MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m. **October 18, 2011**

MEMBERS PRESENT: Chairman David Witham, Vice-Chairman Arthur Parrott, Derek Durbin, Thomas Grasso, Alain Jousse, Charles LeMay (late arrival) and Alternate: Patrick Moretti

EXCUSED: Susan Chamberlin, Alternate: Robin Rousseau

In the absence of Ms. Chamberlin and Mr. LeMay's anticipated late arrival, Mr. Moretti assumed a voting seat for the meeting.

Before beginning the meeting, Chairman Witham stated that he had not been in attendance at Ms. Eaton's (former Board member) last meeting, but wanted to thank her for her years of service. She was a valuable member of the Board and they wished her well.

I. APPROVAL OF MINUTES

A) August 16, 2011

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

II. PLANNING DEPARTMENT REPORTS

There were no reports presented.

III. OLD BUSINESS

A) Request for Rehearing regarding the property located at 28-30 Dearborn Street.

Mr. George Dempsey stated that he was the appellant and resided at 42 Dennett Street. He stated that he had provided two letters, one from him and one from Attorney Pelech. He had also written a response to Attorney Pelech's letter which would present that evening. He addressed each point of the submittal from Attorney Pelech, with one of his main points the fact that Regan Electric was not a petitioner or applicant. He indicated the number of parking spaces being utilized by tenants

of the two buildings and where they parked, noting that parking was not included on the drawings. Mr. Dempsey took issue with the attorney's statement that the code official had accepted the plan and application as meeting the minimum requirement. He felt that, if the code official had done due diligence, he would have found the same information as Mr. Dempsey had and found the minimum requirements unacceptable. Regarding Item 6, he questioned changes made to the drawing without a deposition by the engineer. On Item 7, he noted that the plan submitted to the Planning Board contained changes drawn up two days after the Board of Adjustment meeting based on all the issues he had raised. Mr. Dempsey also questioned the attorney's statement that there was no error of law made by the Board of Adjustment or new evidence presented that was unavailable at the time of the hearing. He listed a number of issues and questions, maintaining that they were unresolved. He concluded by accusing the City of constantly not doing its job and due diligence so that it became the responsibility of an abutter.

Attorney Bernard Pelech stated that he represented the applicants. He stated that the Board knew what the rule was with regard to rehearings. If there were no new evidence that was not available at the time of the hearing, then it should not be granted. Secondly, if the Board felt that it had not committed any error of law, it should not be granted. He concluded that what he had seen in the Request for Rehearing was a re-statement of what was presented at the initial hearing.

DECISION OF THE BOARD

Mr. Durbin made a motion to deny the Request for Rehearing, which was seconded by Mr. Parrott. Mr. Durbin stated that there had been no new information submitted or evidence to suggest that a rehearing should be granted. He also felt that there had been no error by the Board.

Mr. Parrott stated that he had gone over the Minutes and reviewed the discussions and felt that every one of the issues in the applicant's request and the memorandum from the attorney had been raised and discussed. The numbers regarding the acreage added up for him and the bases on which the request was made were so general in nature that he couldn't rule on them.

Mr. Witham stated that he also didn't feel that any new information had been presented or any error made in the decision. He was still confused as to the abutter's idea of the hardship and what the ill effect was on him in granting this variance. He felt that there was no information that granting this variance had an adverse effect on anyone. Although there were issues such as plans not stamped by engineers, he didn't understand the basis of the appeal.

The motion to deny the Request for Rehearing was passed by a vote of 6-0.

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B) Case # 9-7
Petitioners: Timothy J. Andrews & Sarah Ann Raboin
Property: 647 Middle Street Assessor Map 148, Lot 31
Zoning district: General Residence A
Description: Construct fence & retaining wall.
Request: Variance from Section 10.516.30 to allow a portion of a fence to be closer than 20' from the intersection point of a corner lot.

SPEAKING IN FAVOR OF THE PETITION

Chairman Witham noted that this petition had been tabled at the last meeting. Mr. Parrott made a motion to remove the petition from the table which was seconded by Mr. Grasso and approved by unanimous voice vote.

Chairman Witham stated that the Board had received a letter from Steve Parkinson of the Public Works Department. While he had hoped would be a "yes, it was safe," or "no, it was a hazard," what Mr. Parkinson had indicated was that the impact of the fence would be the same situation as currently existed.

Mr. Tim Andrews stated that he was the petitioner. He referred to his previous presentation stating that he had nothing new to present. He hoped everyone had a chance to look at the requested mock-up so that they could understand what he proposed to do. He stated that they were really not changing anything, just trading a bush for a fence.

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 Witham stated that the applicant had spoken at length at the previous meeting. He noted that, from e-mails he had received, the mock-up was not exactly what the Board had been looking for, but he felt they would have to determine if they had enough information to make a decision.

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

Mr. Jousse stated that he had expected more from the mock-up but, while the string on the ground was a stretch, it did delineate where the fence would be. He felt it had been demonstrated that the fence would not reduce visibility any more than the current shrubbery and tree were doing. He stated that, if someone stopped at the stop sign and proceeded with caution through the intersection, he found no problem in seeing any traffic that was present.

Mr. Jousse stated that granting the variance would not be contrary to the public interest and would be observing the spirit of the Ordinance. He felt that no substantial justice would be gained by the City or anyone by denying this variance and he didn't believe the value of surrounding properties would be diminished as nothing had been presented to the contrary. Mr. Jousse stated that the hardship was, like half the lots in Portsmouth, the small lot size and little privacy, noting that erecting a fence along the property line would provide that privacy.

Mr. Grasso agreed, adding that he would like to add a stipulation. He noted that Steve Parkinson had concerns about the public right-of-way and ensuring that the fence be constructed on the

applicants' property. Mr. Jousse agreed to the stipulation. In response to a question from Chairman Witham, Mr. Grasso stated that the stipulation would be that the fence would be erected entirely on the applicants' property with no infringement onto City property. He added that he also had been disappointed with the mock-up and had hoped for the placement of some two by four's to get a better gauge, but took note that the Public Works Director did not seem to have a problem with it.

The motion to grant the petition as presented and advertised, with the stipulation that the fence would be erected entirely on the applicants' property with no infringement into the City right-of-way, was passed by a vote of 6 to 0.

IV. PUBLIC HEARINGS

1) Case # 10-1
Petitioner: Sean C. Evans & Hannah Shea
Property: 165 Dodge Avenue Assessor Plan 258, Lot 41
Zoning district: Single Residence B
Description: Construct a 26'± x 38'± two story home with attached 24'± x 24'± garage
Requests: Variance from Section 10.521 to allow a single-family dwelling on a lot with 11,556 sf of area, where a minimum lot area of 15,000 sf is required.
Variance from Section 10.521 to allow a single-family dwelling on a lot without street frontage, where 100' of continuous street frontage is required.
Variance from Section 10.512 to allow a single-family dwelling on a lot with no access to a City street.
Note: The applicant has submitted a request to postpone the hearing to the November 15, 2011 Board of Adjustment meeting.

Chairman Witham noted that the applicant had requested postponement to the November meeting. Mr. Grasso made a motion to postpone the hearing to the November 15, 2011 meeting, which was seconded by Mr. Durbin and approved by unanimous voice vote.

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2) Case # 10-2
Petitioner: Samonas Realty Trust, John N. Samonas, Trustee, Owner, Mari Woods Kitchen Bath Home, Applicant
Property: 11 Ladd Street (36 Market Street) Assessor Map 117, Lot 29-2
Zoning district: Central Business B
Description: Install a sign projecting over the sidewalk.
Request: Variance from Section 10.1253.50 to allow a projecting sign to project 21" over the sidewalk where 39.5" is required and to allow the sign to be 3.5" from the building where 6" is required.

SPEAKING IN FAVOR OF THE PETITION

Ms. Mari Woods stated that she was the owner of the business and had been advised as a new tenant by the landlord that the size of the sign would be the same as the previous tenant. She had a sign constructed and then discovered that it was in violation of the current Ordinance. With the sidewalk on Ladd Street just over 5' wide, the allowed size would be 15" wide which she felt was exceedingly small. She stated that she was the only business on that street with a projecting sign and it did not block anyone's visibility or hinder them in any way. This was an attractive sign which would not diminish the value of surrounding properties.

Ms. Woods stated that it was in the spirit of the Ordinance to help businesses prosper, which would be helped by the larger sign. She noted that her business involved relationships with builders and designers and it would help their clients as well as the general public to more easily find the location, which would be in the public interest. She felt that there would be no substantial justice in denying the variance as the sign would not be contradictory to any other businesses or the general public. In response to a question from Chairman Witham, she confirmed that she would be using the existing bracket.

Attorney Bernard Pelech stated that he was appearing on behalf of the owner. He stated that the variance was needed from a relatively new section of the sign Ordinance. He felt that a hardship was created by the narrowness of the sidewalk. If the most that they could have was 21" and it had to be 6" away from the building, that left only 15" for the sign. He stated that the sign would be more attractive than the flags that could be seen all over town. He stated that granting the variance would not be contrary to the public interest or the spirit of the Ordinance. He noted that this would be basically the same as the previous sign except that the Ordinance had changed in the interim.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Robert Deveny stated that he owned the unit at 36 Market Street, Unit A and wanted to clarify the letter received from the Condominium Association regarding the vote taken. He stated that the association owned the common area. He stated that the sign had actually been in place for several months and was only 8' above the sidewalk. He felt it did not provide enough clearance for safety reasons and there could be a build-up of snow and ice between the sign and the building. He felt the sign was too big and mentioned two other hanging signs on the street that met the Ordinance. He also took issue with the applicant's description of the sign as "tasteful," calling it a shingle. His final reason for opposing the request was procedural in that the applicant and owner did not seem to understand the permitting process and the sign had been erected without a permit.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Chairman Witham read a letter submitted to the file by Chris Lemerise, the President of the Condominium Association, stating that a majority of the Association did not object to the petition.

DECISION OF THE BOARD

Chairman Witham noted that, while one of the speakers had stated that the sign was too low, it was not before the Board for a height variance, but was for the total projection of the sign and the distance from the building. He added, with regard to the snow and ice accumulation, that they would need scientific evidence to confirm the difference between 3½" versus 6".

Mr. Grasso asked if they could approve a smaller sign, although he didn't want to be in the position of designing it. Chairman Witham noted that they could always grant less, but he felt in this situation they would be better with a yes or no.

Mr. Grasso made a motion to deny the variance, which was seconded by Mr. Parrott.

Mr. Grasso stated that the applicant had to meet all the criteria to grant a variance and he had trouble with the hardship. He agreed that they should have identification, but felt the proposed size was large and could be smaller. He stated that the first requirement was that the variance would not be contrary to the public interest or health, safety and welfare and noted that the comments of one of the speakers would fall under that so he felt the request failed to meet two of the criteria.

Mr. Parrott agreed, stating that something smaller would be more appropriate. As the applicant had pointed out, there were no competing signs so a sign for this unit would not get lost, especially on a smaller street with mainly foot traffic. He felt that they should encourage applicants to comply as closely as they could with the Ordinance.

Chairman Witham stated that he would not support the motion and felt that the application met the criteria. He felt that the basis was the width of the sidewalk which varied greatly. Given the existing bracket and scale of the sign, he felt the petition should be granted. Looking at the photograph with the flags and awnings, he didn't feel the sign would otherwise be visible.

The motion to deny the petition as presented and advertised was passed by a vote of 4-2 with Messrs. Durbin and Witham voting against the motion.

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Mr. LeMay arrived and assumed his seat. Mr. Moretti remained in a voting seat.

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3) Case # 10-3
Petitioner: 150 Greenleaf Avenue Realty, James G. Boyle, Trustee
Property: 150 Greenleaf Avenue Assessor Map 243, Lot 67
Zoning district: Gateway
Requests: Appeal the Administrative Decision of the Legal Department to issue a cease and desist order based on its interpretation of Sections 10.1016, 10.1017, and 10.1018 of the Zoning Ordinance.

SPEAKING IN FAVOR OF THE PETITION

Attorney John Kuzinevich stated that he was representing the Trustee of 150 Greenleaf Avenue Realty Trust and was looking for protection from an overzealous Legal Department engaged in what he termed a personal vendetta against Mr. Boyle. He stated that the legal basis of the appeal was the interpretation of the wording in the Zoning Ordinance and the site plan application. He felt that the words as written were no basis for the Legal Department to issue a cease and desist order with regard to Mr. Boyle's activities on the property.

Mr. James G. Boyle identified himself as the Trustee of 150 Greenleaf Realty Trust. He stated that the back of his property kept flooding due to the City's failure to perform maintenance and address the impact of the sewer line on his property. In discussions with the Department of Environmental Safety and his engineers he saw, along with them, that the situation posed a threat to safety. He stated that he wanted to maintain the area of the pre-existing manmade drainage structures to address flooding issues caused by water flowing onto his property from surrounding He stated that, after reading Senate Bill 21 which became law during the summer, he had determined that he did not need DES permits to perform this maintenance. He saw nothing in the zoning code or site review regulations prohibiting maintenance particularly for safety issues. He then notified the Planning Director and the City Council that he would be doing the work. The Legal Department contended that he needed permits but could not explain why they were required in light of the language of the Ordinance. He added that he had several times observed the City of Portsmouth performing maintenance to the Comcast culverts in the same area without getting a conditional use permit. He repeated his last comment and stated that this maintenance work was not part of the development of this property and was not required irrespective of any future development.

Attorney Kuzinevich stated that the case involved interpretation of language. He reiterated their position regarding the City's Legal Department, noting a lengthy history of lawsuits. He noted that it was stated in the memorandum he had passed out that the Planning Board's power was limited to what was granted to it and it could not exercise authority on other matters. He cited in support the case of Neville v. Highland Farms.

In response to questions from Chairman Witham, he confirmed that he had referenced the Planning Board's authority and their involvement was that the City contended that a conditional use permit was needed from the Planning Board. He then read from Section 10.1017 of the Ordinance which defined the powers of the Planning Board in granting conditional use permits for any use not specifically permitted. He stated that Mr. Boyle was not changing any use and maintained that this was a pre-existing area of manmade drainage structures. He noted that the City's Legal Department had, in its memorandum to the Board, attached a decision from the Rockingham Superior Court finding that this area constituted manmade drainage structures. He reiterated that there was no change of use and maintained that the Planning Board only had authority to issue permits for use. Citing sections 10.1620 and 10.1630 dealing with conditional uses and what happened in wetlands and wetland buffers, Attorney Kuzinevich stated they talked about use, activity or alterations. The same language was in the permitted uses sections. He stated that the words of the Ordinance distinguished between a use, an activity and an alteration and maintained that the Zoning Ordinance did not give the Planning Board express power to grant conditional use permits for an activity or an alteration. He stated that it was clear that the work done in restoring pre-existing ditches and reconnecting areas with two culverts constituted an alteration or reconfiguration of pre-existing drainage. He maintained that, since the Planning

Board did not have the power to issue the permit that the Legal Department felt was required, the City could not require Mr. Boyle to obtain a permit that could not be issued.

Attorney Kuzinevich claimed that what the City wanted was an unconstitutional taking of Mr. Boyle's property thus denying the owner his rights. He stated that all Mr. Boyle was doing was taking advantage of a change in State law which, he claimed, eliminated the permitting bureaucracy of maintenance work. Noting a reference in the City's memorandum to a DES investigation, he stated that there was an e-mail attached to his memorandum just received from the Attorney General saying that the State had not decided at this point to pursue anything on the site. Accusing the City of possibly trying to get in some trickery, he noted that the City's argument was that the word "activity" was also used in the definition of "use" in the Zoning Ordinance. Attorney Kuzinevich read the definition in Article 15, including,"Any purpose for which a lot, building or other structure or tract of land may be designated, arranged, intended, maintained or occupied." He felt applying that became circular so that any use was an activity and any activity was a use and, therefore, the express language in Sections 10.1016.10 and 10.1016.20 all got thrown out the window because they were logically inconsistent. He also stated that the City's argument did not address that this was an alteration and that was not part of the definition of use. He claimed that, taken literally, one could not pick up a piece of trash in a wetlands buffer area without a conditional use permit because it was an activity, adding that would prevent any rational use of the property.

Attorney Kuzinevich stated that the second area was where the City said that they had to go through the site review process. He stated that this was only required if there were development or redevelopment of land which Mr. Boyle had stated it was not. This had to be done to alleviate the safety concerns of the owner, his engineers and the Dam Bureau of DES whether or not his pending site review application to put a second building on the property was granted or granted with modifications. Attorney Kuzinevich maintained that in no traditional sense of the word did maintenance of pre-existing drainage structures constitute development. He cited as confirmation provisions and definitions in the Flood Plain Overlay District section of the Zoning Ordinance, noting that the expansive definition of development in that section was limited to that section and did not apply throughout the Ordinance. He concluded that, since the Ordinance did not otherwise have an expansive definition of development, the only interpretation is that the word development is given a narrower view such as increasing economic value or adding or expanding a use, none of which, he maintained was going on here.

Attorney Kuzinevich stated that another reason why site plan review was not required was that under Section 1.2.2 of the Site Plan Review Regulations, small projects were exempted. He outlined three criteria in that section, noting that if a project met these criteria, it stated that the Planning Director should make a determination that the project was exempt. He detailed how he felt that the actions of this property owner met the criteria. He asked that the Board apply the words of the statute as written. He speculated as to what the City would testify as to the intent of the statute, answering his speculation by stating that the intent of a statute was determined by the words. Attorney Kuzinevich stated that the courts had said to the City that they couldn't have their own unwritten definition or understanding unless it was included in the Ordinance. He noted that in the prior Zoning Ordinance, there were specific sections about requiring a permit for dredging and filling, which were not included in the current Ordinance. He concluded that omission displayed an intent, when comparing the words of both statutes, not to regulate

maintenance of pre-existing structures. He again responded to what he speculated the Legal Department was going to present regarding the environmental impact by stating that the authority of the Planning Board and the authority under site review was not determined by the effect of a project, but by what the Ordinance said. He asked the Board to reverse the findings of the Legal Department that a conditional use permit and site review application approval were required.

When Mr. LeMay asked if he was claiming that his client was performing maintenance on the property, Attorney Kuzinevich stated he was. Mr. LeMay stated so then they believed that the Ordinance was somewhat mute on that subject and they had to loosely construe this as a use and then got into the circular argument mentioned by the attorney. Attorney Kuzinevich said that was not correct. He was saying that maintenance was either an activity or alteration which were words in the Ordinance. The Ordinance talked about uses, alterations and activities. He stated that maintenance was an activity to keep up a pre-existing use, but was not a use in itself. He gave an example that cutting one's grass was not a new use of one's front yard but was maintaining the yard. What he was saying was that the Zoning Ordinance did not grant the Planning Board the power to issue conditional use permits for activities or alterations but only for uses. If they wanted comprehensive ability to regulate everything, the Ordinance should expressly say that. He stated that the solution would be to have another amendment to the Ordinance adding that, under the law, his client lived with the words of the Ordinance as written.

Mr. LeMay asked what maintenance was actually being done and the purpose of it. Attorney Kuzinevich stated that it was to dredge a decades old ditching system to make it more functional and then install two culverts under the city's sewer line which crossed where the former ditch was that was being maintained. He stated there was a pending lawsuit resulting from the installation by the City of a sewer line across the back of his client's property which acted like a dam when it rained. They were trying to have the court order the City to remove the sewer line because when it was installed, the City never got an easement and right now it was their view that the City was trespassing with its sewer line and creating hazardous drainage conditions but that was beyond the scope of the narrow issue they were asking the Board to determine.

Mr. LeMay asked if they recognized any authority of the City or State over this property with respect to operation in a wetlands area. Attorney Kuzinevich responded that the State had very little with the passage of Senate Bill 21, which said that, if the wetland was a manmade structure you don't need state permits to do any kind of alteration, filling, or modification to it. There was very limited State review of this specific area. There might be other areas of wetlands on the property and there were other areas in the City. In terms of the City's regulation, he stated that they recognized that the City could regulate uses within the confines of the Zoning Ordinance. He reiterated his previous comments about the words of the Ordinance and the powers it granted. He stated that there were a lot of issues but what they didn't want was the property flooding. He briefly outlined what he felt was the City's intent and how they should have achieved it. He stated that, due to the change in the law, Mr. Boyle took action, recognizing going in that there was a disagreement with the Legal Department and knowing they would end up there.

Mr. Parrott referenced the attorney's e-mail of August 4, 2011 to Mr. Taintor noting that, sometime after August 10, 2011, Mr. Boyle would be performing maintenance of those drainage structures toward the rear of the property at 150 Greenleaf Avenue. His question was if the age of those new culverts predated or postdated August 4th. Attorney Kuzinevich stated that it was after

August 4th. The work performed was done after the memo. They had sent it to comply with the Zoning Ordinance which required notification of this type of work to the Planning Director. He added that it was a strange provision because the Ordinance did not give the Planning Director the authority to do anything after notice or give any approval. The notice just had to be given. He confirmed again for Mr. Parrott that the August 4th communication was sent before the new culverts were installed. Mr. Parrott asked if it was his position that installing new pipe in a new location was maintenance, adding that he felt that maintenance implied something that existed and a new culvert in a new location sounded like new construction. Attorney Kuzinevich responded that it was maintaining a pre-existing ditch which the City sewer line had blocked. He stated that they viewed it as maintenance and wanted to point out that the Zoning Ordinance talked about activity or alteration and, under the position outlined by Mr. Parrott, this was an alteration for which the Planning Board, under the Ordinance, did not have the power to issue conditional use permits.

Mr. Parrott stated that was not even close to an alteration. By that definition, if they took a piece of plain ground, dug a hole and put in a foundation, they would say they had altered the ground and a permit was not needed. He asked if that was true and Attorney Kuzinevich stated that, the way the Ordinance was written, it was true. While the Ordinance needed to be cleaned up, a private citizen didn't have to do anything other than what it said. Mr. Parrott asked if he understood correctly that it was their position that digging a hole and putting in a pipe was maintaining that ditch or water course which might or might not be manmade. That was maintenance to them? Attorney Kuzinevich responded that, one, a judge had already determined it was manmade in that area and, secondly, he was addressing the foundation in Mr. Parrott's example as an alteration. It could be regulated as a use if that were the first time the foundation was going in to build house in an area. If it were a change of use, then the Zoning Ordinance would grant the Planning Board the power to consider the conditional use permits. He stated that, rather than having nothing there before, they had a whole area of manmade drainage structures.

Mr. Parrott said, to understand Attorney Kuzinevich's position, then there was nothing that could be done there that wouldn't just be fine and the City should have no concern. If they were to install hundreds of feet of giant conduit, that would be o.k. as long as it was in the general area and done for the good purposes of redirecting the flow so they could make more dry land or whatever the purposes was. That would all be alright. They could call it alterations or use or maintenance and the City would have no recourse and no interest in it whatsoever even though it was in a wetland and the City has a Wetland Ordinance. Attorney Kuzinevich noted that he had said alteration or use. Mr. Parrott stated he was trying to follow his terms. Attorney Kuzinevich stated that, if it were a change of use, the City could regulate it, but not with an alteration or activity. He added that it had to be within the area of the pre-existing manmade drainage areas. Otherwise, they would need State permits for it and, if were not something pre-existing, arguably it was a change of use, but they hadn't changed the use. To the issue of whether they were creating more dry land, he stated that the land dropped off with sort of a basin. He stated that, when he and Mr. Boyle had carefully looked at the Ordinance, Mr. Boyle had initially asked if he could just go and fill it all in as that would solve the problem perfectly. He had told Mr. Boyle they could not as that would be creating new land that might be considered something more than existing drainage structures. Attorney Kuzinevich maintained that Mr. Boyle had tried to do the minimal amount that would be allowed within the alterations or activities. He stated that Mr. Boyle did not create new, usable land and could not do that unless there were site plan approval and, at that point, it

would also involve state alteration of terrain permitting. There were different layers which was also a reason this wasn't development. Mr. Boyle did not create anything more or get one square foot of more usable commercial land.

Mr. Parrott stated that the bottom line then was that maintenance under their definition included installing new manmade material, pipe, where it had never existed before. Attorney Kuzinevich stated that, under those circumstances of where the ditch had existed before and then was blocked by the City's sewer line, that was correct.

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Robert Sullivan identified himself as the City Attorney and, before beginning, wanted to respond to Attorney Kuzinevich's use of the word vendetta in describing the City's activities. Attorney Sullivan categorically denied that there was any vendetta on the part of the City of Portsmouth toward Portsmouth Toyota. They were trying to ensure that Mr. Boyle followed the same rules and regulations as any other property owner in the City. Attorney Sullivan noted that he would make some comments, followed by Assistant City Attorney Suzanne Woodland and Rick Taintor, the Planning Director and David Allen from Public Works.

Attorney Sullivan stated that, in August of 2011, a concerned abutter called City Hall and said there appeared to be heavy equipment operating at the site He and Mr. Allen had viewed the site from adjacent property and saw two pieces of heavy equipment which appeared to be digging trenches or ditches where they had not previously existed and taking fill from an onsite pile of material and bringing it forward to this area. He stated that there seemed to be two violations, one of which was that working in wetland buffers required a conditional use permit, and none had been issued. The second was that development of a site required site plan review by the Planning Board. Attorney Sullivan maintained that what they saw that day was indistinguishable from any other construction project commencing after receiving Planning Board approval. He stated that they had made verbal requests for the work to stop, which were disregarded by Mr. Boyle. A cease and desist order was then written by Attorney Woodland, who would provide further detail later. He stated that the cease and desist letter was also disregarded by Mr. Boyle. It was only after the City went to court and secured a temporary, and now preliminary, injunction from the Court did the work actually cease in the wetlands or wetlands buffers.

Attorney Suzanne Woodland identified herself as the Assistant City Attorney. She stated that Mr. Boyle needed a conditional use permit from the Planning Board to dredge, to fill and to relocate stream channels and to install two new culverts under the City's municipal sewer line, unengineered and without the City's permission. She stated that he needed Planning Board approval to start his project to expand his car dealership. She noted that he had a pending application before the Planning Board to basically asphalt all the way to the property lines and establish a new dealership. Because of the litigation, he had asked to have that tabled and it is stayed right now before the Planning Board but it was very clear, and she didn't think Mr. Boyle would deny, that he did have plans for that property. In addition, Mr. Boyle cleared trees and wetland plants in violation of the vegetative management standards in Article 10, something that had not been included in the presentation by Attorney Kuzinevich. She stated that, although Mr. Boyle was advised in writing to get necessary permits and approvals, he elected not to do so. She referred to a letter she had sent on August 9, 2011 which was in the Board's packet which tried to

make the City's position clear so that, if he determined that he had a different position, he could come to this Board, or the Planning Board first, prior to starting to work. She stated that Mr. Boyle had elected not to do so. She noted that the cease and desist order, which was in accordance with the City's Zoning Ordinance, was issued on August 25, 2011. The Rockingham County Superior Court had issued three orders since that time requiring Mr. Boyle to effectively stop work on his property. Two of the orders were in the Board's packet of materials. The third, of which she was unaware until that day, was that the Superior Court denied Mr. Boyle's request that the Court change its determination, so the injunction remained in place. She distributed a copy of that order to the Board. Attorney Woodland stated that the arguments that they had heard that evening from Attorney Kuzinevich had already been made before the Rockingham County Superior Court and were rejected. The Court was satisfied that the cease and desist order had sufficient merit to warrant the injunction.

Attorney Woodland stated she would start off with the violation of Section 10.1018.20 which was the vegetative management requirement within a buffer. Under that section of the Ordinance, the first 25' from the edge of wetlands constituted the vegetative buffer strip and in that strip the removal or cutting of vegetation was strictly limited to the removal of invasive species. From the edge of that buffer strip was an additional 25', which was a limited cut area where the removal of more than 50% of the trees was prohibited. Based on the City's observations, and as described in the chronology and the photographs included in the packet, it could be seen that vegetation had been removed in violation of the section she had cited.

Attorney Kuzinevich interrupted to raise a point of order on the subject matter and Chairman Witham responded that he would have a moment for rebuttal after the presentation. When Attorney Kuzinevich stated this was not rebuttal, Chairman Witham stated that he would not allow him floor time at that moment.

Attorney Woodland stated that Mr. Boyle had been repeatedly cited for violations of this section and referred to a Notice of Violation dated June 22, 2011, which was in the material provided to the Board. She noted that Mr. Boyle did not appeal that violation to this Board as had been offered. She stated that a conditional use permit was required for dredging, filling and moving the stream channels and installing two new culverts. Regarding activities in and around wetlands, there were three components that needed to be analyzed under the Zoning Ordinance. The first was whether there was jurisdiction as not every wet area was subject to the City's jurisdiction. The second was whether the activity that occurred within jurisdictional areas prohibited. This was part of what they would be discussing - activities, alterations and uses. If the activity, alteration or use was prohibited, had the property owner obtained relief, and how did the owner obtain that relief. Those three components were what they had looked at. She stated that what would become clear, if it was not already from the information in the packet, was that there were wetlands on Mr. Boyle's property subject to the jurisdiction of the City of Portsmouth. She stated that Mr. Boyle had engaged in activities and uses on that property that were prohibited and failed to get relief from the Planning Board. The City then, upon discovery of the work, issued a cease and desist. From what she had heard that evening, she stated that it did not appear as though there was any contention that the work which occurred on Mr. Boyle's property was not within the jurisdictional areas. She added that the definition of what constituted a jurisdictional wetland was under Section 10.1013 and 10.1014. They were basically talking about non-tidal rivers and streams and inland wetlands that met three wetland criteria contained in the Federal Manual: hydrology, soils, and

vegetation. Based on the most current information that the City had of the property, there were jurisdictional wetlands and, in the notice of violation issued in June of this year, there was an attached plan which was actually a page from the site plan approved back in 2008 which showed the existing conditions. She pointed out that there were wetland delineations on that plan which was from Mr. Boyle's own wetland scientists. There were clearly jurisdictional wetlands which, she assumed was why they were not hearing an argument that evening on that factor. There were jurisdictional wetlands with streams and they had pieces of property meeting the three criteria.

Attorney Woodland addressed what was prohibited within those areas. The City's current Zoning Ordinance provided that any use, activity or alteration not specifically permitted was prohibited, unless there was approval. She stated that what was permitted could be found under Section 10.1016.10, in particular sub-section (1) which described permitted uses. Dredging, filling, and installing new structures or materials were not permitted, therefore they were prohibited unless the Planning Board granted a conditional use permit. She maintained that they altered the natural surface configuration. Looking at the cited section and sub-section, that was its focus - altering the surface. Attorney Woodland noted that she had not heard it refuted that evening that dredging occurred on the property, that filling occurred, that stream channels had been moved, and that new culverts had been installed.

Regarding the crux of what she had heard for argument that evening, Attorney Woodland stated that, if the activity was not permitted, a property owner could apply to the Planning Board for a conditional use permit. That was the relief Mr. Boyle was advised to seek, but didn't. Section 10.1017 set out the grant of authority for the Planning Board to issue conditional use permits. She understood that Mr. Kuzinevich representing Mr. Boyle had argued that the Board should take a very narrow interpretation of the word, "use" and a very restrictive interpretation of the provision they were discussing but represented to them that would be grossly in error. She stated that the arguments had been made before the Rockingham County Superior Court and carried no merit there. They did not have a detailed decision from the court but they could look at the definition of use, which Attorney Kuzinevich had already raised. She felt it very clearly supported the City. The definition of use was, "Any purpose for which a lot, building or other structure or tract of land may be designated, arranged, intended, maintained, or occupied; or any activity, occupation, business or operation carried on, or intended to be carried on in the building or other structure or on a tract of land." She stated that was Section 10.1530 and suggested that it be read in conjunction with Section 10.1016.10, Permitted Uses, Paragraph 1. She quoted the section, "Any use that does involve the erection or construction of any structure [and they had an admission that two culverts were structures] or impervious surface, will not alter the natural surface configuration by the addition of fill or by dredging, will not result in site alterations and is otherwise permitted by the Zoning Ordinance." She stated that Attorney Kuzinevich would have the Board read the Ordinance in such a way that she stated was absurd. She stated that the Board had the authority to interpret the Ordinance reasonably in accord with its clear language and its intent and purposes. They could look at the Ordinance as a whole, which had plenty of case law. They could use their good judgment which was part of the reason they were there. They were part of this process of review and they were allowed to keep the purpose of the Zoning Ordinance in consideration. She read from Section 10.1011 of the Ordinance which stated that the purpose of wetlands protections was to maintain, and where possible improve, the quality of surface waters, to filter pollution, to trap sediment – and there were significant sediment issues as could be seen from the materials in the packet – to prevent the destruction of, or significant changes to, wetlands, and to prevent flood

hazards. She stated these were the reasons why this section with wetlands protection standards was in the Ordinance. There were important purposes in place to protect, not only the property owner, but downstream residents and other users, as well as to protect the environment generally.

Attorney Woodland raised the issue of the moving of the stream channels as it was a significant site alteration. Prior to the City's construction of a sewer line across the rear of the property, the area was a swamp, as shown on the plans from the State of New Hampshire when they were preparing to construct the voc-tech school. It was a low lying area which they saw in previous documentation provided for lawsuits and from old aerial photographs. She stated there were streams and there was one going through the property. Referring back to the history, she noted that in 1967 and 1968, there was construction of a school along with construction of the City's sewer line. From that period forward, the back of that property was effectively not disturbed. Water flowed through creating stream channels and they were there when Mr. Boyle purchased the property in approximately December of 2003. She stated that those stream channels, some of which paralleled the City's sewer line, were now gone. They were gone. That was the depth and significance of the change. Effectively, you saw roads through the wetlands. She stated these were not minor dredgings but the relocation, effectively, of a stream channel and, as stated before, the installation of new culverts. The current Zoning Ordinance did not exempt from regulation the maintenance of drainage structures. She referred them to Section 10.1014.12 of the Ordinance where these created, manmade, although not really manmade wetlands because it was wet before people ditched it, were meant to be governed by this Ordinance. She stated that not all of manmade drainage areas, little detention ponds or swales, fell within the jurisdiction of the Zoning Ordinance as, again, the three criteria had to be met that she had previously cited. There was also a size criteria of 10,000 s.f.. She stated it was very clear there were wetlands on this property. She stated this was more than maintenance of a little drainage swale. It was, frankly, a substantial change of the use. It was re-routing of streams and installation of culverts without engineering underneath the City's sewer line.

Attorney Woodland stated that they had briefly talked about development of the site without Planning Board approval. Municipalities were authorized under State law to grant their Planning Boards authority to review and approve site plans for the development and expansion of non-residential uses. In an exercise of that authority, the City had adopted comprehensive site plan review regulations, in part to conserve and protect natural resources and to encourage site design techniques that protected water quality and natural hydrology, to prevent increases in the quantity of storm water runoff, and manage that runoff at the source. She stated that Section 1.2.1 of the Site Plan Review Regulations explicitly required submittal of site plans for all development or redevelopment of land within the municipal boundaries that is non-residential. It was clear from the photographs in the packet that there were new crossings across the wetlands that were made which looked like roads. She stated it was development of the site by any reasonable definition and they were allowed under the Zoning Ordinance to use their plain language and plain understanding of development.

Attorney Woodland then offered to answer questions, noting that Mr. David Allen, the Deputy Director of Public Works could address issues, as well as Planning Director Rick Taintor.

Mr. Parrott stated that he was interested in more information regarding the installation of culverts with respect to going over or under City sewer lines and his specific questions were related to

what was the normal procedure when that happened, major pipes crossing each other. Secondly, what was the responsibility of the property owner and the contractor with respect to obtaining permits or engineering a plan. He asked how those issues were addressed as it seemed like a substantial piece of work to install new pipe right beside or over or under an existing sewer line. He would also like to know the approximate age of the sewer line.

Mr. David Allen, Deputy Director of Public Works, stated that this was one of the issues when they first saw this work that was a concern. The work had already been done by the time they were able to actually get on the property and, once they were able to talk to the Court, they were able to bring in cameras and tape that sewer line because they did put these 18" culverts underneath the sewer line. He noted that the sewer line was installed in 1967 and was type of pipe that tended to be very brittle as opposed to modern piping, which were plastic and had a little more give. He stated that they also met after the fact with a site engineer who had represented the applicant in previous parts of his site review. The engineer indicated that he was not involved at all and there was no design. The pipes were installed by a contractor with no review of materials, installation techniques or any of the other pieces you would normally have. Usually you would have a set of plans and review materials to make sure the materials were sufficient to support a pipe and look at inverts to make sure you actually had the clearances between the pipes. None of that was done on this project. Mr. Parrott asked if there was a specific requirement for separation or was that part of the general engineering when you crossed two pipes. Mr. Allen stated that there were different ways to deal with it, such as sleeving it with a somewhat more rigid pipe. There really wasn't good data as to the type of separation they had in this situation so they were still monitoring the line. When Mr. Parrott asked if it were fair to say that to his knowledge there was no such thing as an engineering drawing of the culvert work that was done, or any kind of a drawing, Mr. Allen stated there was not. Mr. Parrott stated that the workers just went ahead and dug it and did what they were told. Mr. Allen said that was apparently correct.

Mr. LeMay noted that the applicant had stated that the City sewer was installed with no easement or compensation for putting it across his property and alleged that it disturbed the drainage in that area and he was in there correcting it. He asked Mr. Allen to comment on that. Mr. Allen responded that the history they had was that they had a set of plans that were done by the City in 1967 and it appears these were actual working plans that someone had out in the field and it showed work done in 1968. He added that there was documentation that the City did go to the Board of Education, then owner of the land, and requested the ability to install the sewer line and there was a vote of the Board to allow the City to do that. They could not find evidence of a follow-up easement but the property owners at the time allowed it to happen.

Mr. Moretti asked, as far as the manmade wetlands to the left hand side of the sewer and the manmade ditch, if there was no connection at all prior to this culvert being installed. Mr. Allen stated there was. There was another culvert that crossed underneath there so the stream actually went on the other side of this sewer line. Attorney Woodland stated for clarification that the culvert that Mr. Allen was talking about was not in the location where the two new culverts were located. Mr. Allen stated that was right. Attorney Woodland stated again, to be clear, there was a culvert but not in the location of the two new ones. To follow up further on the issue of the City's authority to maintain the line in that location, that was a matter of present litigation. There were a number of legal theories which supported the City's continuation of that line so she wanted to be clear about Mr. Allen's representation that they did not have a document that said "Easement

Deed." While that would be typical in current times, it was not uncommon back then to see that piece not happening, but they were confident, based on legal theories, that the City had the authority to maintain those lines.

Mr. LeMay asked if he understood properly that, in granting the injunction, the Court reviewed this Ordinance and the connections between the various clauses in Section 10. Attorney Woodland stated that it was correct that part of the major argument that was before the Superior Court Judge Nadeau in August included substantial discussion and debate on those very points.

SPEAKING TO, FOR OR AGAINST THE PETITION

Attorney Kuzinevich stated that, as to the clearance between the sewer line and the culverts, when the City installed the sewer line at Comcast at the other end of the property, the clearance was 2" between four culverts shown on the plan and the sewer line. He believed they had more clearance than that. Also the exposed sewer line when it was being done was in good condition. He stated that in court Attorney Woodland had consistently denied that the City installed the Comcast culverts according to plan. She denied that the four culverts were installed as shown on there. He stated that, to their questions on engineering, the City did not follow its own engineering when installing culverts. Attorney Kuzinevich stated that, in terms of the culvert near these two new culverts being upland, basically, the neighborhood was protected but the commercial business wasn't with the way that this sewer line was installed. He stated that culvert was approximately 3' to 4' as a guess from the new ones that were installed.

Attorney Kuzinevich stated that he was disappointed by Attorney Woodland's arguments that the Superior Court considered the arguments made here that evening. He stated there was no opinion written and they didn't know if the Court was just preserving the status quo saying that, on its face, there might be permits. The last time they were in Court before Judge Nadeau was whether or not the 2009 or the 2010 Zoning Ordinance applied to his client's development. The Court asked if they were going to do anything or was there time to go to the Board of Adjustment as they were the ones who should have decided it in the first instance. He added that he felt that was what was going on there. He stated that Attorney Woodland also did not say that the first injunction that issued, they agreed to and drafted it with the City's attorneys in Court and the Judge noted it was by agreement. He didn't feel that was a determination on all of these arguments. They said they were done working and just finishing stabilizing and, if a period was needed to sort all this out, then let's sort it out. He thought that was part of the process because, in the first instance, the Board of Adjustment was to determine the merits of this argument before the Superior Court substantively considered them if either they or the Legal Department decided to appeal.

He stated that Attorney Woodland had made a big point of talking about Section 10.1016.10, part (1), which talked about "…the erection and construction of any structure or impervious surface, will not alter the natural surface..." He stated they already had the Judge determine that none of this was natural surface. He maintained that the City was playing games with words. They agreed that this Ordinance was to protect naturally occurring surfaces. They fully disagreed that this was swamp. Their own experts would testify in Court how these "stream beds" were really drainage channels to divert water from an agricultural use and there was an irrigation use there. He stated that the site had been used as a gravel pit and there was zero natural. He added that, when Mr. Boyle was doing the work, he had pulled out concrete culverts 5' in diameter and scrap metal

structures. He maintained that was a dump area, not a pristine wetland. Finally, he stated he wanted to leave the Board with one important thing. Attorney Woodlands had stated that they could apply for conditional use. He stated they weren't doing a use and Section 10.1017.10 had to be carefully read. He stated that it specifically said that the Planning Board was authorized to grant a conditional use permit for any use, which he noted was in bold, not specifically permitted. He stated that Attorney Woodland never explained why every other section of the wetlands Ordinance talked about use, activity or alterations and that one section, which defined the power of the Planning Board, limited that power to use. He maintained that she never talked about the actual words and never talked about the word, "natural." He stated it was all in the detail of the language. They believed it was the job of the Board of Adjustment to consider this and that the Rockingham Superior Court had not and they wanted the Board to use their good judgment and apply the law. He added that, in this case, perhaps the law was lacking good judgment and they were asking them to do what was fair.

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

DECISION OF THE BOARD

Mr. Parrott stated that, for clarity, he would read the appeal and he read what had been advertised. He made a motion to deny the appeal, which was seconded by Mr. Durbin.

Mr. Parrott stated that they didn't have little talking points to deal with as they did with respect to a Variance or a Special Exception, however, he felt the discussion had been thorough and useful to him after reading all the material several times. He stated that his specific motion was to deny the appeal and, under that aegis, he would find that the Legal Department's interpretation and application of Sections 10.1016, 10.1017, and 10.1018.20 of the Zoning Ordinance was and had been correct. That was what they had been discussing. Secondly, he stated that he found that the City's Legal Department, in its interpretation and application of the site plan review regulations as expressed in these memos and as expressed tonight in testimony before this Board, was correct. Lastly, he stated that his motion incorporated the concept to affirm the issuance of the cease and desist order, notice of violation and demand for erosion control measures dated August 25, 2011 as being appropriate. He stated that his motion was based on all of those considerations.

Mr. Durbin stated that, when he looked at the Ordinances that were at issue, they read pretty plainly and he thought one of the things that was pointed out was that the facts weren't really in dispute. There was clearly an alteration of site and surface configuration and it was hard to argue that there wasn't. He stated that there were some material alterations made in general. That did not seem to be in dispute and, in looking at the Ordinance, at what he felt was really the centerpiece there which was Section 10.1016.10 and then looking at that in connection with the other Ordinances, it was really hard to argue the intent there, when the language was as clear as it was. For those reasons, he believed the City reasonably applied the Ordinance and enforced it in a reasonable nature and their decision to do should be upheld.

Chairman Witham stated that he would also be supporting the motion. He noted that, as part of the appeal, there was quite a bit of language and to him it all came down to one word which was the word, "maintenance." He quoted from the appeal, in which the attorney wrote that the owner was performing maintenance on a ditching system stating that site review regulations were not to

create or encourage safety hazards as were there by preventing maintenance. The attorney stated that Mr. Boyle was simply doing work to address unsafe conditions and that all he was doing was maintenance to rectify an unsafe condition. Chairman Witham stated that he hadn't heard anything to give him an understanding of what those unsafe conditions were. He stated that he felt, from what he had seen through the pictures and statements, along with the fact that those culverts were installed, that this was way above and beyond maintenance. He listed the words, "dredge, fill in, movement of earth, excavation," noting that he was certain they could find a way, as the attorney had, to put those in the category of maintenance but it didn't work for him. Chairman Witham stated that he felt those were much more than maintenance and would require permitting.

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

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4) Case # 10-4
Petitioner: 200 International LP, Owner, 180 International LLC, Applicant
Property: 180 International Drive Assessor Map 312 Lot 3
Zoning district: Pease Industrial
Description: Parking spaces located in the front of an existing building.
Requests: Variance from Section 305.02(b) of the Pease Development Authority Zoning Ordinance to allow parking 49' from the front property line where 50' is the minimum required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard Pelech stated that he was representing the applicant and passed out some material.

Chairman Witham noted that, when it was time to make a motion, they would be making a recommendation to the Pease Development Authority and all the criteria did not need to be addressed.

Attorney Pelech agreed that the Board simply need to make a recommendation, noting that the Pease Development Authority Ordinance did not have a provision for somebody applying for an Equitable Waiver because the Ordinance was developed before that state law came into effect. He stated that, when the parking lot at 180 International Drive was constructed, thee was a good faith error in that, of the 300 odd parking spaces, there were 5 of them varying from 1" of encroachment into the 50' setback to as much as 2.5'. It was just this much distance on a 23 acre parcel of land.

Attorney Pelech stated that this was a large property with the special conditions arising from the facts he had just mentioned, with five spaces encroaching. This was coupled with the fact that the encroachment was minimal so there was no fair and substantial relationship between the 50' setback of the PDA and its application to this property. He stated that the spaces were actually 70' to 79' from the edge of pavement. He stated that the value of surrounding properties would not be diminished by making this recommendation as what had been there for years would still be there. He stated that the hardship on the owner, if the recommendation were denied, would not be

outweighed by any benefit to the general public and there would be no public interest as there was no change to the parcel. He stated that, in the spirit of the Ordinance, the request was reasonable and the health, safety or welfare of the public would not be threatened. He noted that, while the distance was advertised as 49', it should be 47', which the Board could recommend if they wished.

In response to questions from Mr. Jousse, Attorney Pelech stated that there was no new work done and the spaces had been there and the discrepancy just discovered by an engineering firm. He advised that Ms. Maria Stowell from the Pease Development Authority was there that evening and was in support of the recommendation.

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 recommend approval of the variance to the Pease Development Authority, which was seconded by Mr. LeMay.

Mr. Grasso stated that these buildings were built 10 or 11 years ago and the parking lot had been in existence for some time. He didn't feel that denying these five parking spaces would benefit anyone and noted that the turn in the road might have accounted for the displacement of these spots within the 50' setback.

Mr. LeMay noted that this was the same type of relief as an Equitable Waiver that might come before them.

The motion to recommend approval of the variance to the Pease Development Authority to allow parking, as presented, 47' from the front property line was passed by a unanimous vote of 7 to 0.

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5) Case # 10-5
Petitioner: Sureya M. Ennabe Rev. Liv. Trust, c/o C. N. Brown Company
Property: 800 Lafayette Road Assessor Map 244, Lot 5
Zoning district: Gateway
Description: Place colored markings on an existing canopy.
Requests: Appeal from an Adminstrative Decision by the Code Official to define canopy markings as signs as regulated by the Zoning Ordinance.

SPEAKING IN FAVOR OF THE PETITION

Chairman Witham requested that the speakers be clear, concise and to the point so that the meeting could remain focused.

Attorney Peter Loughlin identified himself as representing the owners and asked if the Board wanted take both petitions together as what he had to say would apply to both.

Chairman Witham directed him to go ahead with the appeal and they he was comfortable with Attorney Loughlin carrying over whatever was redundant without having to present it all over again.

Attorney Loughlin provided a brief history of the property, including the relief granted in 2009 for parking in front so that they did not have to put pavement in the back near the marsh when the station was rearranged. At that time, they had removed the prior canopy with the Citgo decals and pushed it back. At that time, the owners were seeking to place on the canopy lettering and a trimark, the Citgo logo, that was larger than permitted. He noted that this request lost on a split vote and stated that a statement was made that they must have done studies regarding the Ordinance or they wouldn't have built it. Referring to the photographs he had passed out, he stated that one of the things that had happened was that when they started the permit process in 2009, they had a canopy with the Citgo markings and they tore it down and then came in for the new canopy with the new graphic and learned that it didn't meet the Ordinance. He was sure there were plenty of studies and they just assumed they would be able to put up the same kind of graphics, although they had changed. The good news was that the new canopy was further from the roadway and more conforming but he claimed had less visibility as it was partially obscured by the Sunoco signs.

Attorney Loughlin stated that he wanted to clarify one other thing. He had watched the tape of the June 28, 2011 meeting three times and described the testimony of Mr. Peter March of New Hampshire Signs when he stated, in answer to a question from Ms. Rousseau, that it was a plain canopy. At the time he was pointing to the plan and then he added "with the Citgo wording on it." Attorney Loughlin felt that Mr. Grasso had picked up on that, although it wasn't picked up by everybody. He felt it should be clarified that Mr. March had not just said it was a plain canopy. Attorney Loughlin stated that a representative of C.N. Brown was there that evening and they would like to apply the standard Citgo decal to the canopy. They were not talking about what was there before or putting any letters on the sign of the three-dimensional triangle on it. They were there before the Board as staff took the position that the triangular forms that were in the decal were a sign under the Ordinance. They took the position that, for example, the 16.61 s.f. red triangular figure in the materials in front of them and the 27.75 s.f. orange figure on the north and south sides of the canopy were signs and needed variance relief. Noting that there were Citgo stations all across the country that were being rebranded with changed canopies, Attorney Loughlin stated that they disagreed. He indicated that one of the relevant sections was Section 10.1252.40 which stated that "The sign area of a canopy sign shall include all text and symbols, whether or not illuminated, and all illuminated areas; but shall not include not include non-illuminated areas that are distinguished from the background only by color stripes." Referring to the first part, he stated that the word "Citgo" would be text and he would suggest to the Board that a symbol would be something like the three-dimensional triangle, the golden arches of McDonalds, the Texaco star, a symbol that was the sign. It would not be design graphics that were part of a branding as opposed to signage. He maintained that the triangular forms were neither text nor symbol. He would argue that the Ordinance did not include branding and decorative elements. He stated that the distinctive colors of Dunkin Donuts, and a few other examples he cited, might be a form of branding and associated with a business but were not a

symbol that should be regulated. Attorney Loughlin stated that, even in the Historic District, a color scheme was not regulated, but the Ordinance was being interpreted as not allowing a business owner to use a certain design or color on the canopy, can't paint or color the property as they pleased and that was a problem for Citgo and would be a nationwide problem if they could not use the national graphic

Attorney Loughlin stated that this interpretation was detrimental to Citgo. There had been a discussion at the last meeting as to whether the signage was needed or not as there was a sign on the street. He described what he felt was the public's perception of an off-brand station if there were no national flag or canopy and felt that many people had a particular brand loyalty. Citing an off-brand station that had gone out of business, he stated that, while some might be motivated by price, they usually looked for the best price at a national brand.

Attorney Loughlin cited a decision rendered on a case last February by the New Hampshire Supreme Court seemed to be saying that you needed to raise constitutional issues before the Zoning Board of Adjustment or you might waive them. Although that wasn't exactly stated, it was enough for him to realize that he should raise constitutional issues. He suggested that there were two in this case. He cited Metzger vs. Brentwood and outlined the issues there that he thought pertinent including a four part test as to whether a City could regulate commercial speech. He described again what they City was calling signage indicating that went to whether that was interference with commercial free speech. He asked the Board to grant an administrative appeal of the application of the Ordinance to those particular forms.

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

Mr. Rick Taintor identified himself as the Planning Director for the City of Portsmouth. He stated that Attorney Loughlin had made a vigorous case for a hardship for a variance and also for the fact that the regulation might not be constitutionally valid. He felt that complicated the issue too much. The question regarding the administrative appeal was an appeal from his interpretation of the sign regulations. He would offer that, if the Board wished this sign to be granted, that it not grant the administrative appeal but grant the variance. The reason for that was they had heard a lot of discussion in the previous presentation that evening about the meaning of words. He found that the meaning of Section 10.1252.40 was very clear. It basically said that anything, except a non-illuminated stripe was included within the calculation of sign area. It was not about the definition of a sign. It was about what was included in the calculation of sign area. He stated that, if the Board granted an administrative appeal from the determination that a triangle was not a stripe, then he would have a hard time applying the Ordinance to any future canopy. He stated that he didn't have a particularly strong feeling one way or another about the variance but he felt that a lot of mischief would be created by granting the appeal. It would be far better to grant the variance, if that was the Board's intent.

Attorney Loughlin stated that, rather than getting into a big discussion about the administrative appeal, they could hear the variance and then they would not need the administrative appeal.

Chairman Witham stated that it was up to the Board but he would like to move forward on the administrative appeal and if it were denied, go to the variance. The Board verbally agreed.

DECISION OF THE BOARD

Chairman Witham stated that he was torn by Mr. Taintor's suggestion of granting the variance as opposed to the administrative appeal. He felt that, by granting the variance, they would be indicating their view of this in a certain light and they might be inundated with requests as to how someone painted their sign. By granting the appeal, were they going to set a precedent as to how they viewed it, or maybe the City would change its view and they would not get all these requests. He stated that what he was torn with in the definition of a sign was that signs need not include text and could consist of stripes, spots or other recognizable design shapes or colors. He stated that, if he were shown this sign without the word, "Citgo," he could not say what gas station this was. It wasn't recognizable to him and that followed under the definition of signs. He stated that, if they took the Citgo triangle and tried to paint 50 of them around the canopy, it was clear cut as signage, but the way the stripe kind of ended in this triangular form was not recognizable and he was not sure of the best way.

Mr. Parrott asked if he was ready for a motion so they could get a discussion going and Chairman Witham indicated he was. Mr. Parrott made a motion that the Administrative Appeal be denied, which was seconded by Mr. Grasso.

Mr. Parrott stated that there seemed to be an effort here to talk about signs that served the purpose of signs, but they were not signs because the applicants called them branding. He felt the applicants could not have it both ways. If the applicant didn't want those distinctive designs to mean Citgo, why put them up there. He noted that, although they were attractive, the applicants weren't in the business of providing public art so the clear purpose was to enlarge a sign by another mechanism. He cited the Nike swoosh which didn't have to have the brand name written over it for someone to know what it meant. That was a sign, or a symbol, or a brand, whatever they wanted to call it, but it all served the same purpose which was to say to somebody that this was a Citgo station. He reiterated that they could not have it both ways by saying that this was just an extension or a decoration but not a sign. To his way of thinking, it was a sign. He felt that the wording in the Ordinance should be read plainly and simply for what it said. He thought that the word, "Citgo" was a good size and jumped right out against the white background, as he had stated in the previous hearing. He reasoned that the City wrote the Ordinance and should have the first chance to say what it meant. He felt their position was logical in this instance.

Mr. Grasso stated that he agreed, noting that he believed that the colors were a Citgo branding. If any other corporation were to try to use them in any manner, shape or form, they would have a law suit for trying to steal Citgo's identity. He felt the proposed shapes might be more the current century while the triangle was more the last. He agreed with the motion to deny the appeal.

The motion to deny the appeal was passed by a vote of 5 to 2, with Messrs. Durbin and Witham voting against the motion.

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6) Case # 10-6
Petitioner: Sureya M. Ennabe Rev. Liv. Trust, c/o C. N. Brown Company

Property: 800 Lafayette Road Assessor Map 244, Lot 5
Zoning district: Gateway
Description: Place colored markings on an existing canopy.
Requests: Variance from Section 10.1252.40 to exclude a portion of the canopy markings from the calculation of sign area for the site.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin stated that he was appearing on behalf of the owners. Addressing the petition just heard, he stated that he had narrowed his comments to the canopy, and the first line of that section of the Ordinance dealing with canopies where it referenced a symbol. He stated that they were now seeking a variance for approval of the two triangular forms, which totaled 72 s.f. and on the sides 39.36 s.f. He wouldn't repeat everything he said in the previous hearing but would like to incorporate his remarks into the consideration of this petition.

Attorney Loughlin stated that granting the variance would not be contrary to the public interest or the spirit of the Ordinance. Citing the decision in the case of Harborside Associates, L.P. v. Parade Residence Hotel, LLC, he stated that the court had collapsed these into one and that to be contrary, basic Zoning Ordinance objectives had to be violated. He noted the two methods to determine this were whether the essential characteristics of the neighborhood would be changed and whether the public health, safety, or welfare would be threatened. He stated that adding the expanded Citgo decal to the canopy would do neither. Attorney Loughlin stated that substantial justice would be done as the loss to the individual, if the petition were denied, would not be outweighed by any gain to the public. Again citing the Harborside ruling, he stated that there would be no gain to the public in denying this petition. He stated, regarding diminution in the value of surrounding properties, that it would be hard to imagine how the addition of a colorful decal to a blasé canopy would affect values, particularly with the abutting properties being a Sunoco station and Dunkin Donuts with their standard franchise colors.

Regarding the hardship test, Attorney Loughlin referred to findings of the Board cited in the Harborside case, one of which was that the signs sought by the defendant in that case would not be disruptive to the visual landscape. He stated that the Citgo colors here would also not be visually disruptive to the landscape. The canopy was now pushed further back but the public had come to expect more and looked at the canopy for the flag of a national company. He stated that this was the only white canopy in Portsmouth with no national branding and to deny it to this applicant created an unnecessary hardship.

Mr. Moretti noted that there were two different mock-ups. The one at the top did not show the Citgo triangle on the left-hand side of the Citgo sign. The lower one did show it at the bottom.

Attorney Loughlin pointed out the lower one and noted that they had previously received approval for that so it was not part of this application.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. LeMay stated that a canopy at a gas station was a unique structure. 99% of the gas stations had them and they were necessary for fire suppression and not there purely for a sign. He stated they were either going to have a solid color or, in accordance with the zoning, it was o.k. to use stripes to decorate it but not any sort of pattern. Editorially, he felt that was just trying to slice the baloney too thin. He was somewhat persuaded that there was a brand identity issue and that there was actual value which was not minor in the case of a gas station.

Mr. LeMay stated that granting the variance would not be contrary to the public interest and noted that this had existed previously in a different incarnation and he felt it was informative to the public. In the spirit of the Ordinance, he stated that the nature of the neighborhood would not be changed, noting the Sunoco station next door with dramatic signage and the Mobil station up the street. He felt that the neighborhood was well established in terms of signage and colorings on buildings. He stated that granting the variance would do substantial justice as the brand would be heightened and that would have some commercial value. In the hardship test, he stated that what distinguished this property from the others was that it was new and introduced right after the new Zoning Ordinance where everything that surrounded it already had signage and banding and so forth.

Mr. Grasso agreed, noting that selling gasoline was a competitive field and not having Citgo brand or identity, whatever word you wanted to use, their station was a hardship and put them half a step behind the other stations which were identified with various color schemes.

Mr. Jousse stated that he had made it a point to look for the station when driving north and did not notice the canopy until nearly parallel to Dunkin Donuts due to a rise in the road, although the sign on the street was prominent. He felt the sign on the canopy was wasted as it couldn’t be seen from the street. Going south, he felt it was less visible due to the gas station in front of it. He didn’t feel that the canopy needed color to attract business and wouldn’t support the motion.

Chairman Witham stated that he would support the motion. It was not an issue of color and they could paint stripes all the way around and comply with the Ordinance. He noted that the City had no problem with most of the logo until the end where it fell into a triangular pattern. He didn’t think that the spirit and intent of the Ordinance was to allow stripes if that was all there was but if the stripe were ended in a different way, to call it signage.

The motion to grant the petition as presented and advertised was passed by a vote of 5 to 2, with Messrs Jousse and Parrott voting against the motion.

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7) Case # 10-7
Petitioner: Joanne F. DeWolf & Timothy G. Foley, Jr.
Property: Marjorie Street Assessor Map 232, Lot 20

Zoning district: Single Residence B
Description: Construct new single family dwelling on empty lot.
Requests: Variance from Section 10.521 to allow a lot area of 6,400 s.f. where 15,000 is the minimum lot size required.
Variance from Section 10.521 to allow a lot area per dwelling unit of 6,400 s.f. where 15,000 s.f. of lot area is required.
Variance from Section 10.521 to allow 80' of continuous street frontage where 100' continuous street frontage is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Steve Haight stated that he was appearing on behalf of the applicant. He stated that this property was created by subdivision in 1903, purchased in the 1950's and subsequently transferred to the current owners. As the lot predated zoning, when they went for a permit to construct a home, they were told that it did not comply with current zoning.

He stated that granting the variance would not be contrary to the public interest as this was a lot of record, consistent with all the lots on the street. The proposed development of a single family home with an attached garage would be consistent with the existing homes in the neighborhood. He stated that the spirit of the Ordinance would be observed as the size and aesthetics would be consistent with the other homes constructed on lots of record created by the 1903 subdivision. Regarding substantial justice, he stated that granting the relief would allow the owner full use of the property. He stated that this new construction would not diminish the value of surrounding properties with homes of similar size and aesthetics. He stated that the hardship was that literal enforcement of the provisions of the Ordinance from which relief was sought would effectively eliminate a lot of record that predated zoning in a neighborhood where all the lots were of similar size. He noted that copies of the subdivision proposal, the tax record and the tax map were included in their packets.

Mr. Grasso stated that on one of his exhibits, it was indicated that 20% was the lot coverage allowed and they were not asking for that. Mr. Haight stated that they actually had in the application but he wasn't sure why it didn't get into the notes. Chairman Witham indicated that the lot coverage hadn't been advertised. Mr. Jousse added, and the front setback. Mr. Haight stated that they didn't need a variance in that zone for the front setback as they met the average setback of the homes on the lots on that street. They had obtained a measurement of all the homes on the same side of the street using a laser pointer and not going onto the properties. They had then taken an average of those setbacks and he referred to the color plan in the packet which showed those dimensions.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. David Moody stated that he lived at 11 Marjorie Street and opposed building a house where the minimum requirement for a lot was 15,000 s.f. He stated that the lot may have accommodated a home back when his home was built in the 1920's, but the current standard of homes that would be built wouldn't be consistent with the standards of the older homes. He stated that he had 13 signatures from neighbors who were also in opposition, which he passed to the Board. In

summary, he didn't think this would be beneficial to the neighborhood. There were other unique properties in the Marjorie Street area and, if this passed, he felt that it would open up other problems with other properties. He was concerned that owners would build houses that were close together and he would feel like he was in a trailer park of houses. He felt that the spirit of the Ordinance was trying to get away from that and allow each resident a little distance. At the request of Mr. Jousse, he identified his house in relationship to the applicant's property, which was determined, after a brief discussion off-mike, to be one lot down and across the street.

Chairman Witham recommended that they move forward on the variances as advertised and not vote on lot coverage. The application didn't make note of the lot coverage, but the packet had included that. He stated that, if the Board approved the application and the applicant wanted to build a structure which was over 20% in lot coverage, then they would have to return to the Board for another variance.

Ms. Elaine Langer stated that she lived at 48 Marjorie Street and described the landscape of the neighborhood with large open spaces between the homes. She stated that she bought her home because of the open space and felt that this was going to "open up a can of worms" and what was going to stop the people behind her from developing their property. She felt that the owners building on their property would interfere with the natural landscape and change the character of the neighborhood. She mentioned a drainage pipe right at the property line and wanted to know what the plan was to address that.

Chairman Witham noted that she had mentioned natural space between the houses and that it was not the character of the area and he looked at the lots around this lot which was .147 of an acre and the lot to the left was .146 and to the right, .147 and behind the same and he listed other similar lots. He stated that what was around it seemed to him almost exactly the same size with houses on them. He was trying to understand how this would change everything if it was just like everything around it. Ms. Langer stated that the way the neighborhood was set up, back when a lot of the homes were built, they left a lot of land to one side and to the back. Mr. Moody added that the lots Chairman Witham saw were from when the area was developed when they were 40' x 80' lots. Chairman Witham stated that he understood that they were used to something not being developed and it could seem that something proposed was going to change everything when actually it was mimicking exactly what was all around it. Ms. Langer stated again that they all had a good space between them and Chairman Witham reiterated that he was saying that what was being proposed was what pretty much existed.

Mr. Matthew Turner of 3 Marjorie Street was concerned that inserting another home in the neighborhood would decrease the value of their home, noting that he had combined two lots to expand his home. He didn't see any hardship other than that they had put up the property for sale and didn't receive what they wanted. Mr. Patrick Sharkey of 1 Marjorie Street stated that this was a narrow street with some people parking on the street as there was no place on their lots. He was concerned about the parking and safety questions, particularly in the winter. He also felt it would adversely affect the character of the neighborhood. Mr. Paul Kelly of 600 Middle Road stated that he abutted the property and agreed with the previous statements. He didn't feel it would be in keeping with the spirit of the Ordinance which required a 15,000 s.f. lot. He felt that, if it were allowed here, everybody else all over the City would want to do it as well. He noted that all of their lots were nonconforming but were they going to allow people that were nonconforming to

build buildings on a nonconforming lot. He noted how long he had lived there and knew the old owners. If they were going to do something with it, it wouldn't have been a problem but now there was going to be new owners and he thought they needed to go by the Ordinance. He would have no problem if they wanted to add on to the building that was already there but to put another facility within that 6,400 s.f. was asking for problems.

Mr. Jousse noted that he had mentioned adding to the building that was already there. Mr. Kelly stated that the people who owned that building also owned that lot so if someone purchased the house and wanted to add on, he wouldn't have a problem. Mr. Jousse stated that his house was on the corner and he was talking about the vacant lot right next to his house. Mr. Kelly stated that was correct. Mr. Jousse noted that there was no building on it and Mr. Kelly said that was true. Mr. Jousse questioned his statement about adding on. Mr. Kelly stated that, if somebody bought the property, those two lots would be a part of it and they could add onto the existing house that was there with a breezeway or a garage. Mr. Jousse asked if he was correct that there was a residence on 20 Marjorie Street and Mr. Kelly stated that was correct. Mr. Haight stated that the current owners owned both 20 and 21 and 21 had the house. He felt that what Mr. Kelly was saying that they would extend the house on 21 over onto 20. Chairman Witham clarified that they owned 20 and 21 and were paying taxes on 20 as a vacant lot. They were going to sell both lots as package but that wasn't happened so now they were going to see if they could sell them separately. Mr. Haight pointed out the lots in question on the map on display.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Rick Taintor again identified himself as the Planning Director. He stated that it sounded like two lots that were owned in common, with one having a house and one vacant. If that were the case, there was another variance that had to be granted. There was a requirement under Section 10.514.10 that said that contiguous lots in common ownership should not be separated or transferred in ownership so as not to be in compliance with the provisions of this Ordinance. He stated that in order to grant the variances for area and frontage, the Board would have to grant a variance for this lot and perhaps for the other lot that the house sits as a nonconforming situation would be created.

Mr. Haight stated that because they were two separate lots of record and two separate tax cards as well, that was why they were not combined that way. Mr. Taintor stated that, whether they were lots of record or not was immaterial. It was whether they were under the same ownership. If they were under different ownership then they didn't fall under that section, but if they were the same ownership, he felt they needed a variance.

Mr. Haight stated something from the audience that could not be heard.

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

DECISION OF THE BOARD

Chairman Witham stated that he would still allow the applicant to address the issue if he found something.

Mr. Haight stated that the lots had been owned by Claire and George, who passed away. Claire owned the two lots and then there was a fiduciary deed and she turned the lot that the house was on to her daughter and son as a trust and she retained the right to live on that land until she passed away. With regard to the lots of record, he stated that it was understanding that they were under different ownership as they came to pass.

Chairman Witham stated they had a request for three variances and they would require a fourth to build the house as proposed but they were going to disregard the house plans and just decide whether to make this a buildable lot or not.

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

Mr. Jousse stated that he was a supporter of following the City Ordinance and he has to be convinced to deviate from that, but he felt this was a unique situation. The majority of lots were about the same size. If the owner couldn't build on the lot, then their only alternative was to make a giant garden or a playground or ask the City to buy. He noted that nearly all the lots were the same size on both sides of the street. If the owners of those lots had been allowed to build on what were, by today's guidelines, substandard lots then the applicant should be able to build on another lot with less than the currently required square footage. While he understood the desire for open space, the owner also needed to be able to use their property.

Mr. Jousse stated that granting the variance would not be contrary to the public interest and would be following the spirit of the Ordinance. He stated that no substantial justice would be gained by the City or neighborhood in denying the variance and nothing had been presented as to the diminution of surrounding properties. He stated that the hardship was that these lots were created over 100 years ago and in an environment that didn't have the zoning regulations that were now in place.

Mr. Grasso stated that this was a more difficult case than it first appeared. The proposal was in front of them and, while not voting on the coverage, that might be next month. He stated that these lots were created over 100 years ago and he found it difficult to penalize the current owners who had a right to develop their land and build their house under current guidelines.

Chairman Witham stated that he might not vote for this if it were in another location but he found it difficult to say that this would change the character of the neighborhood when he could point to every house surrounding it and they would be the same. He felt that the new Zoning Ordinance had not taken this neighborhood into account. He understood that the neighbors wanted to see trees and grass, but they were on somebody else's property and those property owners had a right to be granted a variance if it was reasonable.

Mr. LeMay stated he had one more comment which was that this was unique in that they were not looking for a subdivision and to peel off a piece of land and create a lot just because there happened to be space. This had been treated as a separate lot for all those years and he felt that if there were some zoning coercion into combining lots under common ownership and so forth, then that probably needed to more substantial than just referencing lots under common ownership because then you were disadvantaging one person just because he happened to own adjacent lots

where he had seen cases in the past where that had been an Ordinance so a builder went in and deeded one lot to his wife and one lot to himself and so on and get around the provision.

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

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8) Case # 10-8
Petitioner: Trang Bui, Owner, Duy Bui, Applicant
Property: 4 Blue Heron Drive Assessor Map 218, Lot 51
Zoning district: General Residence B
Description: Conduct music classes in a residence.
Requests: Special Exception for Section 10.440, Use 19.22 to allow a Home Occupation 2 in a district where such use is allowed by Special Exception.

Mr. Jousse made a motion to observe the ten o'clock rule, which was seconded by Mr. LeMay. Mr. Grasso asked what observed meant and Chairman Witham stated it meant the meeting would be over. A no vote meant the meeting would continue. The motion to invoke the ten o'clock rule failed to pass.

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8) Case # 10-8
Petitioner: Trang Bui, Owner, Duy Bui, Applicant
Property: 4 Blue Heron Drive Assessor Map 218, Lot 51
Zoning district: General Residence B
Description: Conduct music classes in a residence.
Requests: Special Exception for Section 10.440, Use 19.22 to allow a Home Occupation 2 in a district where such use is allowed by Special Exception.

SPEAKING IN FAVOR OF THE PETITION

Mr. Duy Bui stated that he was the applicant and resided at Blue Heron Drive. He outlined a little of his musical background, stating that there was a room in the house which could be used to provide music lessons. He stated that was necessary as he couldn't drive. He noted that there would only be 5 to 6 students a week, with the lessons usually about a half hour long and none held after 7:00 p.m. in the evening. In response to questions from Mr. Grasso, he stated that he would conduct lessons only on Mondays, Tuesdays and Thursdays, with no weekends.

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 petition as presented and advertised, which was seconded by Mr. Durbin.

Mr. Grasso stated that they would be granting a Special Exception for a Home Occupation 2. He stated that, with this use, there would be no hazard to the public on occasion of fire or explosion, change in the essential character of the neighborhood, or detriment to property values from odor, noise, dust, pollution or other irritants. With only one or two students a day, there would be no creation of a traffic safety hazard or increase in traffic. With no changes made to the structure, there will be no increase in storm water runoff or increased demand for municipal services.

Mr. Durbin stated that he had no additional comments.

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

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9) Case # 10-9
Petitioner: Bellwood Associates L.P., c/o Festival Fun Park Properties, Owner, Festival Fun Parks dba Water Country, Applicant
Property: 2300 Lafayette Assessor Map 273, Lot 5
Zoning district: Industrial
Description: Add new fun park attraction.
Requests: Variance from Section 10.331 to allow the expansion of a nonconforming use.
Variance from Section 10.440, Use #4.60 to allow the proposed use in this district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Andy Nitschelm identified himself as the General Manager for Water Country and noted that this was the first time since 2005 that they had asked for an additional attraction at the park. He offered to answer any questions.

Mr. Parrott asked if the attraction were going to be built in the parking area and Mr. Nitschelm responded that it would be where they had overflow parking spaces. In response to further questions, he stated that they would probably lose 50 to 60 spaces but noted that, while they called it an overflow parking area, it was rarely used as it was not conducive to parking cars. The area hadn’t been used at all the previous season and very few times in 2010. He stated that the traffic flow would not be affected in any way.

Attorney Bernard Pelech identified himself and stated that he would briefly go through his points. He stated that the property, now at 73 plus acres, had been there as Water Country for 27 years. He noted that it was located in two zones, Gateway and Industrial and, since a water recreation park was not allowed anywhere in the City, what was there was by virtue of variances granted as the zoning did not fit what had been in place for all those years. He felt that a new ride was not a

large expansion and, referring to the site map, noted that vast areas could be seen and 30 acres to the rear were not even shown on the map. He stated that the ride would be barely visible from Lafayette Road and not alter the character of the neighborhood, which had a shopping center on one side and various other commercial uses around it. It would, therefore, not be contrary to the spirit and intent of the Ordinance. He maintained that Water Country was beneficial to the public interest, having become a part of summers on the seacoast and bringing tourists to the City.

In the justice balance test, Attorney Pelech stated that the hardship on the applicant if the petition were denied would not be outweighed by any benefit to the general public. He noted that the site was large with more than enough parking and this would not be an over-intensification of the use. He stated that granting the variances would not diminish the value of surrounding properties as the park could barely be seen from the road and was surrounded by commercial uses. Attorney Pelech stated that literal enforcement of the Ordinance would result in a hardship. This was a unique piece of land and a unique use with special conditions distinguishing it. They felt that the request was for a natural expansion of the park and no problems would be created for the public or municipality. He stated that a hardship would be created for the owners if they could not expand when they had a vast open space. He stated that the project would not threaten the public health, safety or welfare. The site could well accommodate this new ride and was a reasonable use of the site.

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. LeMay.

Mr. Parrott stated that this was a small expansion on this lot with no nearby housing to be adversely affected. He felt that the proposed location in a vacant part of the lot made sense and the road was nearby so they would not lose any needed parking space. With no change to the traffic pattern, he felt this expansion could be easily accommodated with no adverse effects. Mr. Parrott stated that it was hard to see any public interest in this proposal as the ride would be out of sight for most folks. It was in the spirit of the Ordinance to support businesses in a reasonable expansion without hurting anyone else. In the justice balance test, he stated that there was no detriment to the public interest that would outweigh any gain to the business by an additional attraction. He stated that the surrounding properties were not close enough to be adversely affected in any way. The hardship was due to a quirk in the zoning applied to this property which did not allow this use although it was a good use for the site. He felt that not allowing them to expand with this ride would be a hardship.

Mr. LeMay stated that he agreed.

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

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Mr. Parrott stepped down for the following petition.

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10) Case # 10-10
Petitioner: Carol B. Ritzo, Owner, MJS Realty Trust, Applicant
Property: 860 State Street Assessor Map 145, Lot 45
Zoning district: General Residence C
Description: Replace existing 5-car garage with new single family dwelling.
Requests: Variance from Section 10.521 to allow a lot area of 2,740 s.f. per dwelling unit where 3,500 s.f. of lot area is required.
Variance from Section 10.521 to allow 52' of continuous street frontage where 70' continuous street frontage is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Chris Wright identified himself as representing the owners and distributed a small plot plan and a list of abutters in support of the property. He stated that they wanted to remove a structure which was in danger of collapsing and proposed building a single family dwelling which would meet the setback requirements and provide two off-street parking spaces, which he indicated on the plan. He noted that there would be over 50% of green space left on the lot.

Chairman Witham asked Mr. Taintor to clarify the street frontage requirement. Mr. Taintor stated that this was on a corner lot which had one front line and one side line so there would be a front, a rear, and two sides. He confirmed for Mr. Jousse that it was a 5' front setback and 10' side yard setback. When Mr. LeMay asked for a description of the proposed house, Mr. Wright showed a conceptual design noting that it would 34' to the ridge. Mr. Jousse commented that it seemed bigger than the surrounding houses and Mr. Wright responded that it was actually a smaller footprint. He confirmed for Mr. LeMay that the entire structure would fit into the area depicted on the plan.

Mr. James Ritzo stated that his wife had owned this property since 1983 and at the time it contained a five-car garage which was a nonconforming use. He stated that the garage was now fallilng down. He stated that they were able, under the Zoning Ordinance, to replace this existing structure and convert it to residences, including a duplex. The proposed buyer did not want to construct a duplex feeling that a single family house was in accordance with the Ordinance and would help the neighborhood. The hardship was that the lot did not have the required 3,500 s.f. of lot area per dwelling unit and had only 52' of frontage on State Street. He noted that the setbacks would all be met. They could replace the deteriorated structure with another garage but they felt the best use of the property would be for a residence. He stated that by putting a single family home there, they would remove a hazardous condition and add a home to the tax rolls.

SPEAKING IN OPPOSITION TO THE PETITION

The abutter at 88 Union Street stated that she didn't want to say she was against it but had concerns. She claimed that the abutters who signed letters in support were not direct abutters as she was. While she agreed that the property currently was an eyesore, she was concerned about losing her view on that side and a possible deck. She felt the property was being sold to a realtor who would "flip it." She thought the single family house might be occupied by transients and mentioned other properties in the area where tenants created a lot of noise.

Mr. Gene Fiske stated that he managed the property at 874 State Street, directly to the right of this property. He read a statement from the owners who were currently living out of the country which made it difficult for them to clarify their concerns directly with the current owner of the property. They stated in their letter that they had finally exchanged e-mails with Mr. Sevigny through their representative but all their concerns were not assuaged. They had considered the information available to them and their main concern was that the structure be a single-family home of a size they described as being appropriate to the neighborhood. Additional concerns included a plot plan which didn't clearly define the parking area and the amount of green space.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Rick Taintor stated, in clarification about the question of a duplex, the property could be converted to a two family with less lot area per dwelling unit, but that provision specifically required no exterior changes to the building. If a duplex were built, it would have to use the existing shell so he would not consider that an option.

Mr. Mitch Sevigny, stated that they had zero intent to put a duplex there. He passed out some photographs of the existing garage so that they could understand the poor condition. He noted, in reference to the direct abutter, that one of the things planned to alleviate any impact on her was to plant a complete row of arbor vitae to provide privacy. (He continued with some brief comments from the public seating area which could not be heard)

Mr. Wright stated that they did not have final plans and had not even looked into the possibility of building a deck. He stated that Mr. Sevigny was being honest in the interest of full disclosure to the direct abutter that, they might consider a deck if they could, but they had not looked into it. Referring to the letter Mr. Fiske had read, he stated that their structure at 32% would be less than the allowed lot coverage percentage of 35%. He also wanted to clarify that there was no separate and detached garage. That was incorporated into the footprint of the first floor. Mr. Jousse referred to the photographs and was trying to determine the orientation, which Mr. Sevigny then described. He also distributed two more photographs with different views.

Mr. Ritzo stated that, if they stood in front of the garage, they would see four houses that were identical. He stated that the neighbors were excellent and they wanted to accommodate the direct abutter who spoke. Referring to the letter read by Mr. Fiske, he stated that those owners were actually overseas most of the time and rented out their property. He stated that they were not going to do anything detrimental to the neighborhood and reiterated that they felt that a single family structure was the way to go.

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

DECISION OF THE BOARD

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

Mr. Durbin stated that he was sympathetic to the concerns of the abutter and clearly she would have a better view from her property with a lower structure but he found that what was proposed met the zoning criteria and would improve the neighborhood and property values.

Mr. Durbin stated that it would be in the public interest to have a more aesthetically pleasing structure on the lot rather than the deteriorated garage. In the spirit of the Ordinance, he felt that what they were proposing was in keeping with the design and appearance of the surrounding homes. In the justice balance test, he stated that the hardship to the applicant if the petition were denied would not be outweighed by any benefit to the public. With regard to surrounding property values, they would increase, if anything. He stated that there were distinguishing characteristics of the property creating a hardship, which included the size of the corner lot which would only allow a small footprint. The special conditions that would not allow the property to be used in strict conformance with the Ordinance included a dilapidated five-car garage which was falling down. A single family home would have a use and purpose in the neighborhood.

Mr. Moretti agreed that the proposed change would be a vast improvement as the current building was in very poor condition, close to a lot line and presented a fire and vermin hazard. He felt that property values would be increased and sight lines improved on the corner, which would be more conducive to the neighborhood.

Chairman Witham stated that, while he was sympathetic to the height concerns, he didn't feel the variances should be denied. He felt the proposal was consistent with what was in the neighborhood and was actually on a larger, corner lot which would minimize the effect on abutters. If the request were denied, they would have to try to renovate a five-car garage which presented a traffic hazard on a busy street. He felt the proposed structure was a much safer situation.

The motion to grant the petition as presented and advertised was passed by a vote of 6 to 0.

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Mr. Parrott resumed his seat and Mr. Grasso stepped down for the following petition.

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11) Case # 10-11
Petitioner: T Beyar Realty LLC, Owner, Rockwell Auto Group, Applicant
Property: 141 Banfield Road Assessor Map 254, Lot 2
Zoning district: Industrial
Description: Change of use to detailing and wholesale of motor vehicles.
Requests: Special Exception for Section 10.440, Use #11.20 to allow motor vehicle

repair in a district where non-marine dependent wholesale use is allowed, but motor vehicle repair requires a Special Exception.

SPEAKING IN FAVOR OF THE PETITION

Mr. Teneyke Smith passed out an exhibit and referenced the submitted packet. He stated that what they would be doing was sourcing cars from wholesalers, reconditioning and detailing them with maybe some light mechanical such as brake work. They would then take them out to wholesale or retail outlets. He explained why their license had to be for both retail and well as wholesale but assured the Board that there would be no selling of vehicles on the premises. He cited other nearby uses, including a full repair garage and a shop doing reupholstering and windshield repair. They also had as neighbors a foreign auto parts operation and a hazmat operation. There were trucks and cars parked all around the building and he couldn't imagine that they would be doing anything different. In response to questions from Chairman Witham, he stated that their goal was to initially handle five cars a week and ultimately 10 vehicles.

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

Mr. Durbin stated that this use was permitted by Special Exception. With the stated operation limited to reconditioning of vehicles and light mechanical, there would be no hazard to the public or adjacent properties on account of fire or explosion. As stated by the applicant, there were numerous vehicle related businesses in the area so there would be no change in the essential characteristics of the neighborhood or detriment to property values. With the representation of the initial and proposed volumes, he stated that there would be no increase in the level of traffic or creation of a traffic safety hazard. He felt there would be minimum impact on the City, with no increased demand on municipal services. He stated that there was no indication of any exterior renovation which would suggest a possible increase in storm water runoff.

Mr. Parrott stated that the use was compatible with others in the building and area and he saw no detrimental effects.

Mr. LeMay suggested a stipulation that there be no retail sales on the premises. Messrs. Durbin and Parrott agreed to the stipulation.

The motion to grant the petition as presented and advertised, with the stipulation that there would be no retail sales on the premises, was passed by a vote of 6 to 0.

V. OTHER BUSINESS

No other business was presented.

VI. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 11:35 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk