MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m. **May 15, 2012**

MEMBERS PRESENT: Chairman David Witham, Vice-Chairman Arthur Parrott, Susan Chamberlin, Derek Durbin Charles LeMay, David Rheaume, Alternate Patrick Moretti

EXCUSED: Christopher Mulligan, Alternate Robin Rousseau

I. APPROVAL OF MINUTES

A) March 20, 2012

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

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B) March 27, 2012

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

Chairman Witham announced that the petitioners had requested to postpone the hearing on 314 Middle Street to the June Meeting.

Ms. Chamberlin stepped down for the following petition.

II. OLD BUSINESS

A) Case # 4-7
Petitioner: Richard S. Bean
Property: 324-334 Parrott Avenue
Assessor Plan 129, Lot 36 & 37
Zoning District: General Residence A
Description: Convert a single family to a multi-family dwelling with a two-car garage.

Request:
1. A Variance from Section 10.311 to allow a structure on a lot with less than the required minimum lot area and street frontage.
2. A Variance from Section 10.321 to allow a lawful nonconforming structure to be extended or enlarged in a manner that is not in conformity with the Zoning Ordinance.
3. A Variance from Section 10.324 to allow a lawful nonconforming structure to be added to or enlarged where the addition or enlargement does conform to all the regulations of the Zoning Ordinance.
4. A dimensional Variance from Section 10.521 to allow a lot area per dwelling unit of 3,211 s.f.± where 7,500 s.f. per dwelling unit is required.
5. A dimensional Variance from Section 10.521 to allow 28%± building coverage where 25.3% exists and 25% is the maximum allowed.
(This petition was postponed from the April 24, 2012 meeting.)

Attorney Timothy Phoenix stated that he was appearing on behalf of the owner, Mr. Richard Bean who was then distributing letters of support from neighbors. Also in attendance were Mr. Eric Weinrieb and Mr. Robert Lenahan, the engineer and architect respectively for the project. Attorney Phoenix stated that the proposal had been submitted after reviewing the requirements with Planning staff. Referring to the plans on display, he pointed out 324 Parrott Avenue where the work would be done to convert from a single family to a two-family with a garage in the rear. He indicated the locations of the ballfield, library and the adjoining lot at 334 Parrott Avenue, also owned by Mr. Bean and the subject of the easement for the driveway between the two lots. He had been advised by Planning that, under New Hampshire law, an owner of adjacent properties could not grant an easement to himself. Their intention, if the Board granted their request, was to deed 324 Parrott to Mr. Bean's sister or an entity she formed and they were open to a stipulation that a draft of the easement document be approved by the City Attorney's office, along with proof of separate ownership, before any permit was issued.

Attorney Phoenix stated that there would be a two car garage and two outside parking spaces in the paved area he indicated on the plan. Currently there was a half parking spot with the remainder of the parking on the street. They would resolve that problem so that the four spaces required for the two created units would be on-site. Relief was needed because the 324 Parrott Street lot was of insufficient size under Section 10.113 of the Ordinance. The final variance was added after discussions with the planner and that was to enlarge a nonconforming structure. He stated that the structure itself was conforming but, because of lot size and proximity to the lot line, etc. it couldn't be built there without a variance. They were also building a garage that met the requirements but was attached to a structure that would not.

Attorney Phoenix stated that the density requirement in the area was 7,500 s.f. per lot. They had 6, 422 s.f. on the existing lot with one unit. They wanted to make it two units which would translate to 3,211 s.f. per unit so they needed a variance for density. While it might seem like a significant density change, it needed to be considered in the context of the neighborhood. The intent of the density requirement was to allow light and space and he cited the surrounding the ballfield, the library and school across the street, which were intensely used themselves. He referred to his submitted exhibits for examples of the density in the area, with a number of lots also having parking issues. He indicated the various color coded lots on the plan on exhibit. He stated that 324 Parrott Avenue was unique in being one of the only single family lots, surrounded by a ball field, an intensive municipal use and intensive residential uses. He added that they

would be seeking one additional variance which would be for 28% building coverage, where it currently was 25.3% and 25% was the maximum allowed.

Referencing his submitted memorandum, Attorney Phoenix addressed the criteria for granting a variance. Considering the criteria dealing with the public interest and the spirit and intent of the Ordinance together, he stated that it was reasonable for the property owner to use his own property, while increasing tax revenues. He maintained that, while the proposal intensified the use with a second unit and slightly increased lot coverage, the lots were more in compliance that most of the residential lots in the area. As detailed in his memorandum, he listed the aims of the Ordinance and how he felt they were met by the proposal. He noted again that vehicles would be parked on-site and not on the street. The current deck would be replaced by a garage that compared favorably with what was now there. Citing the tests outlined in the case of Malachy Glen v. Chichester, he stated that the essential characteristics of the neighborhood would not be altered by a proposal in keeping with the area that was less intensive. There was nothing in the proposal that would harm the public health, safety or welfare. Surrounding property values would not be diminished. The library and ballfield would not be affected and the nearest neighbor had provided a letter in support.

Attorney Phoenix stated that there were special conditions creating a hardship. They had what was currently a single family home, bordered by a ballfield and on the edge of a residential area with many multi-family homes that did not meet the density and parking requirements. They would create 4 off-street parking spaces but, in order to do that, required innovative driveway access. He maintained that there was no fair and substantial relationship between the purposes of the Ordinance and their application to this property. The purpose of the density and lot coverage provisions was to ensure adequate light and air, which these properties met. He stated that the request was reasonable and substantial justice would be done by allowing the property owner a use of his property that was comparable to other residential in the area. He added that the applicants were amendable to a stipulation that there be approval of the easement and the deed approved and recorded as separate ownership before issuance of a building permit.

Chairman Witham stated that he had the wording for a possible stipulation which was that, “prior to commencement of construction, the applicant shall submit the final draft of the property deeds and proposed access easement to the City Attorney for review and approval.”

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. LeMay. Mr. Durbin added a stipulation that, prior to commencement of construction, the applicant should submit the final draft of the property deeds and proposed access easement to the City Attorney for review and approval.

Mr. Durbin stated that granting the variances would not be contrary to the public interest and the spirit of the Ordinance would be observed. This was a residential area with mixed uses and was

fairly densely developed and populated. The spirit of the Ordinance was to preserve light, air and space and this project wouldn't add any additional density not already existing. The proposal would be consistent with the characteristics of the neighborhood and not cause any harm to the public health, safety or welfare. Mr. Durbin stated that the justice balance test weighed in favor of the applicant who would suffer a detriment if the variances were denied while there would be no detriment to the public if they were granted. With no testimony to the contrary, he felt that the value of surrounding properties would not be diminished. In the hardship test, he stated that the property had special conditions and, given the nature of the abutting properties and the surrounding area, this was a reasonable use.

Mr. LeMay stated that the biggest variance request had to do with density but the property was unique surrounded by municipal uses, including the ballfield, so that there was plenty of open space. The proposal would not result in any encroachment on neighbors or change to the neighborhood from any noticeable standpoint. He noted that parking would be improved in a tight area.

The motion to grant the request, with the stipulation, was passed by a vote of 6 to 0.

Ms. Chamberlin resumed her seat.

III. PUBLIC HEARINGS

1) Case # 5-1
Petitioner: Norman T. Ohr, Jr.
Property: 69 New Castle Avenue
Assessor Plan 101, Lot 49
Zoning District: General Residence B
Description: Install two 27" x 27" x 28" A/C compressors against right side of the residential structure.
Request:
1. A dimensional Variance from Section 10.324 to allow a lawful nonconforming building to be extended or enlarged in a manner that is not in conformity with the Zoning Ordinance.
2. A dimensional Variance to allow building coverage of 39%± where 30% is the maximum building coverage allowed.
3. A dimensional Variance from Section 10.572 and Section 10.521 to allow a right side yard setback of 4'± where 10' is required.

SPEAKING IN FAVOR OF THE PETITION

When no one rose to speak to the petition, Mr. Parrott moved to postpone the petition to the end of the meeting to allow the applicant time to appear. The motion was seconded by Mr. Durbin and approved by unanimous voice vote.

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2) Case # 5-2
Petitioner: Lea H. Aeschliman Trust, Lea H. Aeschliman, Trustee.
Property: 314 Middle Street
Assessor Plan 136, Lot 6
Zoning District: Mixed Residential Office
Description: Convert unit from office to residential for two dwelling units on property.
Request: 1. A Variance from Section 10.1112.30 to allow 3 off-street parking spaces where 4 off-street parking spaces are required for two dwelling units.

Chairman Witham announced that the applicant had requested to postpone the hearing until the next meeting. Mr. Parrott made a motion to postpone the hearing until the June 19, 2012 meeting, which was seconded by Mr. Durbin and approved by unanimous voice vote.

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3) Case # 5-3
Petitioner: HCA Health Services of NH Inc.
Property: 333 Borthwick Avenue
Assessor Plan 240, Lot 2-1
Zoning District: Office Research
Description: Construct and utilize a helipad in the emergency room parking lot to the left of the building.
Request: 1. Special Exception under Section 10.232 and Section 10.440, Use #15.20 to allow a heliport as an accessory use to a permitted principal use.

SPEAKING IN FAVOR OF THE PETITION

Mr. Bill Duffy stated that he was the Vice President of Engineering at Portsmouth Regional Hospital which was seeking a special exception for a helicopter pad to be located on the hospital grounds near the emergency room. Mr. Jorge Panteli of the engineering firm of McFarland Johnson was also there and distributing a letter from Liberty Mutual, their abutter, and a layout of the flight paths. For the past several years, they had been focused on improving their plan for moving patients in and out of the hospital. They recently finished a large project for interior movement and this proposal concentrated on the exterior. Currently, they received helicopter support through landings at Pease International combined with ambulance transport which was slower than they would like. This project would put the pad at the back door of the emergency room allowing faster processing. He then introduced Mr. Jorge Panteli.

Mr. Panteli stated that he would take them through the submitted packet and exhibits and also address the special exception requirements. He stated that this would be an accessory use in the Office Research District. In the process of developing the facility, they had used the FAA design standards for heliports and talked to response teams at Dartmouth Hitchcock and in Boston. Based on their experience, they were estimating between 30 to 50 operations a year, basically once a week. They had also talked with the Federal Aviation Authority and Pease Development Authority to research how to run the facility, coordinate arrivals and departures and ensure that all flowed appropriately.

Addressing the standards for granting a special exception, Mr. Panteli stated that there would be no hazard to the public or adjacent property from fire explosion or release of toxic materials any greater than that posed by a truck coming onto the property. Referring to the approach and departure routes he had just distributed, he stated that they would fly over open areas, with the primary approach over Borthwick Avenue and into the parking lot, the secondary on the north side of the building using the I95 corridor. He noted that there would be a portable fire extinguisher, aviation grade for jet fuel, at the site for any possible accidents. Mr. Panteli stated that there would be no detriment to property values or change in the essential characteristics of the neighborhood. The Coakley Road and Islington Street neighborhoods were approximately a half mile away from the hospital separated by large wetlands areas. Liberty Mutual was the nearest adjacent facility and he passed out a letter of support from that firm. There would be accessways within the existing parking lot and a series of gates would block off traffic when the helicopter was arriving and allow vehicles through after it departed. The helicopter would shut down after landing and then start back up about 20 minutes later. The pad was in an area sheltered by the hospital, Liberty Mutual and trees so they expected any fuel fumes to stay in that area.

Mr. Panteli stated that there were pathway lights, as shown in the exhibit which would be seen from an elevated point. There would also be some red lights, strategically located on the building's highest points, that would operate when the helicopter was arriving or departing. They would have a set of power lines and a rotating beacon which would be located roughly 6 or 7 stories up at the highest point and which would be directed upward. Regarding the noise generated, he stated that no variance was needed as the Planning Department had determined that emergency helicopter operations fell under the exemption for a public emergency activity under Section 10.1333, Item 5. They had, however, provided some information on noise in their packet. They had looked at the approach and departure tracks and the document he had just provided was an update based on discussions they had with Pease. Typically when flying helicopters, you like to fly over major roadways which helped to mask the sound. They had also talked about southerly approaches, staying high and then dropping into the helipad. They had run the integrated noise model, an exhibit in their packet, which showed cumulative noise exposure over the period of a year. He explained the data on the exhibit, noting that once the helicopter was 100' off the ground down to landing, the noise would be attenuated by two buildings plus the trees. He noted that I95 at least in the daytime would be much louder than the helicopter.

Mr. Panteli stated that there would be no creation of a traffic safety hazard or increase in the level of traffic congestion from the helicopter. Traffic would move freely when the helicopter was stopped or not on the premises. While the helipad would use about 20 parking spots, the loss was not significant considering the site's overall parking capacity. There would be no increase in the demand for municipal services. He had mentioned the aviation fire extinguisher and the hospital had its own security group with a protocol for when the helicopter was on the premises. There would be no utilities needed other than electricity for the beacon lights. Storm water runoff would not be increased as the 50' x 55' concrete pad would be installed in the current paved parking area.

Mr. LeMay stated that he thought this would be a wonderful thing for the hospital but it looked like it wiped out a lot of the emergency room parking. This was not part of the special exception standards but it did look like a big impact. Mr. Duffy stated that, while it took out 20 spots from an area shared by the emergency room and staff, they had 18 spots open up this past year on their rear access road. If this was approved, the staff would be parking in the main hospital lot and not outside the ER. Mr. LeMay asked why the pad could not be located on the roof, a concern shared

by Mr. Parrott. A discussion followed, with Mr. Parrott expressing his concerns about the choice of location, while noting that it was the applicant's decision to make. Mr. Duffy stated that they had looked at several options, including the rooftop which the current usage did not justify. They were considering those for the longterm. He noted that other locations would still involve an ambulance to transport the patients or were too close to major power lines or transformers. They had valet service and other ways to manage access to the ER.

Ms. Chamberlin expressed her concern about waking up residents in the homes on Coakley and Islington. Mr. Duffy responded that Mr. Panteli had statistics indicating that, at the level the helicopter would be flying over those neighborhoods, the noise would be similar to a lawnmower. They were already near an airport and it would be no more than they experienced now with an airplane. Mr. Rheaume asked the purpose of the beacon and why it would not have a negative effect. Mr. Panteli replied that it was used to guide the helicopter to the hospital. The operators would call in 20 minutes before arrival and the beacon would be switched on at that time, with the lights angled upward and out. After landing, the light would be switched off.

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. Rheaume.

Ms. Chamberlin stated that the testimony had been that a heliport would present no more hazard to the public or adjacent properties from fire, explosion or release of toxic materials than from any other vehicle. From the submitted diagrams, the entry and exit pathways went over or next to the highway and residential neighborhoods would be avoided so there would be no detriment to the property values in the neighborhood. The closest abutter, Liberty Mutual, had no objection and the residential areas were a half mile away. She noted the testimony that the noise would be no different from that of a plane passing over to which the residents were accustomed. There would be no creation of a traffic safety hazard or increase in traffic congestion as any internal roads that would be affected would be shut down while the helicopter was landing. With only lights required, she stated that there would be no excessive demand on municipal services. She noted the testimony that storm water runoff would not change as the parking lot was already in existence and concluded that there seemed to be a use in the area for a hospital to have this service.

Mr. Rheaume stated that it would be in the public interest to have a heliport capability for emergency purposes and agreed that any impact on neighboring areas would be minimalized. He had been concerned about the effects of lighting but it sounded like there would be minimal to no impact on the area. He noted the mention by some Board members about another location and he agreed that this was a little bit of an odd location but, looking at some of the alternatives, he didn't see anything substantially better. The cost of an elevated structure was probably not warranted at this time. If the hospital felt this was the best location, he would concur.

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

of 7 to 0.

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4) Case # 5-4
Petitioner: MJS Realty Trust, M. J. Shafmaster & M. J. Sevigny, Trustees
Property: 860 State Street
Assessors: Map 145, Lot 45
Zoning District: General Residence C
Description: Construct a 4' x 7' second floor, rear landing with stairs to the ground level.
Requests: 1. A dimensional Variance from Section 10.521 to allow a rear yard setback of 13.7'± where 20' is the minimum setback required.

Mr. LeMay asked if, as a procedural item, they should have a discussion about Fisher v. Dover or should he make a motion and Chairman Witham stated that he was open to discussion before a motion. Mr. LeMay stated that, in general, there was little difference from the reasons for their previous denial and declining a rehearing on that denial. The only difference was that they had added a stairway to the deck and he didn't see much that distinguished this proposal from the previous one. Chairman Witham recalled that, with the previous petition, there was negative feedback with respect to the deck and possible grilling or other activities and looking down on a neighbor. He noted that the landing was the same size so a point could be made that it was similar. Ms. Chamberlin asked if the difference was that it had been on the second floor and was now proposed for the first floor. Chairman Witham stated that the difference was the added stairs which were represented as being there for access to the activity space at the ground level where, before, the activity could have taken place on the balcony itself. Ms. Chamberlin noted that there was still a proposal for a balcony. Chairman Witham agreed.

Mr. Parrott stated that the landing was the same size in the same place, enlarged by a set of stairs. One previous concern was the height of the deck relative to that of a neighbor and there was nothing to prevent this from being used in the same way as previously presented. Another concern of the Board had been that this was a brand new house on in this lot which the applicant had chosen to build right to the building envelope. If the applicant had wanted this deck, the initial plan could have been modified. He felt that substantial variances had already been granted and this was one more step which was unnecessary. Those were the things that the Board had found previously and he didn't feel anything had changed.

After Chairman Witham offered them the opportunity to address the Fisher v. Dover issue, Mr. Chris Wright stated that he was representing the applicant. First of all, the landing had to be the requested size due to the French doors. To meet code, they had to have a minimum of 3' clearance so, including the handrail, they had to go out that far. Previously, the issue was whether people would be hanging out on the deck so they moved the activity space. They wanted to get people out the door and down the stairs to enjoy the back yard. Rather than using the back and side yard for parking, they had to move a stall indoors. When Chairman Witham stated that he needed to address why this proposal was different, Mr. Wright stated that now the landing was not a destination, but a way to reach the ground level.

Mr. Mitch Sevigny stated that he was the owner. The new landing was designed as a pathway to the stairs to the ground level and they proposed to put a flower pot to the left so that people wouldn't hang out there. They had met with the abutter and were going to install a six foot fence

across the back so, with the ground level activity, she would still have her privacy. He had thought she was in agreement with their plan.

Mr. Rheaume asked if the Chairman would explain Fisher v. Dover and Chairman Witham stated that the essential ruling was that if an applicant came back with a petition previously denied, there had to be some material difference in their request. They couldn't just keep tweaking it a little and returning. He stated that this applicant had been before the Board in February for a 4' x 7' deck and they were trying to decide if this was materially different from what had been presented. Ms. Chamberlin stated that, if a negotiated settlement had been reached, that would be a significant difference, but she also appreciated that the request was very similar. Chairman Witham stated that usually Fisher v. Dover was pretty obvious, but this was a little different.

Mr. LeMay made a motion to invoke Fisher v. Dover and not hear the petition, which was seconded by Mr. Parrott. The motion failed to pass by a vote of 3 to 4, with Ms. Chamberlin and Messrs. Moretti, Rheaume and Witham voting against the motion.

SPEAKING IN FAVOR OF THE PETITION

Mr. Wright stated that granting the petition would not be contrary to the public interest. The stairs and landing were intended to provide access from the primary living space. The neighbor's privacy would be maintained as the stairs and landing were not to serve as a place to hang out. He stated that the property met all other aspects of the Ordinance and allowing the owners access to the ground level would not intensify the use of the lot. He stated that the value of surrounding properties would not be diminished. The proposed landing and stairs were an attractive design and this was an attractive building. The hardship was that the lot was undersized and, in order to have a reasonable house in keeping with the houses in the neighborhood, they had to fill the entire building envelope. Rather than put one parking space beside the house and another in the back yard to meet parking requirements, they had incorporated a one car garage into the first floor. This necessitated putting the living space on the second floor. He stated that no fair and substantial relationship existed between the general purposes of the Ordinance provision and its application to the property in that they were not seeking a variance to create more living space or recreation space. He stated that this was a reasonable use of the property which would allow the homeowner to use the ground level patio without impacting the neighborhood.

In response to questions from Ms. Chamberlin, he confirmed that this was a single family residence and there was another entrance at the front, but this proposed access to the yard would be the most convenient. Mr. Sevigny confirmed that it would be inconvenient to go down to the State Street entrance in front and all the way around to reach the grill rather than just going down a set of stairs. Ms. Chamberlin asked if the kitchen was on the second floor and Mr. Sevigny responded that it was, along with the dining area and living space. He noted again that the grill location was lowered after meeting with the abutter and the flower box would make it inconvenient to hang out on the landing. He maintained that they had completely changed the design of the landing. Mr. Rheaume asked how the second floor exit via French doors would work as it seemed that opening the right hand side door would then block stairway. Mr. Wright stated that they were in-swing doors. Mr. Sevigny reiterated that, by code, they had to build the landing to a certain depth, which was why it was the size proposed. Mr. Moretti asked if he would just put a railing across if this were not built. Mr. Wright stated that was correct. The doors were there and they wanted to at least look down into their back yard. They would put a railing flush to

the outside of the building which would be within the setbacks so they would still have the ability to lean on the railing, which would be less desirable to the neighbors because they would be leaning on the railing and looking at her deck, which had been her concern. Mr. Moretti referenced the previous meeting when trees had been mentioned and asked if they were out and the fence was in? Mr. Sevigny stated that they had proposed both and came to the conclusion that the fence, which would be more like 8' high once it was completed, would block the abutters' property completely.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Suzanne Greene stated that she lived at 88 Union Street and, when construction had begun, she had asked if there would be a deck and they had said there would not be. She felt that the 4' x 7' area would still allow room to stand sit and then there were steps down to a second landing and then to the patio. She maintained that a 6' fence would not block her deck as her deck was higher. She had proposed going down through the garage, but the owner had said there was not enough room. She felt that a flower box wouldn't stop people from being out on the landing. She noted that she and the owner had met with a Planning Department representative and they had talked about a 45 degree cut on the outside structure. The owner had indicated the French doors were there to stay which she felt almost implied an outside structure.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Sevigny stated that, in the meeting with Mr. Cracknell, they had talked about a curve which they would have preferred rather than installing a flower box. The building code would not allow it. He reiterated that the proposal was just a means to get down to the patio. If the inspector had said they could put in a smaller landing, they would have done so. When he had gone back and explained this to Ms. Greene, he thought they were all set. He emphasized that they had done everything possible to make this less intrusive on the abutter. While her deck appeared to be 18" to 2' off the ground, they felt that bringing the activity down to the patio and adding a 2' berm and a 6' fence would give her the privacy that she has asked for. Otherwise, the French doors would stay there, the rail would go out 6" or so and people would be able to stand and sit there. They would either stay there with a 6" rail or they could have a pathway to the ground. He maintained they were trying to make it better so that people would go down to the ground.

Ms. Greene stated that she had a two level deck with the upper one where she spent her time and a 6' fence would not obscure her deck. She stated they had talked about softscape versus hardscape. She had liked the idea of the previous bushes or trees but they were cut down. When she proposed a softscape, the owner had said he couldn't find anything tall enough to cover.

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

DECISION OF THE BOARD

Ms. Chamberlin made a motion to deny the petition which was seconded by Mr. Parrott.

Ms. Chamberlin stated that she appreciated that the owner had gone and talked to the neighbor but, since they were not in agreement, she felt this was essentially the same request and she proposed denial primarily for the same reasons. Ms. Chamberlin stated that she felt granting the petition

would be contrary to the public interest as there was a neighbor who used her deck and she felt that neighbor would be compromised. The spirit of the Ordinance was to maintain setbacks and reduce the impact on the neighborhood and she felt that item of the criteria was not met. Substantial justice would not be done by granting the request for the same reason. While she didn't know if values would be diminished, the neighbor's personal sense of value would be and there simply was not an unnecessary hardship in the property. While may not as convenient, the owner would still have access to the backyard. .

Mr. Parrott referenced his comments with regard to Fisher v. Dover. He stated that granting the variance would be contrary to the public interest. They had granted previous variances and this proposal would make the back yard that much smaller which went to the light and air protected by the Ordinance. He felt that property values would not be enhanced and might be diminished if the request were granted. Regarding the hardship test, he stated that one of the components was that the property could not be used in strict conformance with the Ordinance so that a variance was necessary. In this case, they knew the property could be used in conformance.

Chairman Witham stated that he had tried to stay open to hear this again to see if it felt different but there would still be human activity and movement up and down the stairs or someone could go outside and sit on the stairs. While it might not be the same activity which previously concerned him, it was still activity 13' from the property line. He viewed it as a reasonable house that was designed and presented previously and now the applicant was requesting a feature that would be nice but he felt would encroach.

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

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Ms. Chamberlin recused herself from the following two petitions.

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5) Case # 5-5
Petitioner: Mark Wentworth Home
Property: 127 Parrott Avenue
Assessor Plan 115, Lots 3 and 3A
Zoning District: Mixed Residential Office
Description: Provide 58 off-street parking spaces with 3 parking spaces located on a separate, abutting lot and 12 new parking spaces located in front of the principal building.
Request:
1. A dimensional Variance under Section 10.521 to allow 22.6% open space where 25% is the minimum open space required.
2. A Variance from Section 10.1113.20 to allow off-street parking spaces to be located between a principal building and a street
3. A Special Exception under Section 10.1113.112 to allow 3 parking spaces to be located on another lot in the same ownership and within 300 feet of the property line of the lot in question.

SPEAKING IN FAVOR OF THE PETITION

Chairman Witham stated that there were two petitions from the same applicant. If Case #5-5 were granted, then they would not hear the next one.

Attorney Tim Phoenix stated that he was there that evening with Mr. Joseph Shanley, their realtor, Mr. Bob Muffola who was handling their construction, Mr. Eric Weinrieb, their engineer, and two of the partners in the venture. They had the existing building under contract to purchase and were before the Board for variance relief. Currently, there was a main building and a small garage on one lot and, in order the meet the parking space requirement for the proposed use, their preferred option required relief from the provision prohibiting parking in front of the building. If they eliminated the parking spots in front, then their second option needed relief from the number of spaces required. They had submitted each option separately but could discuss them together if the Board wished.

With no comment from the Board, Attorney Phoenix addressed the first option, pointing out on the exhibited plan the parking spaces in front where the variance relief was needed. Noting that the building had been the same size for years, he stated that with the added spaces, they would be at 22.6% open space so would also need relief from that requirement. He noted that he had just submitted a letter of support from the nearest neighbor and the other neighbor also supported the proposal. He noted that they had met extensively with the Planning Department to review both proposals. He quoted a section from the memorandum prepared by the department stating that, "This plan shows an increase of 30 new off-street parking spaces. This is a 107% increase over the existing condition for the same land use (offices.)" He stated that it was true that there were limited parking spaces and that there was an office use technically, but it was the senior center. There were offices in there for the Housing Authority and Compass Care but the two large additions on the back of the building were wide open spaces where the seniors spent their time. As traditionally used for at least the past 15 years, the property had not been completely offices. The seniors were dropped off there so there wasn't the need for parking that a full office use would entail.

Attorney Phoenix noted that their firm currently had fifteen and a half employees, all but four of whom parked on Parrott Avenue. Their vehicles would be off Parrott Avenue if they moved into the building. Their floor would accommodate 11 to 12 lawyers for a total number of employees of 22 or so and, with a firm on another floor with 22 or so employees, they were already approaching the 46 spaces needed under the second option, without even allowing for clients and other visitors. While they would love to have the open area that no parking in front would provide, they had to balance aesthetics against their needs and those of the tenants, the public, and the City with regard to parking. If the Board did not agree with their decision, they could address the second proposal. Attorney Phoenix added that the location was unique in that there was a lot of open area with the ballfield, the mill pond and the municipal parking lot on the corner. He described the parking at the courthouse, the library, and what would be at the new Middle School, noting that they felt this proposal was in balance and the best way to maximize the parking.

Addressing the variance criteria, Attorney Phoenix stated that granting the variances would not be contrary to the public interest or the spirit of the Ordinance. By meeting the off-street parking requirement, they would enhance the property, increase property taxes and help the parking difficulties in the City. He stated that this proposal was for a permitted use in the zone with the exact number of parking spaces required. The building would sit as it was, with just the front portico removed. Vehicular access was maximized and they felt it was best to leave the garages as

they were to serve as a buffer between this and residential uses. While not as visually pleasing as leaving the entrance open, there was so much open space across the street and virtually all the buildings on their side of the street had parking in front. While they had not yet gone before the Historic District Commission, he believed they would prefer the existing garages to stay. He stated that there would be no negative effect on natural resources, noting that they still had to go through the Site Review process if this was approved. Citing the Malachy Glen court case, he stated that, for the reasons previously outlined, the essential character of the neighborhood would not be changed and there would be no threat to the public health, safety or welfare.

Attorney Phoenix stated that this was an approved use which would not diminish the value of surrounding properties. Regarding the hardship and special conditions of the property, the building and lot had not changed but the fact that they needed relief that either allowed parking in front or reduced the parking spaces was a special condition. There was no fair and substantial relationship between the provisions of the Ordinance and their application to this property. The primary purpose of preventing parking in front was for light, air and aesthetics, but these needed to be balanced with the lack of on-street parking so there was no fair and substantial relationship. Similarly, with respect to the open space requirement, they felt the approximate 2% they were under was minimal. Adding that this was a reasonable use, Attorney Phoenix stated that he would not belabor the substantial justice part of the criteria as he had covered in his submission why it would be substantial justice to grant the petition given the parking needs in the City of Portsmouth.

Attorney Phoenix stated that a special exception was needed as the corner lot which he indicated on the plan was owned by the Mark Wentworth Home before they owned the large lot so they were technically separate lots although under the same ownership. In that case, the Ordinance required a special exception for allowing the three parking spaces to be located on another lot. He stated that there would be no hazard to the public or adjacent property from fire explosion or toxic materials. None existed. He had covered their argument that there would be no detriment to property values or change in the essential characteristics of the neighborhood when he had addressed the variance criteria. Regarding any increase in traffic or creation of a traffic safety hazard, Attorney Phoenix stated that this would have the opposite result with better traffic flow in terms of parking. There would be no increase in storm water runoff, which would be dealt with at Site Review, and no increase in the demand for municipal services. He concluded that they felt this was straightforward and, again, maximizing parking was the way they preferred to go, but if the Board wanted to discuss it, or hear both before a decision, they would be happy to comply.

Mr. LeMay noted that Attorney Phoenix had made several representations about the usefulness and value of having parking especially in that area and how that would in the public welfare. Certainly there was some benefit to having employees being able to park in close to the building but he wondered if some of the lot might be available in off hours as the bank made theirs available informally, or would this be closed up and locked with signs saying not to park there. Attorney Phoenix stated that they hadn't discussed that. They were not going to put up gates although he would have a concern about liability and their responsibility. He felt that, as long as they could get into the lot when they, as well as their tenants and clients, needed to, they might not be adverse to some after hours use. He added that both of the neighbors to whom they had spoken were happy about the fact that they would be an "8 to 5, Monday through Friday" use so that that they wouldn't have to deal with a lot of people on the site nights and weekends. He didn't think that the occasional weekend use by the public would be a problem for the neighbors.

Mr. Parrott noted that the photograph showed a fire plug which seemed pretty close to the driveway. It was not on the drawing or if it was, it was smack in the middle of one of the parking spaces. Mr. Eric Weinrieb stated that he was with Altus Engineering. The hydrant was shown in an area they had striped off, as he indicated on the plan, but which wasn't actually a parking space. The site currently had three driveways and they had designed the plans to reduce the access points to two. This might have to be reconfigured and they would deal with it with the Department of Public Works as they moved forward.

Mr. Parrott stated for the record that he didn't understand his answer. He also noted the bushes or trees in the middle of the parking spaces which he trusted were not going to stay. Mr. Weinrieb stated that the trees shown in the spaces would be removed. He indicated a tree in the corner and the tree near the exit which would remain as well as the large maple by the garage. They would be reestablishing a landscape buffer of shade trees between the head-in parking spaces and the property line. Additional discussion followed about the spaces and the access points with Mr. Parrott asking why the plan was in front of them if it wasn't what was going to be built. Mr. Weinrieb stated that because they were eliminating an access point, they had the opportunity to reconfigure the parallel spaces along Parrott Avenue and work with the DPW on providing a no parking gap for the fire hydrant. The plan represented the potential for off-site parking improvements that would need to go through Site Review and probably Traffic and Safety. The spaces were not counted as part of this application but showed how, through reconfiguration of the spaces, there would be an opportunity to increase parking.

When Mr. Parrott again questioned the accuracy of the plan, Chairman Witham stated it was accurate. There were two spots along the street that were not the applicants' property so they would work with the DPW to see how many spots were needed and pull the fire hydrant to that area. He asked Mr. Weinrieb if he was correct in understanding that what Mr. Weinrieb was saying was that what was on their lot was accurately drawn at this point and what was off their lot would be worked out with the DPW through all the other channels. Mr. Weinrieb stated that was it exactly.

Mr. Parrott asked Mr. Weinrieb about their elimination of an access point and whether it was shown on the plan. When Mr. Weinrieb stated it was, Mr. Parrott maintained that, again, the map was not accurate if it was showing things that were going to be removed. Mr. Weinrieb pointed out on the plan the faded lines which were the existing pavement lines. He indicated the in-and-out access point that would be essentially where the existing one was currently. On the other end of the side near the garage was an exit only and in between, close to the existing fire hydrant, was another access point that they were eliminating. What the Board saw before them was what they were proposing.

Mr. Rheaume questioned the three spots that were on the adjoining property, noting that they seemed disconnected from the main portion of the lot and that they were important to meet the required 58 spots. He asked how they would be used. Mr. Weinrieb stated that they would be used by staff and there would be a pedestrial walkway onto the main site. In response to a further question from Mr. Rheaume, he stated they would not be striped. There were two spots in the two-stall garage and one alongside the garage. He confirmed that there were doors on both sides of the garage.

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. Rheaume.

Mr. Durbin stated that the only major difference between the two applications other than the difference in parking was really the loss of about 2.5% of open space that currently existed or was presumed to exist on the property so essentially they were looking for relief in that respect. With that in mind, what was being taken away from open space seemed pretty negligible. This appeared to be a productive re-use of the property and had the benefit of adding some off-street parking that might not otherwise exist. He didn't feel that granting the variance would be contrary to the public interest and believed it observed the spirit of the Ordinance in that where it might take away a little bit of open space, it added some additional off-street parking to offset any impact. There was not really a storm water buffer so even with the open space being taken away storm water runoff from the property would be mitigated during the site review process.

Mr. Durbin stated that granting the variance would be a substantial justice and the hardship to the applicant in not granting the applicant would not be outweighed by any benefit to the public. He couldn't see how the value of surrounding properties would be diminished. This was a mixed use area that was fairly densely developed already. This proposal wasn't going to intensify any of that existing density of development. If anything, the improvements might result in some small increase in values. He stated that the unnecessary hardship test was met in that there was limited parking available in this area. He could see a benefit in taking some cars off the street that would otherwise be parked there and felt there was an inherent hardship in not being able to do that. He stated that this was a reasonable use of the property.

Mr. Rheaume agreed with Mr. Durbin. He felt that, if the property was redeveloped for office purposes, it was in the public interest to allow the full maximum number of spaces available to the property. This would minimize the parking impact on Parrott Avenue and the surrounding areas. He also agreed that the proposal was not likely to diminish the value of the surrounding properties. The aerial view of the area showed little that was not already paved so paving a little bit more wouldn't provide a major change that would impact those values. He agreed that the actual impact to the Ordinance was relatively minor. They were talking about a small percentage of open space relative to what the zoning Ordinance required. He also felt that the criteria for the special exception, as set forth, were met.

Chairman Witham stated that he had just been about to ask the maker of the motion if he wanted to address the standards for granting a special exception. Mr. Durbin stated that this was a use permitted by special exception. He didn't feel it was even an issue that a hazard would be presented to the public or adjacent property on account of fire, explosion or release of toxic materials. As he had already covered in addressing the variance criteria, there would be no detriment to surrounding property values. He stated that, with this type of use, there would be no creation of a traffic safety hazard or substantial increase in the level of traffic congestion. It did

not appear that there would be any more demand on municipal services than with the current use. While some remote argument could be made that there would be an increase in storm water runoff onto adjacent properties by increasing the impervious surface, there appeared to be a plan to mitigate any increase.

Mr. Rheaume stated that he also agreed with those points, particularly no creation of a traffic safety hazard or increase in traffic congestion. As depicted in the plans, it would appear that overall the lot was well laid out with adequate siting for vehicles entering and exiting the property. The overall conditions on Parrott Avenue were such that he did not see this change to the property causing any unnecessary burden on traffic safety.

Chairman Witham stated that he was going to go against the grain. He had driven by several times that day and tried to visualize the new parking lot after the removal of the green space and the mature trees. It was a nice buffer and offered a nice view of the building. You could say the parking lot down the street didn't have a buffer or the courthouse but the proposed parking lot came to within 5' of the property line which didn't provide much space for a vegetative buffer, especially considering snow plowing in the winter. He didn't see how this request met the requirements for a variance for off-street parking to be located between the principal building and the street. He didn't feel it was in the public interest to allow this parking lot where there was now a nice buffer. There also needed to be no reasonably feasible alternative for this applicant to pursue and he felt there was an alternative, which was the following application. While it did have less parking spots at 46, they had stated that with all the space occupied, they might need 44, which left 2 for clients. That might not feel like a lot but most attorneys spent a lot of time on the road and in court and he saw many under-utilized office parking lots. He felt 46 spots would function very well for this use, allow the buffer in front and respect that aspect of the Ordinance. While he didn't feel the criteria were met to grant the second variance and he would not support the motion, he was comfortable with the special exception to allow the 3 parking spaces on another lot. He also noted that, with the following request, one less variance was required. Of the two options, he would lean toward less parking spots and respecting the front buffer.

Mr. Parrott agreed with the tenor of the Chairman's comments. He felt the second of the two options was more attractive, particularly from the perspective of the public interest. This was a high profile location and the proposal being considered would require taking down large mature trees that were not in great abundance in that area. If anyone wanted to state that parking in front of the courthouse looked a lot better than the grass in front of the existing middle school, he would disagree. He felt that front buffering was extremely attractive to both the people working in the building and those walking by. Nosing cars right up to the edge of the sidewalk was not in any way attractive. He was only noting this because aesthetics had been mentioned several times in the presentation. He also agreed with the Chairman's comments with respect to the use. The building was a certain size and professional offices used a certain amount of space. From the testimony, 46 spaces, if not exactly the right number, would be very close to it and he felt the second proposal was much more attractive with respect to the specific criteria they had to consider. Once the trees were cut and the grass was gone and paved over, it was permanent. He stated that this proposal might or might not affect the value of surrounding properties, but it would not be a plus to remove the buffer strip. There was an alternative and, if some spaces had to be traded versus the buffer zone, he would choose the buffer. Mr. Parrott stated that one of the unnecessary hardship test prongs was that the property could not be used in strict conformance with the Ordinance. In this case, there were two alternatives and opportunities to get the balance

right between the aesthetics, the use of the property and the demand for parking. Either proposal would be a great improvement and take a lot of parking off public areas, but he felt the second was far superior in terms of complying with the criteria that the Board had to consider and would not support the motion to grant this proposal.

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

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6) Case # 5-6
Petitioner: Mark Wentworth Home
Property: 127 Parrott Avenue
Assessor Plan 115, Lots 3 and 3A
Zoning District: Mixed Residential Office
Description: Provide 46 off-street parking spaces with 3 off-street parking spaces located on a separate abutting lot.
Request: 1 A Variance from Section 10.1112.30 to allow 46 off-street parking spaces to be provided where 58 off-street parking spaces are required.
3. A Special Exception under Section 10.1113.112 to allow 3 parking spaces to be located on another lot in the same ownership and within 300 feet of the property line of the lot in question.

SPEAKING IN FAVOR OF THE PETITION

Attorney Timothy Phoenix stated that he would not go through their presentation again unless the Board wished. By and large, the same arguments applied but, in this case, the relief would be for the number of parking spaces rather than open space and parking location. If the Board Members felt that open space was preferable, they should be able to provide parking with this variance that would meet their needs and some of the need for downtown parking. As he had stated, they had been torn between the two options. He stated that they felt that the variance and special exception should be granted for all the reasons he had cited in the previous presentation and asked that those arguments be applied to this request.

Chairman Witham stated that he was comfortable with that. To validate the record, Mr. Rheaume asked Attorney Phoenix to confirm that they would intend, with this proposal, to keep the trees and flagpole that were currently in the front area. Attorney Phoenix confirmed that they would. The project would be built in accordance with the plan on display. He pointed out on the plan where the driveway to get from one side to another was going to be. Other than that, it would be left as green as possible. Mr. Eric Weinrieb from Altus Engineering noted that when they relocated the driveway on the east side, there was one tree that would be removed, but the trees directly in front of the building would remain. Mr. Parrott noted for the record that, despite his name, he had no connection with the street. Mr. Moretti stated that he only saw one handicapped space and asked if there were additional spots. Attorney Phoenix indicated a little hatched area, noting that there would be one on either side.

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 requested that his comments, in making the motion to grant the variance and special exception on the previous petition, be carried forward to the granting of this variance and special exception. That should be with the exception of striking any comments relative to the open space requirement. He added that this petition addressed any concerns that some Board Members might have had about the detriment to the public in any loss of a visual buffer to the property.

Mr. Parrott agreed and commended the applicant for the second proposal which he felt was a sound plan.

Chairman Witham stated, for the record, that this proposal would also have to go before the Historic District Commission and he encouraged that Commision to consider keeping the portico as part of their approval.

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. Chamberlin resumed her seat.

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Chairman Witham noted that the applicant for Case #5-1, 69 New Castle Avenue, which had been moved to the end of the meeting, was now in attendance and they would hear his petition, which Chairman Witham again read into record.

1) Case # 5-1
Petitioner: Norman T. Ohr, Jr.
Property: 69 New Castle Avenue
Assessor Plan 101, Lot 49
Zoning District: General Residence B
Description: Install two 27” x 27” x 28” A/C compressors against right side of the residential structure.
Request:
1. A dimensional Variance from Section 10.324 to allow a lawful nonconforming building to be extended or enlarged in a manner that is not in conformity with the Zoning Ordinance.
2. A dimensional Variance to allow building coverage of 39%± where 30% is the maximum building coverage allowed.
3. A dimensional Variance from Section 10.572 and Section 10.521 to allow a right side yard setback of 4’± where 10’ is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Norman Ohr stated that he was the owner at 69 New Castle Avenue and apologized for not being there earlier. He had gotten the date confused with tomorrow's HDC meeting. He stated that they wished to add air conditioning to their home by placing two outdoor compressor units which would not meet the setback or lot coverage requirements. There was 7½' between the property line and the house and the units were approximately 2' wide so there would actually be a 5' setback on that side. Noting that they would also be adding approximately 10 s.f. to the building coverage, he stated that they had considered other locations and this was the best alternative. They felt that window units would detract from the value of the home. The left side of the house was a brick driveway and the back area was very small and used for a patio. Their proposed location to the right had no entrances or exits that would be affected and he had spoken to the neighbor on that side who had no problems with the proposal. Mr. Ohr again apologized, stating that he was not as prepared as he would have been if he had not confused the meeting date.

In response to questions from Ms. Chamberlin, Mr. Ohr stated that the area of the units was visible from the street but the units would be screened with the same type of fencing they could see in the current photographs and they were working with the Historic District Commission on this aspect. He stated that these units were about the quietest made. While there was one model that was slightly quieter, it was a foot bigger and would be even closer to the property line. They were looking into soundproofing the fence and had received an information sheet about a covering that looked like shrubbery and also abated sound.

Chairman Witham asked Mr. Cracknell from Planning whether the fence fell into the variance request and Mr. Cracknell responded that it was just the compressor. When Chairman Witham stated that it would interesting to compare the decibel level of a window unit with these units, Mr. Ohr commented that it would not be very attractive with those units hanging out all the windows.

Mr. Parrott commented that they were dealing with the location of the units and not the sound levels. He noted that the Board would not be approving something for which they didn't have proof. The Inspection Department covered that area and they had the meters to monitor and so forth. Mr. Ohr stated that he understood.

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. Moretti.

Mr. Parrott stated that this was a straightforward request for a reasonable addition. Other locations were apparently not feasible and the neighbors in the adjacent house had not raised any issues. For those reasons, he did not feel granting the variance would be contrary to the public interest. It would be in the spirit of the Ordinance to allow the installation of these compressors, which were

in pretty common use. In the justice balance test, he stated that there was no overriding public interest that would argue against granting the relief requested. He didn't see how the value of surrounding properties would be affected one way or the other. In the hardship test, he felt that the special conditions were that dimensionally the lot made it difficult to place the compressors in another location.

Mr. Moretti stated that he saw nothing in this application that would be contrary to the public interest. It was a small request and no one had appeared to speak against it.

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

IV. OTHER BUSINESS

The Chairman asked who would be there the following week, with Mr. LeMay stating that he would like to be excused unless it was necessary for a quorum.

Chairman Witham stated that he wanted to pose an issue for discussion when the Board next met to revise the Rules and Regulations. He wasn't sure he was in favor of having two petitions submitted in a row for the same applicant. A brief discussion followed with Chairman Witham outlining his position that an applicant should come in and make the best case they could with one petition and, if it were denied, then make whatever change might be necessary and resubmit. He felt it was asking a lot of the Board and the public to have someone come in, as they had with the Parrott Avenue petitions, asking for one thing but with a back-up request if that were denied.

Mr. Parrott felt this had been an exception and the department understood that was not the way to go. He noted that it was their long standing policy that it was not the job of the Board to sit there and design projects which was what happened when they were presented with multiple choices. Having been asked to comment, Mr. Cracknell from the Planning Department stated that as an objective party sitting in the public area, he felt the dual submittal had worked in this case. His sense was that, without a second option to consider, the Board might well have granted approval for the first option which was less in the interest of the City and the Ordinance. He pointed out that, for whatever reason, the public participation level on these projects was low which made the job of the Board more difficult as the presumption with no comment was that there were no problems. While he wasn't suggesting that it should be the norm to come in with two plans, with a unique property in a unique setting and with a unique land use, it could work better than not having an alternative. Chairman Witham agreed the best plan prevailed in the end but he wasn't sure he wanted this to be recurring

V. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 9:55 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk

Minutes Approved June 19, 2012