submitted does reflect the square footage of the footprint, not the total building.

Mr. LeMay asked for elaboration on the overhang. Ms. Clark stated the second floor overhangs just a foot. It could be seen mostly on the elevation with the garage where you can see the garage doors. Mr. LeMay asked if it overhung over the front center of the lot? Ms. Clark indicated just to the front.

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Chuck Mead of Portsmouth came forward. He had been asked to speak in opposition to the request for a variance by Mary McDermott, who was present. She is the immediate adjacent neighbor who is being asked to submit to the three-foot shortage from the setback on her side of the property. Mr. Parrott asked where she lived in reference to the property and Attorney Mead indicated she was the neighbor to the right of the property if you were facing it. He stated that his client submitted there was not a hardship in this case. The Clarks, when they purchased the property, presumably knew the dimensions of the property and they had designed the home to fit on that property. They're not disputing the fact that a home can be built there. They were disputing the size of the home and the dimensions which do encroach on the zoning setback requirements. He stated that there are alternate designs and plans that could be submitted. His client's major concern is that the 3' narrowing of the sideline setback would diminish the light that she has. She has enjoyed the easterly and the southerly light. In the winter, when the sun is out, there is enough solar reflection in the home that the furnace won't come on during the daytime. She is very concerned that there is going to be extra shading so that it would cause some burden to her in terms of additional heating cost and loss of light, although they realized that necessarily some would occur. He submitted there is nothing unique, as in Simplex, about this lot that wouldn't allow a building being built in compliance with the current Zoning Ordinance. The Simplex case also spoke to the public or private rights of others which he again related to the potential heating costs and loss of light.

Attorney Mead stated that they propose that the Board deny this variance and allow the applicant to come back with a redesigned plan, sliding everything over 3'. The plan that he was looking at, and he believed this to be the same one that was submitted, shows what appears to be a three-foot high stone wall which would have some width and would necessarily encroach on a 14' driveway. There is a plan for shrubbery and an alternative fence might allow for that 14'. He was not aware of any Ordinance or regulation that requires a 14'-foot driveway and most in the neighborhood range from 8' to 11'. Most people in that neighborhood do park in their driveways. He didn't know anything about the turning radius of any particular cars here, but it seems adjustments could be made to allow for a turning radius into perhaps a smaller garage or one that didn't have as wide of an entrance in the rear, so these setback requirements could be complied with. He submitted that a variance should not be allowed. While he understood that a number of existing structures which were grandfathered were closer than the setbacks requirements, but this construction project would further congest the neighborhood. When Ms. Eaton asked if Attorney Mead knew when his client's house was built, Ms McDermott came forward and replied that the house was represented on the map at City Hall, which was dated 1877. She has owned it since 1984.

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

Mr. James Beale of 286 Cabot Street stated that his property is one street over from the applicant's property. He stated that this lot has been empty for a long time and he felt it would be very nice to see a house being built there. However, there were a few of the points that were brought up he wanted to address. Rockingham was not a heavily travelled street and only serves four to six houses, so he didn't see backing out onto the street as a major issue. No house in a two-block radius, because they are all historic, has a garage on the property, so he sees a garage as a luxury, not a hardship, issue. He stated that the side to the east of the building lot is a parking lot and there is a large space between that lot and the building that exists on Islington Street, so he didn't see any reason why the building could not be shifted in order to conform to the variance, at least to the west side. However, if this variance is granted, he would petition that a high-grade cedar fence be placed around the backside and the west side of the property in order to take into account the closeness of the neighbors.

Attorney Phoenix stated that he wanted to ask the Board to keep in mind balancing the rights of the homeowner against the neighbors. He fully respected the nearest next door neighbor represented by Attorney Mead, but the only thing he wanted to repeat is they believed that 2' one way or another is not going to have an appreciable difference on the shade. The shade is going to be there one way or another and, as he had stated, they were allowed to go to 35' high. He suggested that the higher the house is, the less sun there is going to be. At 35', they could probably get in three floors, but they chose to go to 32' and only two floors. Also regarding the shadowing issue, the length of the house would be 8' away except for the width of one small fireplace that stuck out 1'.

With no additional speakers rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Grasso stated that the applicant needs to satisfy all the criteria for the variance. What he found lacking was the hardship.. This is what would be called a clean slate. If it were an existing house and they were proposing an addition or garage, he thought that would be different. But, with new construction, he thought this could be designed to fit on the lot. With a 32.5’ high roof, he felt that it should really stay within the 10-foot setbacks on that side.

Mr. Jousse stated that the Board is essentially looking at a brand new lot or a virgin lot and this is a great opportunity to put a dwelling on there to conform to all of the setbacks. If he were to make any recommendations, he would put the driveway on the other side of the dwelling. That way the neighbor would get more sunlight, but that was his opinion and had nothing to do with this particular case. He stated that there is absolutely no hardships connected with the particular piece of property except that it was vacant which was not in itself a hardship.

Ms. Rousseau wanted to point out the public who is listening to this vote that part of the variance criteria that they have to decide on is the hardship criteria. She stated this is a description that comes from the State and it says “unnecessary hardship means that owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance.” She wanted to show that is why some of the Board would be voting in the manner they voted this evening. Those members thought that the owner can certainly build a house in strict conformance with the current Ordinance.

The motion to deny the petition as presented and advertised was passed unanimously.

Before moving on to the next case, Mr. Parrott indicated that if anyone present was interested in the petition to modify the house at 300 Rockland Street, the attorney for the applicants had requested a postponement to better prepare. Mr. Grasso made a motion to postpone the petition to the September meeting, which was seconded by Mr. LeMay and passed by a voice vote of 6 to 1, with Ms. Rousseau voting, “nay.”

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- 2) Case # 8-2
Petitioner: NH 1830 Limited Partnership, owner, Jamilla El-Shafei, applicant
Property: 323 Islington Street Assessor Plan 144, Lot 9
Zoning district: General Residence C
Request: To allow a projecting sign of 8.3 square feet where 2 square feet is allowed
- Variance from Section 10.1251.20 Maximum sign area for individual signs allowed in Sign District 1

SPEAKING IN FAVOR OF THE PETITION

Mr. Bob Walter introduced himself and stated he was representing Permanent Cosmetics by Jamilla, presently located at 323 Islington Street. He presented additional photos that he distributed to the Board. 323 Islington St. is located on the corner of Islington and Cabot St., several doors down from Old Port Traders. The business has leased the property with the expectation that Islington Street, which is heavily travelled, was as a zoned commercial business area, but to their

surprise, that one small section of the corner of Islington and Cabot between the existing Old Getty Gas stations and Old Port Traders has been zoned residential. Under the present regulations of Article 12 for signs, commercial businesses are allowed up to 16 s.f. Because this property is zoned residential, the existing regulations only allow 2 s.f. of projecting sign. He held up a 1' x 2' board as an example of 2 s.f. and stated that this size would be a hardship for a commercial business in that one of the philosophies of business is to advertise your business as much means as possible.

Mr. Walter referenced the photographs he had submitted and identified the various views of existing projecting signs in the area. He documented their plans for the proposed sign and showed the iron bracket they want to replace. The size of the sign they would like to install with the Board's permission measures 30" X 40", which measures 8.3 s.f. and is in keeping with the signs that are already in existence. There will not be any additional clutter, advertisements or diversions that would be a safety hazard for the traffic. The sign is well away from the existing sidewalk, so there isn't a hazard to people walking on the sidewalk.

Mr. LeMay asked if the family dentistry sign shown in the photographs was the same size as what the applicants were proposing and Mr. Walter stated it was approximately the size. He hadn't measured the ones that were there.

Mr. Jousse asked how long the cosmetic business had been in existence and the owner, Ms. El-Shafei indicated since 1994 in Kittery, ME and she had just recently moved to Islington. She has a large clientele so she thought it would be good for the community as well because these clients will be coming from out of state. Physicians will be sending her their patients. Basically what she does is paramedical work which she briefly described. The clients coming from out of state will be bringing other commercial business to the community. They have made an effort to obtain a bracket that was made by Pierre Picard, a fairly famous blacksmith with 21 carat goldleaf, so she felt that it enhanced the building. She did want to mention that, looking at the photos of the bracket that was going to be replaced, it is lower and therefore wouldn't be blocking her neighbors or the upstairs neighbors or the neighbors behind her. She just wanted to ask that if the Board felt the sign was too large to please give her some guidance so that they could have a sign that at least people could read, because she felt that this little sign is certainly smaller than anybody else would have and they couldn't put any readable information on it.

Mr. Durbin asked if they knew how large the preexisting sign was. Ms. El-Shafei indicated it was a little larger than this, 25" x 30" or something in the area. They also have several signs. They have signs on each side of their building.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Leslie Kane came forward and introduced herself. She is a co-owner of a condo on 304 Islington St. which sits diagonally across from this sign. She stated that she believed that since it is specially zoned in that area for signs to be two feet that is the way it should be. It's going to comply with all the other buildings and not stick out like a sore thumb. She stated that the corner on which the property is located is dangerous and she thought anything that is visually distracting to drivers is a total detriment. Ms. Rousseau asked if she had a residential or commercial condominium. Ms. Kane replied it was residential. Mr. Rousseau asked if she were in the beauty industry at all and Ms. Kane replied no.

Mr. Parrott then read into record two letters received by the Board, from J. Mark Quinlivan, 383 Islington Street, Unit #2 and Richard B. Vigdore, 383 Islington, Unit #1, both requesting denial.

Mr. James Beale of 286 Cabot Street stated that he believed that the size of this sign was a bit large. If the variance does get accepted, he asked for a 30% reduction to a size of 30” high by 20” wide. Since the applicant already has an established business, he believed that her clientele are already booked and looking for her. Islington is a highly travelled street, so people know there are businesses along that section, so he believed that one does not need a large sign to promote a business that has existed for so long.

Ms. Rousseau asked if he had a business currently. Mr. Beale answered no, he did not. Ms. Rousseau wanted to know how he would be able to speak to that fact that he just made about signage requirements, because he was representing that there is some sort of public interest that would be harmed as a result of the size of sign that the applicant is requesting. How would he be harmed? Mr. Beale replied that he believed that the area is residential and he also agreed with visibility being blocked on that corner. Ms. Rousseau asked if any of the other businesses with signs of a size similar to what this applicant is requesting were in any way detrimental to his interest. Mr. Beale replied no, he did not remember there being a sign on the existing hanger that is on the photograph. Ms. Rousseau stated she was asking about the other properties that abut this particular one. There seems to be a series of signage on that street of similar size that the applicant is requesting that had been there for quite some time. How had he or his interest been harmed by those other entrepreneurs trying to promote their business in a reasonable way? Mr. Beale conceded that he had not been harmed but stated that those signs were not on that block so that their customers can identify their business easily. Mr. Beale replied that he had not. But he further stated that those signs are not on that set block. The larger signs are either on the other side of the Getty station, south of Cabot Street or north of Rockwell. When Ms. Rousseau stated they were within a few feet of the subject property, he replied they were 50’. Ms. Rousseau countered that one particular property, maybe, but the other ones going down Islington Street seemed to be of similar size. She stated that she was trying to understand where his interest, as a residential person out on Cabot Street not even facing the signage, would be harmed in any way. Mr. Beale stated that considering that he walks to town and leaves Cabot Street to turn left onto Islington, if it becomes an issue of pulling out into the street, then it was harming to him. Ms. Rousseau asked if it was correct that he hadn’t any safety issues to date regarding the existing signage on that street and he replied he had not at this location. She asked if he had noticed a public safety issue at any of the buildings on Islington Street with the signage and he replied he had not.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Walter stated that having a business on Islington Street is the distinguishing factor in this case. The fact that it has been zoned residential and the fact that they have a commercial business located within that zone makes is a distinguishing factor. They were not talking about a subdivision or a block off of Islington Street, or Middle Street or State Street. They were talking about one of the City’s primary commercial districts where everybody was promoting their businesses accordingly. The Board would recognize the importance of promoting your business with signage in front of your property. They were not asking for anything more than what has been in existence right next to them. He reiterated that he was surprised that this one small section of

Islington Street has been zoned residential. Mr. Parrott indicated he would give Ms. El-Shafei one minute and then they needed to move on.

Ms. El-Shafei wanted to address Mr. Beale's comment about it being a traffic hazard. She and her husband actually brought a sign to see if it would be a traffic hazard. They hung it up and actually someone from the Planning Dept. came and took a picture of it. When they were applying for the sign permit, the Planning Dept. stated that they had a sign which was illegal. They corrected it and stated they had put it up for just a few hours. They drove up and down the street to see if the sign was going to block and it didn't. All she was asking for was a sign just like her neighbors next to her. It doesn't have to be 30" x 40", just something that people can read. It will be done very elegantly and enhance the building because it's a hand wrought iron sign, not an ugly plastic sign like the business down the street. She just wanted the Board to be reasonable.

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

DECISION OF THE BOARD

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

Ms. Rousseau stated that she was all in favor of doing what can be done for the local entrepreneurs in the City of Portsmouth. She thinks the 1' x 2' signage that the applicant displayed was incredibly small and she didn't think it was reasonable in any way to expect a local entrepreneur to advertise their business with that size signage. She thought that was why they had issues with the free standing signs all over the City of Portsmouth because the signage requirements are not fitting the needs of the business community. This was discussed during a joint meeting with the Planning Board about a month prior and the City of Portsmouth is taking another look at their signage and ordinances currently. She encouraged the entrepreneurs in the City of Portsmouth to make their thoughts and concerns known. She thought that the applicant's sign as presented is incredibly tasteful and will be a wonderful addition to that area on Islington Street. She heard from the neighbors and she didn't think their arguments in any way spoke to the criteria of the variance requirements here. She stated that she liked to let entrepreneurs design their own signs. To her, as long as the signage looks appropriate and tasteful and blends in nicely with the community, there is no reason why the Board has to pick apart every inch of the signage to whittle it down to something closer to the ordinance. It looks very tasteful and fine and it's the design the Board is looking at.

Ms. Rousseau stated that the variance is not contrary to the public interest. She then read for the members of the public present an explanation of how the Board looks at this. "The proposed use must not conflict with the explicit or implicit purpose of the ordinance and must not alter the essential character of the neighborhood, threaten public health, safety or welfare or otherwise injure public rights." She certainly didn't think that the signage the applicant proposed to the Board in any way affects the public health, safety or welfare or changes the essential character of the neighborhood. Therefore she thought the applicant is in compliance with that particular requirement. The spirit of the ordinance is observed. To her, the spirit of the ordinance is to make sure that the signage that the applicant proposed for the variance is reasonable for that neighborhood and the other signage that exists there today, which she believed it did. She stated that substantial justice will be done. The benefit to the applicant is not outweighed by any harm to

the public or other individuals. If anything, it would be a benefit to the public because they can see the applicant has a wonderful new business. She stated that the values of the surrounding properties will not be diminished. She could not see, nor had she heard from abutters that their property values would be diminished. Ms. Rousseau believed that for the applicant literal enforcement of the Ordinance would result in unnecessary hardship. She thought a 1' x 2' sign was an incredible hardship for entrepreneurs. No one could see that little sign. She thought the applicant's signage and the other signage on Islington Street is very reasonable and tasteful.

Mr. Grasso stated he seconded for discussion. He would be in favor of a reduced size sign but wouldn't support a 30" x 40" size. This is a corner lot with very good visibility all around the corner and he thought, although it is zoned residential, he could compromise to 2' x 2' or something like that.

Ms. Eaton stated she would not be supporting the motion either. She thought the sign was too large and significantly exceeds the ordinance. It probably should be rezoned. She wanted to point out that tastefulness or the way the sign looks is not a criterion for a variance. The Board is not the taste police and she thought everyone on the Board would have a different opinion on that.

Mr. Jousse stated that he, too, believed the sign was too big and he would not be supporting the motion. As far as what went on a sign, the Board had tried that once and been advised by the Legal Department that it was covered by the First Amendment. Nevertheless, he was troubled by this particular sign because, according to the applicant, people are coming from out of the City and out of state and they will be driving down Islington looking for a permanent cosmetic when they should be looking for a street address. Islington is a heavily travelled street and the more signs, the more problems we have and as had been testified, not too long ago there was a 3-car accident right there at that intersection or near that intersection. The sign is four times as large as what is allowed by the City Ordinance and so he would not be supporting the motion.

Mr. LeMay thanked everyone for the opportunity to "nit pick" this application a bit. He stated he would like to vote for the application. The shape, size and location were almost fitting for that area but the size was just too big for that corner. He could not redesign the sign, nor would he really want to, but he would be receptive to something less massive.

Ms. Rousseau stated that, she felt, the positions of the Board could be seen and she didn't think there was one person on the Board that was an entrepreneur and had an understanding of the interests of the entrepreneurial community. She reiterated her recommendation that they make their thoughts regarding the signage ordinance known to the City.

Mr. Durbin commented that he agreed with Mr. Grasso. He had asked the question about the existing sign for a reason. It's 25" x 30". He travels through that area quite a bit and he has taken notice of that sign. By its coloring and design, it stood out well to the public without creating any sort of distraction. He has trouble finding that a hardship actually exists, at least with the application as it is proposed. He would probably support something that was slightly modified. He stated as an aside that, with all due respect, he was a business owner although he didn't actually have a sign.

The motion to grant the petition as presented and advertised failed by a vote of 1 to 6, with Ms. Eaton and Messrs. Durbin, Grasso, Jousse, LeMay and Parrott voting against the motion.

3) Case # 8-3

Petitioners: Edward J. Valena & Dale R. Valena

Property: 67 Crescent Way Assessor Plan 212, Lot 147

Zoning district: General Residence B

Request: To allow an addition of 100 square feet to the rear of a nonconforming garage with the following Variances:

- Variance from Section 10.321 to allow the expansion of a nonconforming structure
- Variance from Section 10.521 Table of Dimensional Standards to allow a left side yard of 1'± where 10' is required

SPEAKING IN FAVOR OF THE PETITION

Mr. Edward Valena introduced himself and his wife, Dale to the Board and distributed a letter of support from a neighbor. Mr. Valena stated they were proposing to construct a 10' X 10' open-sided firewood storage shed that would be attached to the rear of an existing detached garage. This garage visually appears to be located directly on the side property line. It is proposed that the attached shed to the rear will have a setback of 1'± off the side property line and they were present to seek an allowance to enlarge a nonconforming structure. He stated that a detached 10' x 10' shed is allowed in the GRB zoning district with five-foot setbacks to the side and rear. He stated that he would like to read what he had submitted to the Board as he did not speak too well off the cuff and asked if that was OK. Mr. Parrott stated the Board would prefer it not be read, but if that worked for Mr. Valena, that would be fine. Mr. Valena then read from his submittal including the need for a storage shed to keep wood for their stove. He outlined the reasons why they needed a variance. Atlantic Heights is an historic neighborhood with tons of personality but with postage stamp size lots – theirs is .102 acre – that must be utilized to their best ability. If the shed were to be built as a free standing structure and sited five feet off the side property line, dead space would be created to the rear of the garage and along the side lot line with the shed encroaching on an already miniscule back yard. This section of the yard is heavily vegetated by the surrounding buildings, fence and shade tree and barren in vegetation. Anchoring one gable-end of the building to the existing detached garage will result in a sturdier building in that this garage, built in the early 1990s, is stoutly built with cement block foundation and solid wood full thickness siding. As shown in the photograph provided to the Board, the proposed design would also be more efficient and economical than a freestanding structure.

Mr. Valena continued reading addressing the criteria for granting a variance. He stated that the there would be no harm to the public interest as the back yard of the property is totally enclosed by a 6-foot high cedar fence. The shed will be nearly invisible from surrounding properties and ensures that the spirit of the ordinance will be met by not encroaching on abutting properties. The shed will actually add as an additional back yard buffer with one neighbor. Surrounding property values will not be diminished and, if anything, could well be increased by these improvements as compared to the blue tarp that they could see in the photograph. The abutting neighbors have no problem with the construction of the proposed shed as they have attested. Still reading from his submittal, Mr. Valena stated that granting the variance would be substantial justice. There are storage sheds located on or within inches of property lines throughout the Atlantic Heights

neighborhood, including the properties to either side, likely due to the diminutive lots and past granting of variances.

Mr. Grasso asked if the shed was going to be open on all four sides as shown in the submitted picture and Mr. Valena stated on three sides as they found that was the best way to get air to the wood. That picture was at his home in Durham and was of a 12' x 12' shed. This will be 3' narrower and 2' shorter and it will be open.

Ms. Eaton stated the height of the structure for wood storage looked high to her. Did he say that he wanted that for air circulation? Mr. Valena replied, "yes," and he indicated his wife won't let him build it that high this time. He asked if she were referring to the picture and she indicated "yes." Mr. Valena said it was going to be probably a foot shorter than the picture illustrated.

Ms. Rousseau stated that one of the criteria is that property cannot be reasonably used in strict conformance with the ordinance. It says unnecessary hardship means owing to the special conditions of the property that distinguish it from other properties in the area. She asked why his property was so different from the other properties in this area such that he needs a variance because he cannot use his property reasonably in strict conformance with the Ordinance. Mr. Valena stated he thought the fact the garage is sitting on the property line drives this. It made more sense to build this structure so that it's attached to that garage. It will be a much stronger building. Ms. Rousseau asked where the hardship was so that he really needed this additional structure. Mr. Valena stated that he could cover the wood with a blue tarp. Ms. Rousseau stated that he was asking for an extreme variance, right up on the property line. The current neighbors might not care but future neighbors might. Mr. Valena stated there is a six-foot fence there, so it wasn't as if it would be visible. In fact, the neighbor to that side has a shed right up on that fence as could be seen in one of the photographs. Ms. Rousseau stated then he wanted to increase the density of the area. Mr. Valena indicated what he was trying to do is to build the most sensible structure he could and that, to him, was attaching it to the existing building which will make it much stronger, according to his and his contractor's experience. Ms. Rousseau asked if there was no other way to do this than to have this shed and Mr. Valena responded that he could build this 10' x 10' building 5' feet off the property line, by right. He is just trying to build a smarter structure. When she asked for what purpose, he stated a stronger building.

Ms. Eaton stated she was wondering about the lot coverage. Does this not increase the lot coverage then, because this doesn't have a foundation? She saw there was a variance already granted that they were at 24.6% where 20% was allowed and this was another 100 sq. ft. Mr. Feldman stated the new coverage would be 29.7%. The allowed coverage is 30%, so he meets the coverage.

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

The letter of support, received from the owners of the property at 101 Crescent Way and distributed earlier, was read into the record by Mr. Parrott.

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

DECISION OF THE BOARD

Mr. Durbin made a motion to deny the petition as presented and advertised.

Mr. Durbin stated that on the face it looked like just a shed. However, the Board had to consider the hardship test as laid out by the legislature and, in this particular circumstance, he wasn't sure that the Board has heard enough for that to be established or how this lot really could be distinguished from other lots in that particular area. He knew it might seem rather harsh coming down from the Board for something so small, but the Board has to abide by that criteria. He felt not meeting that test also impacted some of the other criteria in a negative way.

The motion had not been seconded and, upon Mr. Parrott's call for a second, Ms. Eaton stated she would second. Mr. Parrott asked for Mr. Durbin to speak to his motion now that it had been seconded and Mr. Durbin stated he would like to carry forward his previous comments.

Ms. Eaton stated that the applicant was requesting a need for covered wood storage, but was showing a picture of a 10' x 10' structure which was basically a covered porch. To her that was excessive just for wood storage which she didn't feel justified a variance in this case. She agreed with the comments on hardship and felt there were other ways to meet this need within the required setbacks.

Ms. Rousseau stated the Board gets a lot of comments coming from people in Atlantic Heights and while the lot is a postage stamp-sized lot, there are a lot of postage stamp-sized lots in the City and the Board doesn't distinguish one neighborhood from another in how it makes its decisions but looks at the variance criteria as it relates to the applicant's property. She felt that she had made her points to the applicant as to why she thought the hardship criteria was not met.

The motion to deny the petition as presented and advertised failed to pass by a vote of 3 to 4, with Messrs. Grasso, Jousse, LeMay and Parrott voting against the motion. Mr. Parrott stated that a negative motion had failed and therefore a position motion was needed.

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

Mr. Grasso stated the applicants were in front of the Board to put up a shed to basically cover and store his fuel supply for the fall, winter and spring. If there was a four-sided enclosed shed, he might have a different view but he wanted to add the stipulation that it remain open on the three sides that were not attached to the garage. Mr. Jousse agreed to the stipulation. He stated that the variance was not contrary to the public interest. This is in the back yard and, while it is only one foot from the property line, it is open as well. The spirit of the Ordinance will be observed as, again, the shed is open on three sides so that light and air can go through. He actually wants the air to go through to dry his firewood as a fuel source. Mr. Grasso stated that substantial justice will be done as there is no great benefit to the public in denying this. He had not heard any testimony about surrounding values being diminished. Literal enforcement of the ordinance would result in unnecessary hardship. He could put this elsewhere, but it would probably be more enclosed. Mr. Grasso didn't feel the shed would be a problem to the abutters or the neighborhood.

Mr. Jousse stated that granting this variance is not contrary to the public interest. The alternative is to stack the wood and put a blue tarp on it which isn't conducive to drying the wood, the purpose for this particular structure. By putting a tarp on there is an invitation for all kinds of critters to

move in. Mr. Jousse stated that he knew what the City Ordinance said but he had been on the Board long enough and felt this was a common sense request. The applicant is just trying to keep his wood dry so he can use it in the winter. .

Ms. Eaton wanted to clarify the height of what this structure would be compared to the existing garage was. Mr. Grasso stated it would be the same height or lower than the garage. Mr. Parrott asked if that were a stipulation. Mr. Grasso stated he could make it one if it will satisfy the Board members. Mr. Parrott asked him to do so and Mr. Grasso suggested a stipulation that the height of the shed be garage height or lower. Mr. Jousse then asked if they could be more specific and say 2' shorter than the garage. Mr. Grasso agreed.

Mr. Parrott indicated the motion is therefore to grant the petition with two stipulations: 1) that three sides be open, with the fourth side the existing garage wall; and, 2) that the ridge line be 2' feet lower than that of the existing garage.

The motion to grant the petition as presented and advertised, with the two stipulations, was passed by a vote of 5 to 2 with Mr. Durbin and Ms. Rousseau voting against the motion.

4) Case # 8-4

Petitioners: Karen E. Mountjoy Revoc Trust, Karen E. Mountjoy, Trustee

Property: 62 Orchard Street Assessor Plan 149, Lot 30

Zoning district: General Residence A

Request: To allow the replacement of an existing 19' x 18' garage with a new 20' x 22' garage with the following variances:

- Variance from Section 10.521 Table of Dimensional Standards to allow a building coverage of 26.4% where 25% is required
- Variance from Section 10.521 Table of Dimensional Standards to allow a right side yard of 4'4" for a 1½ story garage where 13.5' is required
- Variance from Section 10.521 Table of Dimensional Standards to allow a 4'11" rear yard where 13.5' is required

SPEAKING IN FAVOR OF THE PETITION

Before the applicant spoke to her petition, Mr. Jousse stated that, as the applicant may be aware, the case of Fisher v. Dover is involved where there is a petition brought in front of the Board which is essentially similar to what had been presented before. In the past, the Board just made a ruling and the applicant never got a chance to voice their opinion. Since the first of the year, that has changed and the Board gives applicants a chance to make comments as to what is substantially different from the previous application. He had noticed that the dimensions of this petition were identical. Mr. Grasso asked if he were invoking Fisher v. Dover and Mr. Jousse replied, "yes."

Mr. Parrott indicated that Mr. Jousse had essentially made a motion, seconded by Mr. Grasso, with respect to the case law that the Board was obligated to follow, namely a case called Fisher v. Dover. This spells out the obligation of the Board to consider whether there were substantial changes from one application to subsequent applications. The point, he believed, is that the changes in the application before the Board do not constitute an appreciable change as discussed in

that case. He recommended the Board listen to the applicant and then it can vote before it takes up the substance of the argument if it chooses to go ahead. Mr. Parrott then asked if it were the consensus of the Board that they let the applicant address this on this particular point. The Board responded affirmatively..

Mr. Jeff Mountjoy, co-owner with his wife, Karen who was also present, thanked the Board for the opportunity to address the issue at hand. Mr. Mountjoy wanted to state a little bit of background and explain the material differences that are in this application. At the last meeting, the presentation was made by Attorney Bernard Pelech. Essentially their goal was to try and replace a rusty old metal garage which was 18' x 19' in size and sought to replace it with a new garage which is 20' x 20' (*sic*). They would keep the right side as it is, but pushing the rear back a few feet into a fairly substantial slope. At that July 27th meeting, there was detailed discussion on the unique attributes of the lot and the associated hardship. He stated that, if the Board had visited the site, they would have noticed that the rear of the property had a 12' slope from the bottom of their garage to the grass area of the neighbor to the rear. That was one of the unique features of the lot. There was also a lot of discussion about the neighborhood in which they reside where it was typical to have garages tucked to the right or left of the lot. If the Board recalls that meeting there was no discussion on record for or against any of the variances to the setbacks to the right or to the rear. All of the discussion focused on the massing of the structure itself and that the dormers to the left and to the right apparently were too big. This was reinforced by the letter of denial they received from the Chairman of the Board and from the City of Portsmouth, signed off on by the Chairman, that the denial was based on that it was felt that these dormers could not be supported. There again, there was no mention of the denial being based on the sideline setbacks. Using the discussion of the Board members at the July 27, 2010 meeting and considering the content of the written denial, it appeared that the dormers were the issue. They had acted accordingly and made significant modifications to the plans and to the structure which the Board could see before them. They have taken off the side dormers. While the footprint remains the same, they have certainly adjusted the massing. It was his belief that that adjustments makes this a materially different application from what was presented on July 27th. He asked for the Board's comments and looked forward to being able to proceed and present their case.

Mr. Parrott stated that the Board had heard the presentation of the applicant in respect to the applicability of Fisher v. Dover to the application before them. The Board needed to vote on whether the differences between the petitions were substantial enough to hear the new petition. It was not voting on the substance of the petition itself at this point.

Ms. Rousseau stated that she would not support the motion as she agreed with the applicant that the application is materially different from the last one. She did recall the discussion by the Board that the dormers were the only issue and she thought eliminating dormers is materially different. The Board has had applications for dormers on a stand-alone basis many times. Therefore the applicant is actually changing a substantial part of a variance request that the Board would ordinarily look at as a stand alone basis. She did not recall any discussion or issues members had with the setback issues. Therefore, she thought the Board should allow the applicant to move forward with this changed application.

The motion to invoke Fisher v. Dover failed by a vote of 2 to 5 with Ms. Rousseau, Ms. Eaton and Messrs. LeMay, Jousse, and Parrott voting against the motion. The application therefore would be heard.

For the record, Mr. Jeff Mountjoy reintroduced himself to the Board and thanked the members for the opportunity to go through that process. He felt it was a very important one for the public to know it does exist and have the opportunity to speak to that. He called attention to the packet of information submitted in support of the variance. He wanted to bring the Board's attention to page 3, which should not be there. It proposes an Option B. It was his understanding that no one liked the Option B and he didn't want to talk about Option B, so he asked the Board to please strike that from the record. Mr. Parrott injected that, for the record, they could only consider one version anyway. Mr. Mountjoy thanked him for the clarification.

Mr. Mountjoy stated that, addressing the criteria, they believed that increasing the size of their garage and pushing it back into the rear slope of their lot is certainly not contrary to any public interest. He stated that the proposed garage had been architecturally designed to match their neighborhood, which is a little New England type of neighborhood. The garage was a typical structure seen throughout the City. They also believe the variance is not contrary to the public interest because the garage has been designed to blend in with their New England style home and they felt the size is not an over intensification for the lot. Moving from the current size to the proposed size and pushing it back did not, they believed, have any impact on theirs and neighboring lots and it was in keeping with the character of that neighborhood. He noted that, as presented by Attorney Pelech at the last meeting, they had the complete support of their abutters and many neighbors. He referred to the tax map that had been submitted, noting all the lots whose owners had given their signature of approval for the proposed site plan and design and its impact on light and air. They had been diligent and open with their neighbors and sought their help in the seeking the variance. He noted that the proposed garage does not encroach on any neighboring property nor have a detrimental impact on any of the neighboring homes. A critical point about their lot is the 12' slope so that the top of their current garage's roof lines up with the level of the yard of their rear neighbor.

Mr. Mountjoy stated that the spirit of the Ordinance would be observed. The current garage is a prefab, metal design that is rusted all the way around the bottom and is leaning to the right toward their neighbor's yard. He noted that in their neighborhood, although the fence runs straight, the lot lines run on an angle. So part of the applicant's lot lies to the right of theirs and is utilized by their neighbors. Likewise, part of their neighbor's lot lies to the left of their fence and they utilize their space as well. The spirit would be observed by allowing them to replace that garage with a more modern, attractive and functional space while at the same time preserving the integrity of the lot. The garage will not interfere with the light and the air of their surrounding neighbors. There is no impact upon sunlight coming from the southern exposure of any of their neighbors, nor will it affect their light because it's set amongst a bank of trees.

With regard to substantial justice, Mr. Mountjoy stated that their garage is smaller in scale compared to other garages on the street and immediate vicinity. Granting the variance will enable their family to bring their garage up to modern day standards of function and safety which he thought would be substantial justice. Justice also would be done by enabling their family to utilize the space above for storage and a studio area. Discussion was had at the last meeting about storage. They have an extremely wet basement and right now their basement is not used for any significant valuable storage. They would like to use the space above the garage for a play area and it would in no way become an accessory living dwelling. They don't expect to run any water or have a home business there, but they would like to maximize the use of the half story above. An

important point relative to safety is that, given the state of the current garage, there is a risk of it collapsing in winter with young children around. .

Mr. Mountjoy stated that they do not believe the value of surrounding properties will be diminished for many of the reasons already stated regarding their design and other structures in the neighborhood. He reiterated that the garage was an attractive structure which will fit very well on the lot and with the existing home and surrounding properties. As a real estate agent, it was his professional opinion that the garage would increase the value of not only their home, but also the surrounding properties. He reiterated that they had discussed the project with their neighbors and had on record 100% support.

Regarding literal enforcement of the Ordinance resulting in unnecessary hardship, they believed that if the Ordinance were enacted as it was written, it would push the garage into the middle of an already small lot. They do currently have a two-car garage and felt they should be able to have another one there. Mr. Mountjoy stated that literal enforcement of the Ordinance would place the garage in a location where it would have an adverse impact on their subject property creating very small pockets of space around the garage and making the lot unusable. As previously mentioned, they had that unusual circumstance where the fences run straight, but the lot lines run on the diagonal. Shifting the garage in accordance with the literal enforcement of the Ordinance would be a detriment to their property and, as a professional, Mr. Mountjoy believed it would be a detriment to the surrounding properties as well. Shifting the garage to the middle of the lot would require more impervious surface and maneuvering their vehicles would be extremely tight. Their proposed placement pushing the garage back into the dysfunctional slope in the rear enables them to keep the backyard as functional space, have a nice attractive two-car garage in place, and not impact anybody around them.

Before hearing from the Board, Mr. Mountjoy stated that he wanted to reinforce the fact that it was not their intent to use the garage as an accessory dwelling or run water out to the structure. He completely understood and respected the Board's concerns about that. He reiterated the fact that the peak of their garage was on a line with their rear neighbor's lawn, where there was also a planting of arbor vitae. By pushing the garage back next into the slope, he estimated that the rear neighbors would, at most, probably see 12 inches of the peak of their garage. He again listed the criteria, stating in summary that they meet every one. He thanked the Board for allowing them to address the Fisher v Dover issue and also for the presentation of their variance request.

Ms. Eaton asked for verification of the increase of the height of the proposed garage vs. the existing at that peak. Mr. Mountjoy stated 10' feet. He believed the existing garage is 12' and the proposed garage is 23.5'. She asked for confirmation that he was proposing to reduce the rear setback that is currently 8' to 4'11" and he confirmed that was correct. Ms. Eaton stated the garage is 2' wider and 3' longer and asked about the impervious area increasing. Mr. Mountjoy stated that was if he followed the literal interpretation of the Ordinance. Right now where the garage is currently and where the proposed garage hopefully will be, they could back directly out, but he felt if he shifted it to the left, they would then need to have some degree of turn around in their back yard and that is what he meant by increasing the hot top. Ms. Eaton asked why replacing the garage in kind would result in a hardship and Mr. Mountjoy replied that right now they can fit two vehicles, but they cannot fit rubbish bins and the recreation equipment a typical family of five would have. That, he believed, was a hardship. Ms. Eaton pointed out that having a fence on the

wrong side of the property is not unique to a property, that's a mistake. It's not something that is worthy of a variance. Mr. Mountjoy stated he appreciated her input.

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 moved to deny the petition as presented and advertised. Mr. Grasso seconded for discussion.

Before Ms. Eaton spoke to her motion, Mr. Grasso noted that Mr. Parrott had entered the record on the second variance to allow a right side yard 4'4". That was the dimension that was crossed out. It should be 4'7". Mr. Feldman stated that he had wanted to explain that when they submitted originally and had the two options. Knowing that the Board could only listen to one, he had discussed it with Attorney Pelech at that time and suggested rather than seeking an Option A and Option B, they should take the worst case setback from A and the worst case setback from B and if they needed to shift the building within that envelope, they would be able to do so. That was why it was that way. It's a menu from A and B in order to get to one set of variance requests.

Ms. Eaton was concerned about the increase of the height of this structure and also she is concerned about the reduction in the rear yard setback from 8' to 4'11". She can support replacement of this garage in kind as it is but couldn't support increasing from 8' to 4'11", regardless of the slope behind. It's not hardship. That's not something unusual about the property. She didn't support increasing noncompliance.

Mr. Grasso agreed with Ms. Eaton's comments. He too could support a replacement in kind size wise, but not the larger replacement.

Mr. Jousse stated he would not be supporting the motion. From the drawings and renditions in front of them, it looks like a 12-12 pitch and if he recalled what's on the present garage, it's much flatter than that, it's probably about a 5 or 6-12, so that is a difference in height and looking at the plans, it looks like a 3' or 4' knee wall before the roofline starts to create what has been described by the applicant as a storage space and you need head room going up the stairs to this second floor. He sympathized with the applicant about getting water in the basement, because he has a similar problem and has to keep everything 3 feet of the floor so he doesn't get flooded out, so would just love to have an out building so he could just store things. There are many houses in Portsmouth that have the same situation and he believed that this is a perfect remedy by enlarging their garage slightly and creating a dry storage space.

Ms. Rousseau stated she was looking at the application and where the applicant chose to put this garage in place of where it exists now. It looked like the best possible place on the lot, because if they replaced what they have now with a similar construction, it seems like it would be right up on the neighbor's property line and there might be some obstruction of views issues. She did believe the 12' slope is a hardship issue and is unique to the property. It is not something everyone in the neighborhood has to deal with. : a 12-foot slope that goes down. She stated she owns a property

in Durham with a similar situation and it is unique to that property. Putting it up against the slope made it a more ideal position for the garage for all the surrounding neighbors. She thought it was reasonable to have the storage upstairs and the new design does not in any way look like it is going to be an accessory apartment. She had had some reservations on the first one as it looked like it could be an apartment but now it looked like a very reasonable barn or storage garage. She thought it was the best possible spot for this request.

Mr. Parrott stated he would comment before he called for the vote. This is an expansion of an already pretty good size garage. According to the plan, the lot is only 49.55' wide at the back and a 20' wide garage is 40% of that width. That is very substantial and 4.5' setbacks are just absolutely very tight. As the Board has seen similar situations on other streets where there are 50-foot lots, you just can't have perhaps everything you'd like because you end up overbuilding for the lot and in this particular case, not only is the footprint is enlarged, but the height is increased by a good 10' or 11'. A 23' tall structure looks like a mini-house and he thought the massing was inappropriate with respect to changing the character of the neighborhood, and light and air. He stated that this lot is 108' deep on one side and 126' deep other so there was room to make a smaller structure and be, if not in full compliance with the ordinance, at least more in compliance than the proposal. For those reasons and, in view of the fact that he thought a much greater degree of compliance can be achieved and still meet the homeowners' basic demands, he would support the motion.

Ms. Rousseau stated that Mr. Parrott had talked about mass, but she was looking at what they had here, to allow building coverage of 26.4% where 25% is required. It really was a very small percentage increase for building coverage. Mr. Parrott stated he agreed, but his main concern was the percentage of the width of the lot that is being taken up by structure, which is 40%. That's a lot of mass and the height makes the mass that much more obvious. He thought it was overbuilding for the lot.

The motion to deny the petition as presented and advertised was passed by a vote of 5 to 2, with Ms. Rousseau and Mr. Jousse voting against the motion.

II. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 9:25 p.m.

Respectfully submitted,

Patty Coughlin, Acting Secretary

These minutes were approved at the Board of Adjustment meeting on February 15, 2011.