MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m. **April 17, 2012**

MEMBERS PRESENT: Chairman David Witham, Vice-Chairman Arthur Parrott, Susan Chamberlin, Charles LeMay, Christopher Mulligan, Alternate Robin Rousseau

EXCUSED: Derek Durbin, David Rheaume, Alternate Patrick Moretti

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I. APPROVAL OF MINUTES

A) January 17, 2012

It was moved, seconded and passed by unanimous voice vote to approve the Minutes with one change.

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B) February 21, 2012

It was moved, seconded and passed by unanimous voice vote to approve the Minutes with one minor correction.

II. NEW BUSINESS

A) Acceptance of April 10, 2012 Memorandum from Robert P. Sullivan, City Attorney, regarding property located at 604 Lincoln Avenue.

Chairman Witham referenced a memorandum from Attorney Sullivan regarding the property located at 604 Lincoln Avenue. This was a structure that had a house fire and the owners received a variance to rebuild it with an addition. At the time, they were going to save the foundation and most of the first floor but it had subsequently been determined that the foundation was not worth saving and the applicants are now requesting to essentially replace in kind. The Board was being asked to clarify whether the intent of their previous approval would extend to a rebuilt structure or would the applicants have to come back for a new variance.
Ms. Chamberlin stated that her recollection was that the property owner was going to replace what

needed to be replaced with small modernizations without any major changes. She stated that it was certainly within her intent that, if the foundation was no longer good, the applicant could replace it without coming back.

Mr. LeMay agreed and asked if the applicant was talking about rebuilding in the same footprint, same house basically? Chairman Witham stated it would be to replace in kind.

Ms. Rousseau quoted a section from Attorney Sullivan's memorandum where he indicated that, based on his review of the February 21, 2012 meeting file, it appeared that the intent of the Board was to allow the applicants to rebuild their home as requested and the distinction between rebuilding the fire damage and the entire home would not be relevant to the decision of the Board. She had then looked at the meeting Minutes where Ms. Chamberlin had said what they were requesting was not a huge change, it would allow some improvement to the building, and a little remodeling after a fire sounded reasonable. Mr. Moretti had referred to this as a small modification and a small increase. Ms. Rousseau stated that the City Attorney was saying it was no big deal if they demolished and rebuilt the home versus what the ZBA approved, which was to remodel or add an addition. She felt that was a major change and they were back with the Harborside project where they were trying to interpret the language of major change. She didn't agree with the City Attorney's position.

Chairman Witham asked Ms. Chamberlin if she wanted to put her comments into a brief motion.

Ms. Chamberlin made a motion that the applicant did not need to come back for a new approval in that repairing what could be repaired of the home was what had been brought before them in the beginning. As the foundation could no longer be repaired and had to be replaced, her motion was that was within the intent of the Board's original approval. Mr. LeMay seconded the motion.

Mr. Parrott stated that, procedurally, he was happy that the matter had been brought back for clarity so there could not be any question in the future as to whether or not the proper procedures were followed. With respect to the actual construction, it would end up the same footprint and the same size and mass as it would have been had they rebuilt it. He felt there was not that much difference so he felt the Board could approve the request.

The motion to clarify that the Board's intent was to allow the applicant to rebuild the structure as necessary and not require the applicant to come back for a new approval was passed by a vote of 4 to 1, with Ms. Rousseau voting against the motion and Mr. Mulligan abstaining.

Chairman Witham announced that there were six sitting members sitting. Individual Members would have to recuse themselves from the hearings on the petitions for 90B Fleet Street, 750 Lafayette Road and 324/334 Parrott Avenue leaving five voting members. With four votes necessary to pass a positive motion, the petitioners in those cases had the option of postponing to the next month. There was no response from the petitioners.

III. OLD BUSINESS

A) Case # 3-9
Petitioner: Commerce Way, LLC
Property: Commerce Way & Woodbury Avenue
Assessor Plan 216, Lot 1
Zoning District: General Business
Description: Modify existing free-standing sign and add a second free-standing sign.
Requests: 1. Variance from Section 10.1243 to permit two free-standing signs on a lot where only one free-standing sign is allowed.
2. A dimensional Variance from Section 10.1251.20 to permit a free-standing sign with a sign area of 124.4± s.f. where 100 s.f. in sign area is the maximum allowed.

(This petition was postponed for more information at the March 20, 2012 meeting.)

SPEAKING IN FAVOR OF THE PETITION

Mr. Dan Fallon thanked the Board for the opportunity to re-present their petition. They needed a variance to modernize the Hesser College sign with something slightly smaller as well as one to add a sign closer to the street for the 24-hour veterinary hospital.

Ms. Rousseau asked if he would make his presentation, noting that there were issues previously regarding measurements. Mr. Fallon stated that they were addressing that with the sign replacing the Hesser College sign. The current size was 121" x 151" and they were requesting to replace it with a sign that was 121" x 148". While a reduction, it still exceeded the 100 s.f. He asked if they wanted him to go through the criteria individually or could he address both at the same time. Chairman Witham stated he could do it at same time. Mr. Fallon added that the dimensions for the separate, free-standing sign for the veterinary hospital were 120" x 42", for a total of 35 s.f.

Mr. Fallon stated that granting the variances would not be contrary to the public interest as they would be directed to the Portsmouth Office Park and a veterinary service. He felt that it would be in the spirit of the Ordinance to clearly identify the services available in the park and how to easily access them. The value of surrounding properties would not be diminished by updating an old sign that needed modernization and he felt it demonstrated positive activity in the area. Mr. Fallon stated that a hardship would be created by leaving the old sign in place. With the time and money spent to improve the park, the existing sign was a hindrance, creating the impression that nothing was being done. It was also a hardship for people to not be able to find the veterinary hospital when they needed it in an emergency.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Ms. Chamberlin stated that granting the variance would not be contrary to the public interest as the sign for the college was being replaced with a slightly smaller, modernized sign with more information. The other, new, sign would direct the public to emergency services. The spirit of the Ordinance would be served as it was designed to limit signage clutter and allow signs that were easily understood by drivers. Substantial justice would be done as the emergency sign, if added on top of the other sign, would get lost. She stated that there would be no effect on surrounding properties in terms of value. The special conditions were the first sign being replaced by a smaller modern sign and the current inability of people to find the services on the property.

Mr. LeMay stated that the style of sign was consistent with zoning and he felt there was an additional unique aspect to the property in that the building was down the road and couldn't be seen. It was a visually confusing area so it would be helpful to have direction.

Mr. Parrott stated that this one of the few plots where there was enough physical room so that the signs wouldn't look oversized and out of place. The number of businesses in the park was significant, with one operation an emergency service. He felt this was the rare case where two signs could be approved on one property without bending the Ordinance too much.

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

IV PUBLIC HEARINGS

1) Case # 4-1
Petitioners: Angelique & Michael Murray
Property: 17 Thaxter Road
Assessor Plan 166, Lot 52
Zoning District: Single Residence B
Description: Replace existing storage building and a portion of rear deck with 1160± s.f two-car garage/addition.
Request: 1. A dimensional Variance from Section 10.521 to allow a rear yard setback of 18'6"± where 30' is the minimum required.
2. A dimensional Variance from Section 10.521 to increase the building coverage to 21% where 20% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard W. Pelech stated that he was representing the owner and he wanted to correct a typographical error in the memorandum he had handed out where it indicated that the Murrays purchased the property at 17 Thaxter Road in July of 2000. That should be 2004. He stated that the intent of the proposal was to remove the white block building on the lot and put an addition onto the home. He noted that they had come to the Board in June of 2010 with a different proposal which was to create a home office in the building with an addition. That was withdrawn due to the number of variances needed and other concerns. Referring to the submitted plans and elevations and distributing photographs, he stated that this was a different proposal in which the ugly block building would be removed and a two-car garage added to the rear. They were

looking for variances to allow a rear setback of 18½' and 21% building coverage, which included the house and deck, where 20% was allowed. The request and variance were rather minimal.

Attorney Pelech cited the Chester Rod & Gun Club and Malachy Glen v. Chichester cases in which the court ruled that there were two tests to determine whether a variance would be contrary to the public interest and would meet the spirit of the Ordinance. The first was whether or not it would result in a substantial change in the character of the neighborhood, and he stated this proposal would, if anything, bring the property more in keeping with the neighborhood character. The second test was whether granting the variance would result in harm to the public health, safety or welfare. He maintained that moving the building off the property line would not do so and taking down that building and replacing it with a tasteful addition would increase surrounding property values. He stated that substantial justice would be done as there would be a hardship created for the applicant if the petition were denied with no balancing benefit to the public. In the hardship test, he stated that the special conditions of the lot differentiating it from other lots was that this was a corner lot abutted by commercial uses. Secondly, there was a current structure which was not in good condition, had no real purpose and was nonconforming as to the location and the use it once had. There was no fair and substantial relationship between the purposes of the Ordinance and its applicability to the property as the Ordinance required a 30' rear setback to provide for light, air and emergency access. They now had a 2½' setback and were asking to move it 16' further from the lot line. The other variance was a slight increase in coverage over what was allowed which was not contrary to the Ordinance. Finally, the proposed use was better than what was now there. He concluded that the property could not now be used in strict conformance with the Ordinance and a variance was needed for a reasonable use.

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 Ms. Rousseau.

Mr. Parrott stated that this was an unusual property in several regards, the obvious one the brick building which had the look of a commercial structure in a residential zone and had always looked out of place. This addition, if approved, would make the property less nonconforming. He noted that to the left of the property was a busy street and to the back was a commercial building sitting close to the property line so that anything at the rear would not have any effect. On the right hand side, they were not even close to the setback so there would be no detriment to that property. All of that spoke to not being contrary to the public interest and also to complying with the spirit of the Ordinance. In the justice balance test, he stated that this would allow the owners to fully use their property, where previously that back structure had no real use. As had been mentioned, he felt that, if anything, property values would increase as what was being added would be more accommodating to a residential district. He stated that the hardship would be the location of the property and, in particular, the existence essentially in their back yard of a commercial structure.

Ms. Rousseau agreed.

Chairman Witham stated that, considering what was being removed and replaced, he considered this proposal a win.

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

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Ms. Rousseau recused herself from the following two petitions.

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2) Case # 4-2
Petitioners: Robin G. Bianchi, owner & Andrea Rossetto, applicant
Property: 90B Fleet Street
Assessor Plan 117, Lot 41B
Zoning District: Central Business B
Description: A retail gelato shop with indoor tables and chairs with no off-street parking.
Request: 1. Variance from Section 10.1115.20 and the requirements of 10.1115.30 to allow no off-street parking spaces to be provided where 1 space per 100 s.f. Gross Floor Area is required.

SPEAKING IN FAVOR OF THE PETITION

Chairman Witham noted, that with Ms. Rousseau's recusal, there would be five members sitting and 4 votes were needed for a positive motion.

Mr. Andrea Rossetto stated that their petition was similar to one presented the previous month. He noted that they wanted to have only five tables with two chairs each in a 1,300 s.f. space. There was no parking for tenants and the public. If the variance were not granted, they would have to pay a $30,000 fee and could not open their store.

Mr. Rossetto stated that it would be in the public interest to try to have something different to offer to the public. Portsmouth attracted people who came for the scenery and character and this would be an additional option. He stated that the spirit of the Ordinance would be observed as they had been classified as a restaurant, but were not really a full food restaurant, more of a short term accessory for someone dining elsewhere. This would be like an ice cream parlor with shorter hours in the winter when there would be less business. He stated that substantial justice went back to the fee, which would take up too much of the budget needed to open a store. Mr. Rossetto stated that the value of surrounding properties would not be diminished. He felt that the surrounding shops would benefit from the traffic in and out and there would be no loud music to bother the residential tenants. The hardship went to the amount that they would be required to pay because they could not provide the 30 parking spots.

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 Ms. Chamberlin.

Mr. LeMay stated that this petition was very much like the one in the last month or so where this was not a destination to which you would take a car, park and have dinner. Basically they would cater to foot traffic. He felt there was justification in granting the variance given the lack of parking spaces and a possible change being contemplated for this Ordinance. He felt it was in the public interest to keep the building busy and rented. The spirit of the Ordinance would be observed and, in the justice test, while monetary considerations were not usually something they considered, he felt this could be looked at as a hardship caused by the Ordinance in this case. He stated that the value of surrounding properties would not be diminished as there had been commercial uses in there on several occasions. The hardship again went back to having to provide those parking spaces or pay the fee which would be severe enough to prevent opening the store.

Ms. Chamberlin agreed and stated that they were in a difficult situation where they had the Ordinance as it existed but felt it was making it impossible for people to open something less than a restaurant. They would be doing here what they had done for the chocolate shop the previous month and she felt it was the right thing to do to be consistent. At some point, however, they needed to know if the Ordinance was going to be changed to ensure that they were treating people fairly. She felt that the number of spaces was too many for a small shop, maybe a small amount of money to help with the parking, but not the $30,000 that the current Ordinance required.

Mr. Mulligan stated that the problem with this particular Ordinance might have to do with the definition of restaurant. It was clear that had this been any other type of retail operation, the applicant would not be having this problem. What concerned him was the fact that they did have an Ordinance which required a parking assessment. He felt what had been articulated was an adept explanation of why that was a hardship in this case. He thought that this might be an appropriate case in which to attach conditions of approval. The applicant had indicated that he would have no more than 5 tables which didn't sound like a high impact restaurant. He would support the motion but would like to attach a condition that there be no more than the 5 tables as set forth in the application. Chairman Witham noted that the applicant had also said 10 chairs with the 5 tables and asked if the condition was acceptable to the maker of the motion.

Mr. LeMay stated that he wouldn't like to see that condition. He felt there were other reasons this Ordinance was flawed, for example, applying only to restaurants and only on the first floor. He had made a point previously that this was almost like spot zoning, not in a geographical sense but in a business sense. That was one of his bigger objections to it. The Board might want to vote on the stipulation but he didn't think it was necessary. Chairman Witham stated that it was his understanding that they couldn't have any more tables and chairs because that was how it was presented. Mr. LeMay stated that he didn't feel there was a major justification for adding a stipulation so he would rather not. Ms. Chamberlin stated that they did have to rule on the petition that had been presented. She didn't think the applicant could jam more than a few tables in there anyway so the stipulation could be left off.

Chairman Witham called for a vote on attaching a stipulation limiting the applicant to 5 tables with 2 chairs each. The vote was 2 to 3 with Mr. Mulligan and Chairman Witham voting to attach the stipulation and Ms. Chamberlin and Messrs LeMay and Parrott voting against.

Mr. Parrott stated that he shared Mr. Mulligan's concern but there was a sketch showing 5 tables and 10 seats which would be going to the Inspection Department for compliance. He added that this shop was probably not going to be a destination spot, more of a drop by and with no major impact on parking. He felt the initial motion to grant the petition could be approved.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 5 to 0.

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3) Case # 4-3
Petitioner: 750 Lafayette LLC, owner, Summit Land Development, applicant
Property: 750 (&720) Lafayette Road
Assessor Plan 244, Lots 7 and 8
Zoning District: Gateway
Description: A single-lane drive-through facility in association with construction of a 4,000± s.f. bank.
Request: 1. Special Exception under Section 10.440, Use 19.40 to allow a one-lane drive-through facility as an accessory use to a permitted principal use.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin noted that they had previously been before the Board for a sign. If the Board Members had driven by the property, they could see the transformation already underway which would involve very aggressive landscaping and some removal of pavement. Since they were before this Board and the Planning Board, the plans had changed in terms of the building closest to Greenleaf Avenue, now a two-story building for which they were proposing a drive-through facility. The building was a permitted use in that zone but the drive-through was permitted only by special exception. A special exception was required as it was a use that warranted a second look to see if conditions were there to permit it. For example, there might be a number of situations with a drive-through facility where the queuing might be an issue. Attorney Loughlin referred to the plan which indicated an area of over 160' where 8 cars could queue if necessary, which would be far greater than the usual number at a drive-through.

Attorney Loughlin stated that, in his submitted materials, he had addressed each of the specific requirements of the special exception. Unless the Board had a question, he would not go through those, but he would go through the review criteria that had to be satisfied as spelled out in the departmental memorandum. He read No. 1#, which was the standards for this particular use. #2, covered no hazard to the public or adjacent properties on account of fire, explosion or release of toxic materials, which he stated would not happen with a simple drive-through window. #3 dealt with no detriment to property values or change in the essential characteristics of any area. He stated that this use would hardly be noticed and there would be an overall improvement to that neighborhood from the landscaping and increase in the surface water treatment of drainage, which now drained into the salt marsh. This was the first time it would receive treatment on site. #4 was

that there be no creation of a traffic safety hazard or increase in traffic congestion. They had submitted a traffic study for site review and the impact of a drive-through was minimal. The whole traffic situation was actually improved in that everything was pulled further back from the roadway, with all the traffic meted out through the signalized intersection. #5 dealt with excessive demand on municipal services. He stated that there would be no impact of any consequence and, if anything, it would be positive. Regarding #6, storm water runoff, he reiterated that there would be less pavement and surface water would be treated on-site before going into the marsh. Eric Weinrieb and Erick Saari were also there from Altus Engineering for any questions.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Ms. Chamberlin stated that the petition was similar to the bank petition presented previously. The Ordinance anticipated requests for drive-throughs and allowed them to be granted by special exception. Addressing the standards, she stated that there would be no hazard to the public or adjacent properties or detriment to property values. This was a commercial area and people were entering and exiting all the time. It would be no different with a bank so that there would be no change to the essential character of the neighborhood. There would be no creation of a traffic safety hazard or increase in traffic not addressed by the complete redesign of the site. This was simply adding a drive-through so that there would be no excessive demand on municipal services. There were several banks in that area so that public demand would be spread out. She stated that it had been presented that there would be better on-site treatment of storm water so there should be an improvement in storm water runoff over what had been taking place.

Mr. Parrott concurred, stating that this was a logical use for the property. In terms of traffic impact, there was already a signalized intersection so he could not see that any traffic hardship would be created.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 5 to 0.

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Ms. Rousseau resumed a voting seat.

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4) Case # 4-4
Petitioners: Five Way Realty LLC, Two Way Realty LLC, & Richard P. Fecteau
Property: 80-100-120 Spaulding Turnpike
Assessor Plan 236, Lots 38, 37 & 33
Zoning District: General Business
Description: Storage, offices and automobile dealership with parking and signage.

Requests:
1. A Variance from Section 10.571 to allow an accessory use in a Required front yard.
2. A Variance from Section 592.20 to allow the sales, rental, leasing, Distribution and repair of vehicles and related equipment, parking, display and storage within 200' of a Residential District.
3. A Variance from 10.843.21 to allow vehicles sales, use and parking And outdoor storage and display within 40' of the front street right-of-way.
4. A Variance from Section 10.1113.31 to allow off-street parking areas, accessways, maneuvering areas and traffic aisles within 100' of a Residential District.
5. A Variance from Section 10.1113.41 to allow off-street parking areas, accessways, maneuvering areas and traffic aisles within 40' of the front lot line.
6. A Variance from Section 10.1113.41 to allow off-street parking areas, accessways, maneuvering areas and traffic aisles within 40' of the front lot line.
7. A Variance from Section 10.1243 to allow a second 100 s.f.± free-standing sign where only one free-standing sign is allowed on the combined lots.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin stated that he was there with Richard and Jennifer Fecteau, as well as Eric Saari and Eric Weinrieb of Altus Engineering. He stated that 80 Spaulding Turnpike had been a gas station and, most recently, an adult bookstore. 100 Spaulding Turnpike had been the Madeline's Daughter site and 120 Spaulding Turnpike was the Port City Nissan dealership and had been the site of a car dealership since the 1970's. He stated that this was a unique 10.75 acre property with less than 3 acres zoned for commercial uses. Previously, the owners had made an unsuccessful attempt to install parking in the residential zone behind the dealership. When the former Madeline's Daughter property became available, they had purchased that and, most recently, the bookstore site. They now owned all the property from about 150/140 Spaulding Turnpike down to 80 Spaulding Turnpike. There was over 1,000 feet of frontage on the Spaulding and 10.75 acres, the majority of which was uplands. The property could also be accessed from two ramps created in 1950 when the Spaulding was developed.

Attorney Loughlin stated that this proposal, which seemed like a lot of variance relief, was to add 10,276 s.f. of impervious material to create additional parking in a business zone. He stated that everything proposed was a permitted use but they were seeking relief from the setbacks which overlapped the property in a number of ways and wouldn't allow any development for automobile dealership purposes without variance relief. He stated there was a 200' setback from the edge of a residential district, which came within 150' of Spaulding Turnpike extending 50' past the dealership and then there was a 40' setback for automobile dealerships from the roadway for display of vehicles so there was a double-up on the prohibition on display of automobiles. He stated that it was understandable why those types of regulations were developed as there were locations where a dealership within 200' of a residential district might be problematic. In this situation, there was the length of a football field between the closest dealership use and the closest home. There was a 300' Public Service easement which separated the area where the dealership

proposed to improve the 80 and 100 Spaulding Turnpike properties. He stated that, if you looked at the property from the railroad bridge to Gosling Road on the Route One Bypass and on the Spaulding, one of the predominant uses was dealerships, which he listed. The uniqueness of this property was that the only dealership that was in a similar situation was the Mazda dealership. At the Ford dealership and beyond, the 300' easement which ran behind it was zoned commercial so the 200' setback from residential uses ended up in that easement area with no impact at all. In the back of all the other dealerships, the zoning essentially did not require additional setbacks so this property was quite unique in that sense, in addition to being a fairly large property.

Attorney Loughlin stated that six variances seemed like a lot of zoning relief but he would go through them quickly. In his submitted material, he had gone into more detail as to why they met the conditions for a variance. The first variance was for an accessory use in the front setback and that was to be able to use the former bookstore for a detailing facility. The building was in today's setbacks so that any new use of that property would require relief. He stated that they would be improving the site with landscaping. The second variance was to allow vehicle sales within 200' of a residential district. Again, they were 300' from a residential district but because the zoning line was on the Spaulding Turnpike side of the easement, they had overlapping restriction on the setback and had to request relief.

The third variance was for the display and parking within 40' of a front setback. While that was a requirement which made sense in some places, on the Spaulding Turnpike, there was probably a 50' area of open green space from the edge of the breakdown land to the right-of-way fence. He circulated some photographs to show what was there now. He stated they were asking for relief in two separate places which he pointed out on the display. One was where, in front of the former bookstore, the pavement extended 25' into the State right-of-way. Where that pavement would be pulled back to the property line, they were asking for relief so that they could use that area between the existing garage and the property line for storage. They were reducing the potential storage by 50% but it would make the property more compliant with the Ordinance and allow more green space. Another area where they were seeking relief from the 40' setback was in front of the former Madeline's shop. That building had the benefit of a variance from 1996 that allowed parking in front of that building within 4' of the right-of-way fence. The pavement they could see in the photographs had all been done with approval from the City. The current owners could take advantage of that setback variance and have parking on at least 60% of their lot within 4'. Instead, they were proposing to give up that variance and have the parking 25' from the right-of-way along the entire Madeline's Daughter property, with the result that the amount of pavement in that area would be pulled back significantly which would be an improved situation.

Ms. Rousseau asked Attorney Loughlin if he was on number five for Madeline's space. Attorney Loughlin stated that he would use the chart they had so that he wouldn't throw anyone off. No. 3 was sales and storage within 40' of the front street right-of-way and that was the former Madeline's Daughter property.

Attorney Loughlin stated that No. 4 was a variance to allow off-street parking areas and accessways within 100' of a residential district. One of the improvements was that the tractor trailers that delivered new cars would be able to exit the roadway, drive into the site at the bookstore entrance, unload and drive out the other end. They would not be unloading on the street. The problem was that the Ordinance did not allow an accessway within 100' of a residential zone so they couldn't have a driveway servicing the property, or have a layout that made sense,

and still abide by the Ordinance. He didn't feel the Ordinance was designed to prohibit a driveway, in this case, 500' from a residential zone. No. 5 was to allow off-street parking areas and accessways within 40' of the front lot line. That went back to where they were asking for parking within 25' of the roadway and be able to be able to park in front of the brick building, but, in order to have the driveway go from the roadway into the lot, they needed a variance. He maintained that this might make sense in certain contexts, but not in this one.

Attorney Loughlin stated that No. 6 was to allow a second 100 s.f. free-standing sign where only one free-standing sign was allowed on the combined lots. For this property, they could have by right a 100 s.f. sign for each of the three lots. The reason a sign in this location was important was that there was an entrance that would provide much easier access into the site from the Spaulding and it was more than 1,000' from the existing entrance. They needed to alert motorists that this was the best place to turn to get into the property and a sign at that location was needed in terms of safety. One of the problems with the entrance now off the Spaulding was that you went by the dealership and then through the yard at the little ticket place and back into the dealership. That was less than ideal. The proposed new entranceway would make a lot more sense and it would be helpful to have a sign at that location. The additional sign at that location would guide the public and identify the brand being sold there.
Stopped reviewing

Attorney Loughlin stated that the uniqueness of the property was spelled out in the material. He referred to the aerial view in the submitted material, noting that there was no residential use in close proximity. The land had been zoned for commercial uses for 40 years and there would be no negative impact on the value of surrounding properties. The former Madeline's Daughter site would be more attractive with reduced pavement. For the first time, there would be treatment of surface water runoff and they could see in the parking lot some recessed areas for plantings. In the justice balance test, he stated that, in each instance, denying the petition would harm the applicant with no benefit to the public.

Chairman Witham noted that for the auto detailing building on the Spaulding Turnpike side, there was a vehicle display area indicated and he asked if any of the 6 variances pertained to that area. Attorney Loughlin responded t hat it would be the variance that allowed display within 40' of the right-of-way. In front of the detailing building, they were asking to be able to be up to the property line, which was about 25' further back from the current paved area. In front of Madeline's Daughter, they were asking for 25', but it was covered by that 40' setback variance request. Chairman Witham asked if the pavement itself extended beyond the property line and Attorney Loughlin responded about 25', he thought.

Mr. Eric Saari from Altus Engineering stated that the rendering in the packet showed that the small building which was once the adult bookstore had some pavement in front of it, most of which currently existed. A lot of that would be removed. Some of it had to remain in the right-of-way because that was the best access. The building was built so far up against the right-of-way that to get a driveway in on that side of the building, they were using some of the existing pavement that was in the right-of-way. That was part of the 40' variance and, on the other side, they had 26' of setback where 40' was required. Chairman Witham asked if there was pavement that went beyond the property line in that vehicle display area. Mr. Saari confirmed there was, noting that they were removing as much as they could. Chairman Witham stated that he couldn't see who was going to enforce parking the vehicles only on the dealership property when there was

pavement that encroached over the property line and was labeled vehicle display area. If you told an employee to go park four cars in that triangular space, he was oing to bring it right up to the edge of the pavement. Mr. Saari stated that this was to be used for cars exiting onto the new side driveway. A parked car would be blocking the driveway. The building would be set up as sort of a drive-through operation accessing from either the back or the front and driving out the other end. Chairman Witham stated that it was then was labeled vehicle display area but it would never be used for that. It was driveway. Mr. Eric Weinrieb stated that the plan did say vehicle display area but that was not the intent. It really was intended for the storage of the vehicles that were going into or coming out of the detailing area because they had the garage doors on both sides. He reiterated that the area was not for vehicle display but for access. Chairman Witham asked, if there were a favorable motion, they would be amenable to a stipulation that cars could not be parked, queued, or displayed there and Mr. Weinrieb responded, "absolutely."

Ms. Rousseau asked for clarification as to which of the three properties the variances were assigned. Attorney Loughlin stated that there were no variances for 120 Spaulding Turnpike, the existing dealership. The rest of the variances were for either or both 80 or 100 Spaulding. Ms. Rousseau commented that it was a little confusing and it would have been helpful to have the variances listed by lot. Attorney Loughlin responded that the lots would be merged into one but they had listed and advertised them separately so that all the abutters would be notified. He recommended that the Board think of all the lots as one property.

Ms. Rousseau stated she still needed clarification and asked if he could go down the line with the six variance requests as to the property for which they were needed. Attorney Loughlin stated that the variance for an accessory use in a required front yard was only 80 Spaulding Turnpike. The variance to permit sales within 200' of a residential district was both 80 and 100 Spaulding. Ms. Rousseau stated he then needed two variances for that. When Attorney Loughlin stated if she wanted to put it that way, she responded that was the way it now stood legally. Attorney Loughlin consulted with his client and then stated that the 80 Spaulding lot was smaller and some of the land behind that lot was actually part of the property that was listed to Richard Fecteau at 120. That rectangular parcel was in the General Business zone and would be an area for display of vehicles so all three lots were included with this second variance. Ms. Rousseau stated they then needed three variances for the second type of relief.

Attorney Loughlin stated that the third variance relief was to permit sales and outdoor parking and display within 40' of the front street right-of-way. That would be 80 and 100 Spaulding. The fourth variance relief was to allow off-street parking areas, accessways, maneuvering areas and traffic aisles within 100' of a residential district. He would say this would be for all three lots. It would again be all three for the fifth variance, which would be to allow the same types of uses within 40' of the front lot line. Number six, to allow a second free-standing would only be 80 Spaulding. Ms. Rousseau stated that the free-standing sign was no. 7.

Attorney Loughlin stated that the issue of what was issued to which lot could be solved by making their approval if granted conditional that it would not be effective until the lots were merged. Attorney Loughlin stated that, if they were not treating these as separate lots, they wouldn't need the variance for the sign so the sign request anticipated the merger. When Ms. Rousseau asked if it wasn't for a sign, Attorney Loughlin stated it was but they could put a 100 s.f. free-standing sign There was a brief discussion of the numbering of the variances with the agenda incorrectly listing the request for off-street parking areas within 40' of the front lot line twice so that the variance for

the sign appeared to be #7. It was clarified that the listing and numbering in the memorandum and Attorney Loughlin's submittal was correct. Attorney Loughlin reiterated that the simplest thing might be to make any variance subject to the lots being merged because the Planning Department was going to make them merge them as part of the site review process. Chairman Witham stated he was comfortable with that.

Ms. Chamberlin asked if, should the requests be granted, any commercial activity would be closer to the residential areas. Attorney Loughlin stated there would be parking behind the existing bookstore lot where there was none. At that point, he believed it was well over 300' to the nearest residential use and it was zoned for that purpose. Ms. Chamberlin asked if it was so far away because of the PSNH easement. Attorney Loughlin stated that in this particular area, the setback line was measured from what amounted to the very edge of the easement. Ms. Chamberlin asked if there would be increased noise exposure for the residential area. Attorney Loughlin stated that she could see in the aerial and submitted photographs that there was more than the length of a football to the nearest residential use. Ms. Chamberlin asked if he could explain again why it was in the setback area if the distance was so far. Mr. Eric Weinrieb from Altus Engineering referred to one of the plans and pointed out the area where they were expanding the pavement. There was a section of the site in parking that was already in the residential district and he indicated another area that was closer to residential uses than what they were proposing. She had asked if the project would be coming closer to residential uses than the existing situation and the answer was, "no." The area he indicated was the existing area and the proposed expansion area was further away from any houses.

Ms. Rousseau asked if the applicants would be all right with a stipulation regarding the free-standing sign. Their request was for a second for a total of 200 s.f. for three combined lots, specifically 80, 100 and 120 Spaulding. She asked because they might not want to combine one of the parcels for some reason. Attorney Loughlin responded that the project wouldn't work unless they combined them so the stipulation would be fine.

Mr. Richard Fecteau stated that the activity was primarily going to be a storage/parking situation. 120 Spaulding Turnpike would remain intact. The additional parking and space to develop was strictly for storage and display of cars. The only activity would be the amount of vehicles going into the reconditioning center, the two-bay building down at the end. He also wanted to comment on the access off the Spaulding Turnpike. This would allow delivery trucks to access them directly and keep activity away from the residential area.

Mr. Weinrieb stated that now it was difficult to safely maneuver commercial vehicles onto the property and they would like to reduce the impact on the neighbors. Having a sign would also create a safer situation with a sign to alert people driving at high speeds on the highway before they got to the facility. He also noted that they were in a sensitive watershed area. They were trying to reduce sources of pollution and wanted to get rid of their septic system and tie into the sewer. They would have state-of-the-art storm water treatment which would benefit the City as well as the watershed.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Tammi Truex stated that she lived at 187 Meadow Road. She stated that the only time they were treated as a neighbor was when they got a letter. She listed all the things a good neighbor did

not do, including flying balloons, talking to people on a p.a. system and ignoring local traffic laws. She had lived there for ten years and paid taxes to feel that her rights were protected. She didn't believe that the trucks would be kept from the residential area and would prefer safety issues to be addressed by public works people who were professionals.

SPEAKING TO, FOR, OR AGAINST THE PETITION

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Chairman Witham noted that, if there were a positive motion, he would be adding a stipulation.

Ms. Rousseau made a motion to grant the petition as presented. She felt that she knew what the Chairman's stipulation would be and she wanted to add two stipulations: one, that the variances would not take effect until the three sites, 80, 100, and 120 Spaulding Turnpike, were merged into one lot; and, two, that there will be only two 100 s.f. free-standing signs on that merged lot. Mr. LeMay seconded the motion.

Ms. Rousseau stated that she had viewed the entire property and it was sort of an eyesore for the City right now. It would be nice to see the vacant properties developed into active, attractive sites. With other dealerships on the street, it seemed a perfect fit this particular site. While she had heard the abutter, she felt that the abutter chose to be near a general business district with a busy highway. She noted that the commercial property owners also paid taxes and supported the City.

With regard to the criteria, Ms. Rousseau stated that she would take them as a whole. She did not see this as being contrary to the public interest. The essential character of the neighborhood would not be changed and she had seen no facts that the proposal would threaten the public health, safety or welfare or injure the public rights of others. There was already a dealership use with which there had been no issues in the past. She stated that the spirit of the Ordinance would be observed. While there were setback requirements, this was a unique site fronting on the Spaulding Turnpike so that it was a very different sort of right-of-way from Islington Street. The variances, such as being 40' of the front street right-of-way were not as much of an issue as they might be in another general business district.

Ms. Rousseau stated that there was also the spirit of the Ordinance with regard to related equipment, parking, display and storage within 200' of a residential district. In looking at the submitted exhibits, it seemed that the residential area was far enough away. There had been no serious issues with the residential district with the existing dealership. She felt this was just a continued use and probably a good use of that site. Regarding the free-standing sign, she felt that one or two hundred square feet of free-standing signage was perfectly reasonable for a general business district on a busy highway. They needed to advertise their business and she thought it was a reasonable request. She stated that substantial justice would be done in that the benefit to the applicant would not be outweighed by some harm to the general public or other individuals. She didn't see how the public could be harmed because it was just a continuation of the current use by other dealerships on that street.

Ms. Rousseau stated that she saw no evidence from any opposing party that the value of surrounding properties would be diminished. She reiterated that parts of the site right now were an eyesore and they could only improve that particular section of the neighborhood for the City of Portsmouth. Regarding the hardship criteria, she stated that the property could not be used in strict conformance with the Ordinance. Some of the lots had been vacant for a long time. If they could have been used as they were laid out, they would have been. These particular uses would not alter the essential character of the neighborhood and she didn't think they wanted to go back to the prior uses on the vacant sites. She felt this was a special property with a special configuration. The property owner did have a hardship as far as using the sites in their current condition. Overall, she had no issues with the requested variances as long as it was not each property getting the variances, but the combined property.

Mr. LeMay agreed that this was a great use for this area and he didn't know what else would go there that would make more sense. In terms of the buffering and distance from other uses, they had the turnpike and Pease on one side. On the back side, there was a 300' right-of-way for the power lines which effectively satisfied the spirit of the Ordinance with respect to proximity to the actual residences in the residential neighborhood. That right-of-way was pretty well locked down and there was nothing that was going to go in that area.

Chairman Witham stated that he would like to request the maker and second of the motion to entertain a third stipulation that the area in front of the auto detailing building was not to be used for parking, display or queuing. Ms. Rousseau and Mr. LeMay agreed

Ms. Chamberlin noted that the applicant had testified that the use was not going to be detrimental to the residential neighborhood and would actually improve it with different access for truck deliveries which had been a problem in the past. The location was an awkward spot in front of the Spaulding Turnpike and the past uses had not been desirable. She felt that, to have the lots under one ownership with a car dealership made sense and fit in with the intent of the zoning. Based on the testimony, she believed this would be an improvement in the over use of the site and in terms of problems in the past with the residential area so she would support the motion.

The motion to grant the petition as presented and with three stipulations was passed by a vote of 6 to 0. The three stipulations were the following: 1) That the variances would not take effect until the merger of the three lots was complete; 2) that after the merger there would not be more than two free-standing signs on the merged lot; and 3) that the area in front of the auto detailing building would not be used for parking, display, or queuing.

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5) Case # 4-5
Petitioner: Tammy L. Byron, owner & Scott Broughton, applicant
Property: 633 Dennett Street
Assessor Plan 161, Lot 34
Zoning District: General Residence A
Description: Construct an 8' x 10' shed, 11'6"± in height at the rear of the property.
Request: 1. A dimensional Variance from Section 10.571 to allow a side yard setback of 2' where 10' is the minimum required.
2. A dimensional Variance from Section 10.573.20 to allow a rear yard setback of 4' where 10' is the minimum required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Scott Broughton stated that he lived at 633 Dennett Street. He and his wife were living on a large lot and wanted to build a small storage shed to get their lawn mower and combustibles out of their small house. He distributed a larger plan for the yard, noting that conforming with the Ordinance would put the shed right in the middle of the back yard. Both of their neighbors would be looking at it from either their kitchen or dining room if they met the setbacks. There was also a picture in the packet from their parking area which showed a garage the Board had approved for his neighbor which was about 3' away from their property line. Their shed would block the view of that from their yard. He distributed a note of approval from those neighbors at 623 Dennett Street. Mr. Broughton stated that the other reason to put the shed in the proposed location was their landscaping plan for the future. With the Hyder property right across the street, they were staring at quite a bit of construction and their plan was to improve their property and add some buffer around their house. He stated that granting the variance would not be contrary to the public interest and would be in the spirit of the Ordinance. He also felt that the value of surrounding properties would not be diminished. If the shed were conforming, it would block more of their neighbors' view. The shed was attractive, would be appealing to the neighbors, and would match the design of their house. He noted that both of the neighbors had storage facilities. He believed it was a reasonable use and hoped they would approve the location.

Mr. Mulligan asked if the neighbor's garage shown in the photograph Mr. Broughton provided appeared in the aerial view. Mr. Broughton stated it might not as the aerial might be older. Mr. Mulligan stated he was trying to orient this. He asked if their proposed location would essentially block the view, from this photograph, of the garage. Mr. Broughton stated that was correct. He could see a chainlink fence on the left. It would be about 4' from the left of it and then 2' from the yellow blooming bushes in the back. When Mr. Mulligan asked if it would be visible from Dennett Street, he stated that it would. He confirmed that the neighbor's garage was also visible.

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

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

DECISION OF THE BOARD

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

Ms. Chamberlin stated that, looking at the photograph, the location of the shed would actually be an improvement for the neighbors as well as for the property owner by tucking it into the corner. For her it was not that it was better for his landscaping but better for the whole neighborhood to put the storage where the neighbor had their garage.

Regarding the criteria, she stated that granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance. The setbacks were to improve the overall green space and layout of the neighborhood. Because of the way the houses and the neighbor's

garage were configured, in this instance, not observing the setback was the better way to move forward. It would do substantial justice and did not diminish the value of surrounding properties. As the applicant pointed out, other people had storage and they had no garage or place to put their outdoor materials. There was an obvious need for the shed to fully use their property. Regarding unnecessary hardship, the special condition was that meeting the setbacks would actually make the shed placement less attractive than the proposal.

Mr. Parrott concurred and had nothing to add.

Ms. Rousseau stated that she would not support the motion. She had looked at the photograph and it was very dense. There was some open space now and the applicant could use some creative ideas. They had setbacks for a reason and, for density reasons, the applicant couldn't just place another building right there.

Mr. Mulligan stated that he would support the motion. He pointed out that, as the applicant suggested in his drawing, a conforming shed could be put in the setbacks. He thought they needed to be mindful that there was going to be a very large development across the street from this property and it was important to be able to preserve as much of his rear yard as possible. He felt this was an appropriate solution.

The motion to grant the petition as presented and advertised was passed by a vote of 5 to 1 with Ms. Rousseau voting against the motion.

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6) Case # 4-6
Petitioners: Joanne F. DeWolf & Timothy G. Foley, Jr.
Property: 20 Marjorie Street
Assessor Plan 232, Lot 21
Zoning District: Single Residence B
Description: Construction of a single family home with attached garage.
Requests: 1. A dimensional Variance from Section 10.521 to allow a rear yard setback of 18.6'± where 30' is the minimum required.
2. A dimensional Variance from Section 10.521 to increase the building coverage to 27%± where 20% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

Mr. Stephen Haight of Haight Engineering stated that he was representing the applicants. They were proposing a single family home with attached garage and deck on a currently vacant lot. They needed a variance for an 18.6' rear yard setback for the deck. The house itself would fit within the setbacks but would make up, along with the deck, garage and stairs, the 27% building coverage for which they also needed a variance. He noted that the petitioner had been before the Board the previous October at which time relief was granted for the 6,400 s.f. size of the lot itself.

Addressing the criteria, Mr. Haight stated that granting the variance would not be contrary to the public interest. They were proposing a single family home with attached garage and deck similar to others in the neighborhood. The spirit of the Ordinance would be observed as this was a lot of record that predated current zoning. The size and aesthetics of the home would be consistent with others in the neighborhood. He stated that substantial justice would be done as granting the relief would allow the owner full use of her property consistent with the uses of the adjacent properties. The value of surrounding properties would not be diminished as the home would be of new construction and, again consistent with the adjacent single family homes in the neighborhood. He read the part of the criteria regarding literal enforcement of the provisions of the Ordinance resulting in unnecessary hardship. He stated that currently zoning required a 30' setback at the rear, 10' on the side and an average of the homes on Marjorie Street for the front yard. The house itself would meet all those setbacks and the relief was for the proposed rear deck. In terms of the percentage of lot coverage, they were proposing a colonial style home with an attached garage which was included in that number. They felt that what they were requesting would not be a detriment to the neighborhood.

In response to questions from Mr. Mulligan and Ms. Rousseau, Mr. Haight stated that the home itself was 1,008 s.f., 28' x 36'. The garage was 528 s.f., 22' x 24', and the deck was 144 s.f., 12' x 12'. The total came to 1,680 s.f. on a 6,400 s.f. lot of record. He confirmed that the house with the garage would meet the setback; the deck would not.

Chairman Witham stated that he was struggling with the fact that, in October of the past year, they had presented plans for a house to be built and needed variances for an undersized lot. He had voted in favor of granting the request as the house seemed in scale with the other homes in that neighborhood. They were now coming back with a much larger structure. When the Board had granted it, it was as presented and advertised, which seemed to be for a cape. The applicant now had a buildable lot and was asking for a colonial with a deck. He stated that the scale seemed larger and oversized compared to what had been presented the last time and he was not sure he would have approved it. He was wondering if that variance still held as what had been presented was a cape and now they didn't have a cape.

Mr. Haight stated that one of the requests at that time was for lot coverage but it hadn't been written into the advertisement. At that time, it was a 30' x 36' house, 25% lot coverage with all the appurtenances. After looking at different homes and considering resale value, the owner had looked at various plans to see what would fit on the lot and felt that a colonial would yield the best return.

Chairman Witham asked why the applicant had not done that review before presenting them with a cape and she was now asking for a deck on something that didn't fit. Mr. Haight stated that the owner has asked them to look for a little better return. That being said, in terms of lot coverage, they had asked previously, he thought, for 25%. He didn't feel the applicant was trying to do anything different although the home now was a little larger with the attached garage. Realtors had advised that the deck would make it more saleable. Right now, they were proposing a colonial style home and before it was a story and a half cape style home. They had actually advertised the garage last time as well. In terms of the size, itwas now two stories and 10' wider. He stated that the owner could live with a smaller size house, but what the realtor had talked about made more sense for the lot. Chairman Witham commented that the realtor would support what would make

the most money and the Board was more contextual. Mr. Haight reiterated that they could build a smaller home, going back to the same footprint and, if the deck was too much, eliminate the deck.

Ms. Rousseau asked what the difference was in square footage between the old proposal and this one, noting that they were asking for 2% more in coverage. Chairman Witham stated that it was the footprint. The structure could be four stories, not just one. Mr. Haight stated that they were talking about a couple of hundred square feet. The house was taller and slightly larger in the footprint. Last time, they had never gotten to the lot coverage issue which was why they were there now. Again, there was no problem with going with a smaller footprint. Ms. Rousseau asked if there were not other two story properties on the street and Mr. Haight confirmed there were. She stated that they were asking for 2% more coverage and she didn't see the issue.

Mr. Parrott stated that he was looking at 27% lot coverage where 20% was allowed. That would be a substantial variance for a structure that they were designing and was not already built and just needing an addition. He hadn't heard any argument about hardship in the lot, not something to do with the sale of the property and looking at comparable properties in the neighborhood. He had reluctantly voted for a 6,400 s.f. lot, which was less than half of what was required by zoning as he had felt this was a lot of record and there were some homeowners' rights. That didn't translate into building anything they wanted and requesting two considerable variances with no hardship as to the land. He noted that financial issues were not part of the criteria the Board was obligated by law to apply. Although he was not saying this was the case, it almost seemed that it had been pre-planned to come in and get one thing and then come back with a larger request.

Regarding the hardship, Mr. Haight stated that the lot itself was small. If this were a 15,000 lot, the 20% lot coverage would cover a much larger area. 20% on this lot would not allow a comparable home to others on Marjorie Street. He stated that they had not intended to come back. In October, they had intended to have the lot coverage and presented a plan, but when it came out for advertisement, it wasn't included so they couldn't add it back in. With an opportunity to look at it again, they were trying to have a house that would be comparable with those next door and across the street.

Mr. Parrott asked how much design work had been done to try to come up with something that went to the allowance within the setbacks. He noted that some people lived without a double garage. Mr. Haight stated that, if they eliminated the garage, they had a 1,008 s.f. home. With the deck, it would probably be about 22% to 24% on the overall lot coverage. Again, if that were an issue, they could look at the size of the building itself and make it work in terms of the setbacks. They were trying for something realistic in terms of what would make sense for the lot.

Chairman Witham stated that another thing that worried him was that originally they had just presented pictures of a cape and photocopies of house plan magazines. Now there was a deck, but it didn't show up on the house plans, only on the site plan and he didn't have a sense of the deck height. They were asking for a variance for the deck and the elevations didn't even show it. Mr. Haight stated that they had talked to a builder and the home was a real design. When they looked at the elevations, it could be 4' to 5' above grade in the back for the deck. It wasn't on the house plan because the deck was basically part of the lot coverage they were looking for. Chairman Witham stated that, when he looked at the elevations and the ground plane , the deck looked to be 18" to 2' off the ground. 4' or 5' off the ground was about the bottom of the window. Mr. Haight stated that the lot sloped from left to right, dropping 4' to 5'. Chairman Witham stated that was

what he thought but again it added to the scale and height and feel of the house. The elevations also showed a perfectly flat ground all the way across. Mr. Haight agreed but maintained that the deck was 4' above grade at the rear looking from Marjorie Street on the right hand side. If the issue was lot coverage, they could make a smaller home consistent with what had been considered in October, or they could have no deck. They were trying to give an idea of a full build-out of the lot. Chairman Witham appreciated that, but he then felt the Board was getting into the position of designing the house and they didn't want to be in that position.

Mr. LeMay stated that he agreed with Chairman Witham's remarks.

Ms. Rousseau stated that she had been more concerned with the last petition. This didn't seem a big deal to her. Basically they were already approved for 25% and he was adding 2% to the original request. It looked like there was some nice distance from this property to the next, with an open deck. She felt that looking at the back of a shed was more invasive.

Mr. Haight clarified that, when they made the application in October, it was 24.9%. Previously, the house was 34' x 30', with a 24' x 24' garage. Now they were requesting 28' x 36', shrunk the garage to 22' wide and added the deck. This all equated to 27% building coverage. Chairman Witham stated that there was just a certain scale last time that he felt was contextual. Mr. Haight again reiterated they had no problem with reverting to the other size. Chairman Witham posed a question for the Planning Department to look into - whether the applicant could even come before the Board for a deck attached to a different house that was part of an approval for a substandard lot.

Ms. Rousseau stated that she didn't see an issue with someone changing their mind during the design process. If what had been originally wanted had changed since the variance then the applicant came before the Board again to ask for a different variance. The Board could say "yes" or "no," but they were talking about a 2% increase in building coverage.

Ms. Chamberlin asked if they knew how their new proposal compared to others. Mr. Haight stated that most of the homes were two-story structures, next door, directly behind and across the street. In terms of overall size this, with an attached garage, would be a little bit larger than the house next door which also belonged to this applicant. As to the aesthetic feel, she was looking for a colonial, but if that was the issue, they would be more than happy to go back to the cape. What they were looking for that evening was lot coverage and the setback for the deck. If it appeared that the setback was an issue, they would have no deck.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Elaine Langer stated that she lived two properties over. She stated that, under the site plan revew regulations, abutters should be given ten days notice and she had not received her notice until April 10 which she termed inadequate notification. She claimed that was the reason a lot of the neighbors couldn't be there. Ms. Rousseau asked if she was proposing that this be continued so that people would have enough notice. Chairman Witham noted that Ms. Rousseau had not asked to be recognized before speaking. Ms. Langer stated there was a lot of confusion about this proposal and a lot of misconceptions about the homes around there. She stated she was taxed as a one and a half story home, but she had two floors. Most of the homes did not have attics. She described other homes in the neighborhood, maintaining that a two story home would not be

conducive to the neighborhood. She believed there was an ordinance about uniformity in height but hadn't had a chance to look due to the late notification.

Chairman Witham commented that the New Hampshire Land Use Guidebook regulation stated that they needed to provide five clear days notification prior to the meeting so that the proper notification had been given. Ms. Langer read from the statute governing Site Plan Review. Chairman Witham stated that was for the Site Plan Review meeting. When Ms. Langer asked if this was not Site Plan Review, he clarified that this was the Board of Adjustment. Ms. Langer apologized.

Ms. Langer further outlined her concerns, which included drainage, what would happen when the dirt was displaced, and water flow onto adjacent properties. She wanted to ensure that what was built would be conducive to the neighborhood, not going higher and in the same style. She felt it would create a hardship for the neighbors if this home was larger and higher than the others and would be detrimental to the neighborhood.

Ms. Rousseau asked how that was detrimental. In what way did a two story property affect her personally in any way. Ms. Langer stated that the lighting would affect her because she was sitting downhill and it would affect problems she already had with water pressure. In response to a further question from Ms. Rousseau, she stated that she was in the house next to the one right next to this property. Ms. Rousseau stated that she was not going to be affected by sunlight as she was not right next door. She reiterated her uncertainty as to why Ms. Langer would be personally affected, noting that there were single story and two story homes in her neighborhood and all lived perfectly fine together. She didn't feel the argument had been made as to how Ms. Langer was harmed. Ms. Langer stated it was just the attractiveness of the neighborhood in changing the landscape. All the homes had similar styles and sizes. There was only one other house that had a garage. She maintained the overall appearance would be detrimental and stated that other neighbors had other issues.

Chairman Witham asked for any other questions. Ms. Rousseau began a question and he stated that the Chair needed to acknowledge her. Ms. Rousseau asked the him if she could ask this person a question. Chairman Witham told her to go ahead but to please keep things moving along. Ms. Rousseau stated then that the abutter wanted the applicant to be like everybody else. She wanted to dictate to this property owner what their property should look like and was saying that she wouldn't approve it unless it looked just like hers and everybody else's.

When Chairman Witham banged his gavel, Ms Rousseau stated that was a legitimate question because she was trying to understand. Chairman Witham stated that she didn't agree with her; that was fine and he directed her to stop. Ms. Rousseau said that she should be allowed to make that decision and he replied, "no." Ms. Rousseau continued her question when Chairman Witham gaveled again, stating, "Ms Rousseau." Ms. Rousseau stated that this was ridiculous and told him that he was overstepping his boundaries.

SPEAKING TO, FOR, OR AGAINST THE PETITION

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Ms. Rousseau stated that the applicant had requested to build a single family home with an attached garage and all they were looking for was a 2% variance on building coverage as they had been approved in the past for 25%. The applicants just wanted to add a deck on the back for a rear yard setback of 18.6' where 30' was required. She didn't believe the proposed structure would infringe on the view of the neighbors. Whether it was a cape or a two story property, it would not alter the essential character of the neighborhood in any way. Putting a two story property versus a cape did not in any way threaten the public health, safety or welfare or injure the public rights of anyone. She heard the abutter but didn't see how her public rights were infringed upon. She felt the abutter would like design input on what the property owner wanted to do with their property. Ms. Rousseau stated that the spirit of the Ordinance would be observed. They were looking at a setback variance and one for building coverage. She noted they voted on open decks at the time and this was not going to be an issue with the spirit of the Ordinance. Substantial justice would be done because the benefit to the applicant would not be outweighed by any harm to the public. Surrounding property values would not be diminished. It would be a nicer property than what was already there and could increase property values. She had not heard any constructive testimony to the contrary. In the hardship test, a deck was a minimal request. They should be able to have it as the Board approved these decks all the time without any issue. This was a vacant lot and the applicant was trying to design for a reasonable use of the site.

Mr. Mullian stated that he agreed. He wanted to note that he didn't see that, when they were there in October, 25% building coverage was approved although that wouldn't change his response to this application. He felt the significant factor was the small size of the lot so that they would rub up against coverage and setbacks. He felt that this was a reasonable request.

Chairman Witham stated that he couldn't support the application. For one thing, the lot coverage was never granted. The applicant might have written it down on a piece of paper but it was never advertised and granted so they were not asking for a 2% increase but a 7% increase. He noted that the substandard lot was not approved with the understanding that 25% lot coverage was a part of it. It was approved with an understanding that they would meet lot coverage and setbacks and there would be a cape on the lot which was more applicable to the surrounding neighborhood as described by the abutter. He couldn't wrap his arms around the fact that now there was a colonial in front of him. He stated that he wouldn't have been on board with the former approval of a substandard lot if it had entailed 7% of relief. He had no problem with the substandard lot but felt it needed a smaller house. He continued that they had a request for a deck but no plans or elevations. It showed up on the site plan and they were told it was 5' in the air but it was not on the drawings. The drawings indicated that the ground looked to be right up to the floor level. He felt that when an applicant asked for something, they should show the Board what they were asking for and stick with it. He felt there was no consistency with the drawings or the requests and he didn't agree with the statement that things changed and you could build what you wanted. They had asked for a small house to fit on a small lot. He felt there were a lot of missing parts and personally would like to see them come back and he could possible see some relief for lot coverage and possibly for the setback for a deck, but he would need detailed information. He didn't feel he would ever be able to wrap his arms around a colonial as was proposed.

Mr. Parrott stated that it was relevant to put on record that the October, 2011 approval granted three variances: 6,400 s.f. where 15,000 s.f. was the minimum lot size required; a lot area of 6,400 s.f. per dwelling unit where a lot area per dwelling unit of 15,000 s.f. was required and to allow 80' of frontage where 100' was required. The Board granted considerable amount of leeway to this lot by those three actions alone. He felt it was significant that there was no mention in the official actions of a house of any size and therefore no lot coverage or setbacks so this was a brand new request. There was no 25% coverage approval and the applicant couldn't compare this against something that didn't exist other than maybe some discussion points. The Board had taken action on what was in front of it and documented what took place. He felt that with a 6,400 s.f. vacant lot, regardless of what the neighborhood might be like, you ought to be able to build something that complied with zoning. They could drop the lot coverage down close to the allowed 20% and have a respectable house. He agreed with the Chairman that what had been presented in the past was nothing like what was being presented now. He also felt the Chairman's comments were appropriate with respect to the building plans because the deck was only shown in one place. Although there were architectural renderings, the deck was not shown on them and the Board didn't even know what it would look like. He was not ready to approve this.

The motion to grant the petition as presented and advertised failed to pass by a vote of 2 to 4, with Ms. Chamberlin and Messrs. LeMay, Parrott and Witham voting against the motion.

There was a brief discussion of the ten o'clock rule and the balance of the agenda.

Mr. Mulligan made motion to suspend the ten o'clock rule, which failed to receive four positive votes, Ms. Rousseau and Messrs. LeMay and Parrott voting against it. With a tie vote, the ten o-clock rule was invoked and the remaining petitions were postponed to the following week.

V. ADJOURNMENT

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

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk