

**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 16, 2013

MEMBERS PRESENT: Chairman David Witham; Vice-Chairman Arthur Parrott; Susan Chamberlin; Derek Durbin; Charles LeMay; Christopher Mulligan; David Rheame; Alternate: Patrick Moretti

MEMBERS EXCUSED: Alternate Robin Rousseau

I. OLD BUSINESS

- A) Request for One-Year Extension of Variances granted May 15, 2012 for property located at 324-334 Parrott Avenue.

*Vice-Chair Parrott made a motion to **grant** a One-Year Extension of the Variances through May 15, 2014 for property located at 324-334 Parrott Avenue. Mr. Mulligan seconded, and the motion **passed** by a vote of 7-0.*

- B) Request for One-Year Extension of Variances granted May 22, 2012 for property located at 28 South Street.

*Vice-Chair Parrott made a motion to **grant** a One-Year Extension of the Variances through May 22, 2014 for property located at 28 South Street. Mr. Mulligan seconded, and the motion **passed** by a vote of 7-0.*

- C) Case # 12-6
Petitioner: Justin D. Setchell
Property: Fairview Avenue off Maplewood Avenue
Assessor Plan 220, Lot 66
Zoning District: Single Residence B
Description: Construct a new single-family home.

- Requests: 1. A dimensional Variance from Section 10.521 to allow a rear yard of 10'± where 30' is the minimum required.
2. A dimensional Variance from Section 10.521 to allow a lot area of 6,000 ± square feet where 15,000 square feet is the minimum required.
3. A dimensional Variance from Section 10.521 to allow a lot depth of 60'± where 100' is the minimum required. *(This petition was continued from the January 15, 2013, February 19, 2013, and March 26, 2013 meetings.)*

Chairman Witham announced that this hearing was continued from the January 15, 2013 meeting.

Mr. Mulligan recused himself and Mr. Moretti stepped in as an alternate.

SPEAKING IN FAVOR OF THE PETITION

Attorney Frank Quinn appeared before the Board on behalf of Mr. Justin Setchell to review the changes from their initial application in January. He said they reduced the size to a one and a half story, dormered, three-bedroom cape. He said they also reduced the garage down to a single car. Attorney Quinn said some concerns were also raised about the drainage and Mr. Henry Boyd of Millennium Engineering agreed to do a study of the drainage issue.

Mr. Boyd said it was clear that this site acted as a detention basin, receiving drainage from all of the abutting properties and Maplewood Avenue and Fairview Avenue with the exception of water flowing away from the property from the crown line of either street. He said the challenge presented was whether they could ensure that more water would not run off after the house was constructed. Mr. Boyd said it was unusual for a project of this size to undergo so much scrutiny at a zoning hearing for a side setback.

Mr. Boyd said they tried to be sensitive to the neighbors who were concerned about the situation, which was understandable because part of the City drainage was quite ancient and outdated. He said there was an existing catch basin there and one of the proposals was to place a new culvert in the right-of-way that would receive some of the storm water that came down Fairview Avenue so it wouldn't end up at the site and would slowly make its way to the drain manhole instead. He explained that it was not the typical steel frame catch basin with a square grate and the iron cover, but was a shallow, round and hollow structure with a round grate and a fibrous 4" Orangeburg pipe that was used for septic systems and drainage from the 1950's through early part of the 1970's. Mr. Boyd said the sewer department was very helpful and responded immediately to their request to gather information. He said the drain cover was cracked and welded in place over time so the City's Department of Public Works came down to break it and fit a new one. He added that the water ran down from the paved driveways and inundated the culvert, which was broken and blocked with debris. He said the water then spilled out and continued to go on to Mr. Setchell's lot. He said Mr. Setchell offered to pay for a new 4" standard City catch basin with a deep sump that would tie in to the existing manhole. Mr. Boyd said the biggest challenge was trying to make sure they didn't exacerbate the Johnsons' problems because they were effectively using this lot as a detention basin for their runoff.

Mr. Boyd went on to address questions regarding grading on the house lot. He pointed out details that had been added, including a landscaping retaining wall and a pipe that would allow water to flow from the Johnson property into manhole. He said the City had a 6" clay pipe so they could not design anything with a larger pipe. He suggested it would be good for the City to upgrade the municipal system to handle the City water at least.

Mr. Boyd said they were not really charged with making the area better for abutters, but they couldn't make it worse. He said an argument could be made, however that they were making it much better with a smaller that was in line with others on Fairview Avenue.

Mr. Rheume asked Mr. Boyd to review some inconsistencies with dimensions on the Gray Construction prints dated February 26, 2013. Mr. Boyd said they had not been edited.

Mr. Rheume asked for further clarification on the dormers, and Mr. Boyd said he believed dormers were still part of the proposal. Mr. Patrick Carey said the intent was to have a dormer off the back of the house and another off the garage.

Mr. Rheume said he also noticed the addition of French type doors that went out to steps on the side. Mr. Boyd said it was pointed out that the doors on the previous drawing would not have worked because they needed stairs and a platform to accommodate the grade, but they didn't have enough room to meet the setback requirement so they moved the door.

Ms. Chamberlin said she had expected to get a written drainage report. Mr. Boyd said it was highly unusual for a small residential lot with a single-family building to require one. Ms. Chamberlin asked if there was such a report. Mr. Boyd said there was not, but they studied the site and discovered City structures were underperforming. He said they added drainage mitigation to the site so that less water going off site and he thought it was unreasonable to ask the owner to spend thousands of additional dollars to run studies.

Chairman Witham said it was more than a side setback issue on a lot of 6,000 s.f. where 15,000 s.f. was required. He said they would have more space to deal with water issues if it was 15,000 s.f. so drainage issues were relevant. Mr. Boyd said he was just trying to point out what Mr. Setchell had gone through to get to this point and how they were trying not to exceed impervious surfaces.

Attorney Quinn said Mr. Patrick Carey would speak about an opinion from a realtor retained by the Johnsons that there would be a diminution of property values. He said there would be no diminution based on the size, character or builder they were proposing to use. Mr. Carey said the proposal was in the spirit of the Ordinance because the house was similar in size to homes in neighborhood. He said the Johnsons were experiencing water problems for years and the owner would be willing to help with their problem and the City's problem. He said the design was tasteful and would only increase property values.

Mr. Rheume asked Mr. Carey what his background was and Mr. Carey said he had owned a real estate company, and had sold over a million for himself and over a billion for the company over 29 years in the Seacoast area.

Vice-Chair Parrott noted that Mr. Carey said the proposal was within spirit of the Ordinance, but they were proposing a 10' back yard and asked him if he knew what the standard was in the neighborhood. Mr. Carey said he was not sure, but knew it was not 10'. Vice-Chair Parrott said he was testifying as an expert, but didn't know the requirements so didn't see how he could say the proposal was in the character of the neighborhood. Mr. Carey said he knew what it was when it was built, and Vice-Chair Parrott said they looked at current standards of the Ordinance.

Attorney Quinn said he had gone through the criteria in several of the meetings and there was a written submission on record, but he reiterated that their proposal was not contrary to the public interest. He referenced the Chester Rod and Gun Club vs. Chester that found there must be a marked departure from the essential purpose of the Ordinance for a request to fail. He said Mr.

Setchell had gone beyond what was needed by proposing the replacement of a dilapidated shed with an attractive house. He said they were proposing to resolve the drainage issue to the benefit of Mr. Johnson and the neighborhood, which would observe the spirit of the Ordinance and substantial justice would be served.

Attorney Quinn said the proposal wouldn't take anything away from the character or value of the surrounding properties with a similar size to the abutting houses, close to the 1500 s.f. average of living space in that area. He said the lot size was also similar to others in the neighborhood.

Attorney Quinn said it was a lawful, non-conforming lot of record and the unique hardship was the lot had a depth problem that required a variance. He said the back would be close, but they did their best to line up the property to the other properties and would improve the drainage problem.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Christine Ruhnke of 898 Maplewood Avenue said she lived across street and said she and her husband reviewed the elevation plans online and were concerned that the construction would cause more drainage into their backyard than they already had. Ms. Ruhnke asked who would be responsible for water damages. She said she was home when they did the drainage study and were told the study failed because the water did not drain properly. She said there was a memo in the file to Mr. Nick Cracknell with the Planning Department from Mr. David Desfosses, Engineering Technician at DPW that outlined many questions and issues. Ms. Ruhnke said she wanted know if they had all been addressed, noting that it had been established that the drainage system in the area was old and couldn't support the current drainage problems in the neighborhood.

Ms. Chamberlin asked Ms. Ruhnke if she had spoken with the City to confirm they had no plans for upgrading. Ms. Ruhnke said that was her impression.

Chairman Witham asked the engineer to speak to the issue.

Mr. Boyd said there was no official drainage study with pre and post conditions. He said the soils were full of construction debris and infiltrated poorly during perc tests so replacing the soils with clean sand would help drainage. He said funneling some drainage into a better functioning City system would also help. Mr. Boyd said they could pave the entire site and water would not pond and jump the crown to Ms. Ruhnke's side of Maplewood Avenue. He said problems there were coming in from up the hill in both directions and their plan would not affect her from a drainage perspective. Ms. Ruhnke said there was a note in the memo saying implementation of a new drainage system would not guarantee the elimination of all drainage concerns. She said there was not a substantial crown there and more rain would flow their way if the applicant raised their lot for construction. Mr. Boyd said it would run to the catch basin and it would have to be a huge storm to go over the crown.

Ms. Tara Schoff of 934 Maplewood Avenue said she was also there on behalf of her mother, Ms. Joan Connors of 134 Fairview Avenue. She said she had appeared before the Board in regard to this application a couple of times before and expressed concerns with the size of the house. Ms. Schoff said a smaller house has since been proposed, but believed there were still concerns. She said her mother lived next to the Ruhnkes. She said water issues had always been present in that neighborhood. She said the basement flooded during heavy rains and she was concerned that this

proposal would exacerbate the issue. She said despite what had been said, she was not assured their plans would be sufficient without seeing a drainage study.

Attorney Bernie Pelech representing Mr. and Mrs. Johnson of 860 Maplewood Avenue said they would be the most directly affected by the proposal. Attorney Pelech said they did not raise the drainage issue, which was raised by other abutters or the Board. He said their main concern was diminution in the value of their property. He said the applicant was seeking to put a big structure 10' from the property line where 30' was required. He said the Johnsons asked the applicants to move the structure closer to street, perhaps with a 20' back yard, but they did not consider that option. He said they were now proposing a 3' to 4½' high, 4' to 5' long retaining wall 6" from the property line that would clearly diminish their property values.

Attorney Pelech said the intent and spirit of the Ordinance wouldn't be met and would result in a substantial change in the character of the neighborhood. He said he didn't see a hardship to the applicant. He said they might need a variance, but they could build a smaller house closer to Fairview. He said it might be a lot of record, but they still had to comply with the Ordinances and that didn't give the applicants carte blanche to build whatever they wanted. Attorney Pelech said a letter was submitted in October from Mr. Jim Mills from ReMax by the Bay indicating the diminution in surrounding property values. He said a smaller house closer to Fairview Avenue would alleviate some of the Johnson's concerns.

Attorney Pelech said it was within the Board's right to request a drainage analysis. He said it was a vacant lot that currently infiltrated storm waters. He said the Johnson's did not have a problem with storm water at this point, but adding impervious surface on the lot would exacerbate storm water runoff. He said the City's Technical Engineer, Mr. Desfosses was not satisfied with the analysis. He said they didn't have numbers showing where the storm water currently went, how much and at what rate, let alone what will happen after adding impervious surfaces. Attorney Pelech asked the Board to deny or table the request until a drainage analysis was done.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Quinn said he was surprised at Attorney Pelech's comments, saying the ReMax letter that Attorney Pelech submitted at the December meeting said it was "highly probable that the Johnsons would have new runoff problem with drainage", but didn't mention diminution. He said they engaged Mr. Boyd to study the drainage and he provided a solution. He said Mr. Boyd was the only engineer and the others testifying could not comment from an engineering basis as to what the mitigation would be. Mr. Boyd said tying into City pipes and raising fill would mitigate and improve the drainage situation and there was no one there to refute his testimony except for laypersons. He said moving to the front of the lot would probably bring the ire of Ms. Ruhnke and Ms. Connors so they were trying to work out a solution that would be most feasible.

DECISION OF THE BOARD

Mr. LeMay said he was not clear on whether the engineer representing the City felt this was an adequate plan or not.

Chairman Witham referred to the submitted memo that said, "The DPW would like to explore the pipe capacity in the area prior to agreeing to the proposed improvements. Thus I would

recommend a final decision on this application be deferred until such time as we have written confirmation from the DPW that the proposed drainage improvements are supported.”

Mr. Rheume said it was a difficult case and the applicant did a great deal to address their concerns, but the drainage issue for this lot was still a significant concern. He said it was a very small lot in an odd location with a low point for the neighborhood. He said they had made recommendations, but it sounded as if draining water into a 6” pipe out of an existing 12” pipe wouldn’t seem to work well. He said the study explained a lot about what was going on in the neighborhood and the City had an obligation to look into it.

Mr. Rheume said this was a tiny lot and they could see the applicant was tugged between the size of the dwelling compared to the square footage of the lot and infringing on the neighbors’ open space. He said they chose to go toward an abutting neighbor on Maplewood Avenue to create the space needed for a single-car garage, an adequate driveway and parking on a small lot and they kept bumping against numerous constraints. Mr. Rheume said he understood there were hardships on a small buildable lot, but the criteria was a tad more stringent because they were looking at an entire new dwelling that was not fully conforming, not an existing situation. He said there had been a buildable lot there for many years, but no one had proposed development until recently, and unfortunately, the zoning in place hampered the proposed development.

Vice-Chair Parrott said the variances requested were substantial. He said the lot was 6,000 s.f. where 15,000 s.f. required. He said the backyard was 10’ deep where 30’ required. He said that related directly to the water situation because 10’ of soil didn’t have much absorption capacity. Vice-Chair Parrott said the proposed drainage system might or might not work, but the Ordinance was the standard frame of reference. He said the Ordinance anticipated proposals of non-conformity and addressed them very directly as he read from the Ordinance which said “...nonconformity shall not be the basis for granting the variance.”

*Mr. Rheume made a motion to **deny** the petition as presented and advertised. Vice-Chair Parrott seconded.*

Mr. Rheume said the requestor needed to meet all the criteria and failed to meet two of them. He said the substantial variations from what was allowed for lot area and setbacks did not meet the spirit of the Ordinance or the public interest, with a setback that was two-thirds less than the minimum and less than half the square footage of open area. He said he understood that the lots in the neighborhood were small, but they were talking about zoning on this date when proposing a new structure. He said the drainage issues associated with the proposed site development had not been adequately addressed. He said this lot had become a retention pond and he was not convinced the drainage proposal would not create excess water which would not serve the fundamental purpose of the Ordinance to promote the health, safety and general welfare of the community. Mr. Rheume said the hardship criteria were the toughest to meet. He said although there were small homes on small lots in the neighborhood and they shrunk the size of the proposed dwelling, they were still proposing a new dwelling on a small lot. He said he still didn’t see how they met the hardship criteria by proposing such substantial variance requests from the Board.

Vice-Chair Parrott added that the spirit of the Ordinance and the public interest were combined. He said they were proposing a family style home on a 60’ lot from front to back that wasn’t large enough for a deck or even a swing set for children to play in a 10’ back yard.

Chairman Witham said he wouldn't support the motion considering the abutter was allowed to build 10' from the back property line already so he didn't think the 10' rear yard setback was reason enough for denying the application. He said they would have met the side setback requirement if they went for a street address on Maplewood Avenue, depending where they put the front door, but because the door was facing Fairview Avenue, it was a rear yard setback. He said there was a hardship of being on a corner lot. He said 6,000 s.f. was a smaller lot, but not inconsistent with the neighborhood, nor would it change the character of the neighborhood. He said when it came down to the issue of drainage, he felt they put their best foot forward and it seemed to be well thought out so he was comfortable with the proposal.

The motion to deny the petition passed by a vote of 4-3 with Messrs. Durbin, Moretti, and Chairman Witham opposing.

Mr. Mulligan resumed his seat and Mr. Moretti returned to alternate status.

D) Case # 3-3

Petitioners: Beth L. and Marco A. Gross-Santos

Property: 79 Lois Street

Assessor Plan 232, Lot 14

Zoning District: Single Residence B

Description: Proposed sub-division of an existing lot into two lots, one fronting on Lois Street and containing an existing structure and one fronting on Marjorie Street on which a new home is proposed to be constructed.

Requests: Variances from Section 10.521 to allow the following:

79 Lois Street Lot:

1. A lot area of 12,768 s.f.± where 15,000 s.f. is required.
2. A lot area per dwelling unit of 12,768 s.f.± where 15,000 s.f. is required.
3. Lot depth of 80'± where 100' is required.
4. A rear yard setback of 25'± where 30' is required.

Lot fronting on Marjorie Street, number to be assigned if subdivided:

1. A lot area of 9,600 s.f.± where 15,000 s.f. is required.
2. A lot area per dwelling unit of 9,600 s.f.± where 15,000 s.f. is required.
3. Lot depth of 80'± where 100' is required.
4. A rear yard setback of 14'± where 30' is required.
5. A front yard setback of 15'± where 30' is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Steven Lee, representing the owner, said their reasons for asking for a postponement were due to actions taken by the City Council on Monday, April 15, 2013 that said a request for a subdivision was no longer necessary, as the property was unmerged. He said there were some changes to the original proposal and they would need time to change their exhibits.

DECISION OF THE BOARD

Mr. LeMay asked if this would change the nature of what was being requested by the Board and if what was advertised would cover the requests. Chairman Witham said it might make sense to withdraw and reapply, but that would require another application and fee. Planning Director Rick Taintor said the change would reduce the number of variances and the legal notice still covered the request.

*Mr. Durbin moved to **postpone** the petition to the May 21, 2013 meeting. Mr. Rheume seconded, and the motion **passed** unanimously with a vote of 7-0.*

II. PUBLIC HEARINGS

- 1) Case # 4-1
Petitioner: GMR Holdings of NH LLC
Property: 163 International Drive
Assessor Plan 313, Lot 14
Zoning district: Pease Airport Business Commercial District.
Description: Install wireless communications facility.
Requests: Special Exception under Section 303-A.04(c) of the Pease Development Authority Zoning Ordinance to allow installation of a 150'± high communications tower with antennas, related equipment and utilities enclosed in a 60'± x 60'± compound.

SPEAKING IN FAVOR OF THE PETITION

Chairman Witham referred the Board to the criteria for a Special Exception for the Pease Development Authority (PDA) Ordinance, which differed from the City of Portsmouth's Ordinance.

Mr. Peter Cook, project manager of GMR Holdings along with Ms. Maria Stowell from the PDA appeared before the Board. Mr. Cook said GMR Holdings was a wireless technology company based in Pembroke, New Hampshire affiliated with a wireless construction company. He said they were proposing to construct a new facility at Pease International Trade Center with a 150' monopole located 150' to the north of the existing City of Portsmouth water tank. He said it would have a 60' x 60' equipment compound at the base designed for wireless uses. He said there was currently a small facility and dish for the New Hampshire Department of Transportation on the water tank, and they were proposing to relocate that to the new pole. He said they were also making space for the City of Portsmouth's public safety antennas that were also on their water tank. He said that tank was scheduled for demolition in the next year or two and having a permanent home for the DOT and City's antennas was important. He said they also had interest from traditional wireless carriers, such as Verizon Wireless who were interested in improving coverage in the area.

Mr. Cook said they addressed the four required findings of the PDA’s criteria on page 2 of their cover letter. He said this use was passive in nature and met the first criteria because there would be no diminution in surrounding property value. He said it would be situated on a ridge on ten acres in an area with no plans for development. He said it would be adjacent to the tank, which was about 3’ higher than the tower they were proposing. He said they believed improved communications would add to values in the area. He said the use would not increase traffic or cause any health or safety hazard. He said they were working with the DPW to make roadway improvements and improve their access to the tank. He said it would be unmanned facility so there would be no traffic or safety hazard with one round trip to the facility per carrier per month. Mr. Cook said it was in an appropriate location with a safe and proper access and egress. Lastly, Mr. Cook said it met or exceeded most of the setback and site plan requirements outlined in the PDA zoning Ordinance.

**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. Taintor reminded the Board that the motion would be to recommend approval to the Pease Development Authority.

*Ms. Chamberlin made a motion to **recommend** to the Pease Development Authority that the Special Exception be approved as presented and advertised. Mr. LeMay seconded.*

Ms. Chamberlin reviewed the PDA criteria and said there was a need for the businesses and this was an area intended for businesses. She said there appeared to be no adverse effect or diminution in property values. She said the new tower would be more attractive no more intrusive than the water tower. She said there would be no traffic or safety hazard because there would not be a lot of traffic with an unmanned tower. She said it would be in an appropriate location with roadway improvements. She said a new tower would be a valuable asset and it was necessary to have the safety antenna relocated.

*The motion to recommend approval to the Pease Development Authority **passed** unanimously with a vote of 7-0.*

Messrs. Mulligan and Parrott recused themselves from the following petition. Mr. Moretti assumed a voting seat.

- 2) Case #4-2
 - Petitioner: Seacoast Trust LLP
 - Property: 150 Route One By-Pass
 - Assessor Plan: 231, Lot 58
 - Zoning District: Single Residence B

Description: Place 51'± x 8.5'± mobile diagnostic coach, with no advertising, in front of existing building with fencing.

- Requests:
1. A Variance from Section 10.434.40 to allow a use not specifically authorized in Article 4 of the Zoning Ordinance.
 2. A Variance from Section 10.331 to allow a lawful nonconforming use to be extended, enlarged or changed in manner that is not in conformity with the Zoning Ordinance.
 3. A Variance from Sections 10.333 & 10.334 to allow a nonconforming use of land to be extended into any part of the remainder of a lot of land.
 4. A Variance from Section 10.571 to allow an accessory building, structure or use to be located in any required front yard.

SPEAKING IN FAVOR OF THE PETITION

Mr. Peter Weeks and Mr. Corey Caldwell of MSC Engineering distributed their plan and exhibit. Mr. Weeks said they were returning with a proposal for technology that would be a better fit for the time. He said there was a stipulation that no advertising would be visible from the street. He said prior to the residential zoning the site was built as a medical facility in the late 1950's and became the home of Sports Medicine in the late 1980's. He said it was on a three-acre site and it met the criteria for setbacks and coverage. He said they were asking for a mobile coach, which would not leave the site, but would actually be attached to the building.

Mr. Weeks went over the criteria presented in the packet, noting that the proposal would be in the public interest and would not create any problems for surrounding properties. He said the proposal was for the same medical purposes used for over 50 years since the onset of zoning and would meet the purpose and spirit of the Ordinance. He said substantial justice would be done by allowing the owner to continue the same use with updated technology to serve the public. He said the value of surrounding properties would not be diminished and there would be a cover over it and a fence between the Route One By-Pass and the mobile coach. He said one of the hardships was that the Route One By-Pass had 700' of frontage on a heavily traveled road. He said the medical use predated the Ordinance and it was a mystery why the area was zoned residential when surrounded by commercial uses. He said the use was a reasonable one that would allow improved services to patients.

Mr. Rheume asked why they weren't making a permanent addition instead of a trailer structure. Mr. Weeks said it was at the recommendation of company to shield the MRI. He said they could simply move the coach out as technology changed instead of going through a lot of construction to remove outdated equipment.

Mr. Rheume asked if it was their intent to use ground skirting to make it look less like a trailer. Mr. Weeks said they would use a 6' fence with some plantings along the fence so the bottom wouldn't be visible. He said the top 2' would be the most that would be visible. Mr. Rheume said he was concerned with using a temporary structure that tended to deteriorate in five to ten years. Mr. Weeks said their experience was that new technology seemed to turn around every two to three years.

Mr. LeMay said he recalled a lot of discussion regarding screening the abutters to the east when they came before the Board in 2008. Mr. Weeks said the first approval was regarding the parking

lot and then they came back two months later and asked to move it to the front so it would not be visible to the abutters.

Mr. LeMay said he recalled another request on the right. Mr. Weeks said they also received an approval for an addition in 2008. Mr. LeMay asked if that had screening as well. Mr. Weeks said Mr. LeBlanc made a stipulation that arborvitae be planted as a screen, but that expansion was not done.

Mr. Taintor clarified that one of the variances advertised was for the front yard, but it would not be needed. Mr. Weeks said Mr. Cracknell said it was his assumption that there was an accessory use in the front yard and agreed they met the front yard setback. Mr. Taintor clarified for the record that the Board was limited to the variances that were actually required.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Chairman Witham said they would be voting on the first three variances listed, omitting the fourth variance, which was not required.

*Mr. LeMay made a motion to **grant** the petition as presented and advertised except the Variance from Section 10.571 with the stipulation that there be no signage, printing or advertising in any form on the coach. Mr. Durbin seconded.*

Mr. LeMay said granting the variances would not be contrary to the public interest and the spirit of the Ordinance and the small intensification of an existing use on the property wouldn't change the nature of the neighborhood even though it was technically in a residential zone. He said it was a reasonable expansion of a non-conforming use that pre-existed before the current zoning and substantial justice would be served by allowing the owner to continue the existing use with updated technology. He said the applicant stipulated that they would not use the side of the coach as an advertising billboard and represented that there would be adequate screening so there would be no change to the value of surrounding properties or effect on residential abutters as a result of such a small change to the use on the parcel. He said restricting their use would not serve the public interest and the literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship by applying the restriction to the side of the building abutting the bypass. He said it was understood that the technology changed over time and there was logic to having a mobile coach that could be swapped out instead of reconstructing a wing to the building.

Mr. Durbin said he felt the application in 2008 adequately addressed the continuation of use. He said it was a unique parcel in a residential neighborhood so they met the hardship criteria in that respect. He said it was a reasonable use and served a public benefit by having this type of technology in the area.

Mr. Rheume said he appreciated Mr. LeMay adding the stipulation that there be no advertising on the trailer. He said his main concern was that lightly constructed temporary structures such as

trailers deteriorate quickly and he hoped they would not regret the decision a number of years down road. He said he also hoped the applicant kept the area looking good by swapping out the structure or taking actions to improve the appearance as time went on.

The motion to grant the petition with one stipulation passed unanimously with a vote of 6-0.

Messrs. Mulligan and Parrott resumed their seats. Mr. Moretti returned to alternate status.

3) Case #4-3

Petitioners: Trustee for Renato S. Maldini Rev. Trust, owner, Mark McNally, applicant

Property: 121 Boyd Street

Assessor Plan: 174, Lot 7

Zoning District: General Business

Description: Construct a 16'± x 10'± right side dormer for access to third floor of an existing home.

Requests: 1. A Variance from Section 10.324 to allow a lawful nonconforming building to be added to or enlarged without conforming to the dimensional requirements of the district in which it is located.

2. A Variance from Section 10.521 to allow a 16'± x 10'± dormer to be constructed with a right side yard setback of 7'5"± where 10' is the minimum setback required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Jay Krupp of 325 Greenleaf appeared before the Board on behalf of the applicant and owner, Mr. Mark McNally. He said Mr. McNally was seeking to build a 16' x 10' shed dormer with a rear yard setback of 7½' where 10' was the minimum. Mr. Krupp said that at no point would the structure come closer to the lot line than it was already. He said there were letters of support from abutters included in the packet.

Mr. Krupp went over the criteria for approval saying that it would not be contrary to the public interest or change the character of the neighborhood. He said a simple shed dormer would provide safer access to the third floor and would not threaten the health safety or welfare of the neighborhood and the spirit of the Ordinance would be observed. Mr. Krupp said the proposal would not diminish surrounding property values. He said Boyd Street was located at the rear of the Wynwood Hotel along with a series of other houses, many of which also had dormers and the proposal would not infringe on the neighborhood. He said substantial justice would be done by allowing the proposal and denial would cause a hardship because the third floor couldn't be used safely without this dormer.

Mr. Rheume asked what the use of the proposed expansion of the third floor would be and Mr. Krupp said there would be just one bedroom, a closet and bath.

Vice-Chair Parrott asked for clarification on the alignment of the vertical wall and the overhang on the plan. Mr. Krupp said they were not building to the edge and the eave would be stepped back slightly.

Mr. Wayne Semprini, Realtor with Olde Port Properties said the applicant was asking for minimal relief that would meet the spirit of the Ordinance. He said he was a developer and partner himself who had represented Mr. McNally from time to time. He said Mr. McNally had developed housing of high quality and value to the Portsmouth community and thought he was worthy of support.

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. Mulligan made a motion to **grant** the petition as presented and advertised. Mr. Rheume seconded.*

Mr. Mulligan said the proposed dormer was a reasonable request for the property and would not be contrary to the public interest, would not alter the essential character of the neighborhood or hurt the health, safety or welfare of the general public. He said the spirit of the Ordinance would be observed as there were properties in close proximity that had similar dormers to take advantage of third floor space. He said justice would be done because the proposal would not create a greater encroachment than already existed as they would just be moving up vertically. Mr. Mulligan said there was no opposition or indication that the proposal would reduce surrounding property values. He said there was a hardship in the way the home was oriented on the lot with an encroachment in the setback so anything the applicant did to access the third floor would require additional construction within the setback encroachment. He said there was no fair and substantial relationship between the provisions of the Ordinance and their application to the property.

Mr. Rheume agreed and emphasized the proposal was in the spirit of the Ordinance in that all the homes were equally spaced and two of them had dormers. He said the strange shape of lot was the driving need for the variance and a hardship existed because the house was very narrow and created the need for a dormer to access the third floor.

*The motion to grant the petition **passed** unanimously with a vote of 7-0.*

- 4) Case #4-4
 - Petitioner: Tazman Investments LLC
 - Property: 155 Commerce Way
 - Assessor Plan: 216, Lot 1-10
 - Zoning District: Office Research
 - Description: Install 8’ x 22’ 500 kw generator and transformer on pad along southeast wall of existing building.
 - Request: 1. A Variance from Section 10.531 to allow a right side yard setback of 36’± where 50’ is the setback to the existing building and 75’ is the minimum setback required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Tim D. Caouette from Tazman Investments said they were looking for a variance to install a 500 KW generator on the southeast side of the building to allow their business to continue running in the event of a power outage. He said they currently had an open permit, but they had not been aware of the ramifications of the revitalization plan on Commerce Way at the time of their application in which entrances and exits that fed the property would be closed off to allow for a boulevard style road. He said the changes would make the rear of the building the actual front entrance so moving the generator to the rear would conceal it better. He said they would put in bollards to protect unit from damage from vehicle strikes and hide it from the park.

Mr. Caouette reviewed the criteria and said the application would be in the public interest and there would be little or no impact to the public as the proposed location would be tucked between two existing concrete stairways. He said there would be no change to parking. He said maintenance would be scheduled between 1 a.m. and 3 a.m. on weekends with no adverse impact on surrounding properties. He said the spirit of the Ordinance would be observed because they tucked the generator between the concrete stairs so there would be no impact on travel lanes. He said they intended to add a patio, table, chairs and trees in the space in the future for their employees to enjoy and conceal the space. He said substantial justice would be done because the revitalization plan would cause the rear of their building to become the primary access and adversely affect the appearance of their property if they could not properly conceal the unit. He said a nearby building had a generator and studies showed there were no adverse affects from the generator. He said making this change would not diminish the values of surrounding properties. He said the generator was a sufficient size to run the building during a power failure and not granting the variance would be a hardship because there was not another acceptable location available that would allow access to the building and utilities. He said placing the generator in this area reduced the overall impact on their property and on their abutters.

Mr. LeMay asked where the fuel tank was. Mr. Caouette said it was part of the base of the unit. Mr. LeMay asked if they were proposing to use a sound package enclosure and Mr. Caouette said they were. Mr. Rheume asked if there was just one occupant and if the side doors were emergency exists. Mr. Caouette said they were.

Mr. Taintor said he had talked about operating the generator overnight and asked if they met the dBA for the property line. He said the daytime had a higher sound allowance. Mr. Mark Richards from Northwood Electric said there was no sound study done at the property line, but it was reviewed during the original permitting process and they had no problem. Mr. Taintor said 50 dBA was the maximum during the evening and they might want to check it since they were moving closer and there was a building behind.

Chairman Witham said if the Board granted the request, they would be locking them into the 1 a.m. to 3 a.m. time so they might want to revise that time so they could test at a time when they would meet the dBA requirement. Mr. Taintor agreed and Mr. Caouette stated they would test at a time when it would meet the dBA requirement.

Mr. Robert Mazerowski, a representative of Tazman Investments and their tenant, Direct Capital said they were limited to the placement of the generator due to the entrance to the building. He said their original permit approved the placement behind the building, but due to the recent improvements, their curb cuts would be reduced and a lot of traffic would be behind building. He

said their company only ran one shift so their businesses did not have visitors on a regular basis. The abutting businesses did not have many visitors either, and they had no objections.

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

Vice-Chair Parrott said he would like to add the stipulation that if approved the Board would not be approving the sound requirement compliance at the property line because there was no testimony on the sound.

*Vice-Chair Parrott made a motion to **grant** the petition as presented and advertised with the stipulation that the Board’s approval was limited to the variance request as advertised. The Board did not address, and was not certifying that the applicant would be in compliance with, the provisions under Article 10.1330, Noise and Vibration Performance Standards, in the Zoning Ordinance. Ms. Chamberlin seconded.*

Vice-Chair Parrott said the proposal was in the spirit of the Ordinance, and it was in the middle of a commercial development so it was difficult to identify any public interest or substantial justice in an argument for denying the request. He said the surrounding properties were part of the same complex so there would be no diminution of property values. He said the facility was built and the utilities were in a logical place that met the criteria for hardship.

*The motion to grant the petition with one stipulation **passed** unanimously with a vote of 7-0.*

5) Case #4-5

Petitioners: Sarah Parker & David Natt

Property: 76 Brackett Lane

Assessor Plan: 206, Lot 6

Zoning District: Single Residence B

Description: Replace existing deck over garage with 10’± x 12’± addition and relocate rear stairs.

Requests: 1.A Variance from Section 10.321 to allow a lawful nonconforming building to be extended, reconstructed, enlarged or structurally altered in a manner that does not conform to the Zoning Ordinance.

2.Variations from Section 10.521 to allow a rear yard setback of 14’ 10” ± for the addition over the garage and 8’ 10” ± for the stairs where a minimum 30’ setback is required for both.

SPEAKING IN FAVOR OF THE PETITION

Mr. David Natt and his wife, Ms. Sarah (Parker) Natt said they wanted to remove the deck over their garage, which had a foundation and change it into a dining room. He said they would like to reconfigure their kitchen and remove the exterior and interior stairs because they were steep, not up to code and dangerous for their two year old.

Mr. Natt said their designer proposed moving the stairs to the front near the living room to bring them up to code and make more room in the kitchen. He said they would lose space in their living room so they were proposing the addition over the deck in compensation. He said the back steps were close to setbacks and already in violation at 10' so they were proposing to move them to 8' for the functionality of kitchen. Mr. Natt submitted an approval form signed by both abutters.

Mr. Natt went through the criteria and said extending their living space to create a reasonably sized family dining room and a functional kitchen would be in the public interest by allowing a young, growing family to continue as part of the established neighborhood. He said the stairs were dangerous and were in violation where they were. He said moving the rear door from the middle of the kitchen and moving the stairs to the front foyer reduced their living room space and necessitated using the space over their existing deck. Mr. Natt said many homes on the street had additions and exceeded setbacks, so their addition would be in the character of the neighborhood and in the spirit of the Ordinance. He said their lot was an odd wedge shape so justice would be served by granting the variance. He said the new structure would improve his property values and the surrounding property values. He said strict adherence to the zoning laws would create an unnecessary hardship by interfering with a reasonable use of the property as the existing stairs were dangerous and prevented them from having a functional kitchen.

Mr. Rheume asked if the Planning Department assisted them in averaging the front yard setback and Ms. Natt said the Planning Department worked with their architect.

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. Mulligan made a motion to **grant** the petition as presented and advertised. Mr. Rheume seconded.*

Mr. Mulligan said the application would not be contrary to the public interest, would not alter the character of the neighborhood, nor threaten the health, safety or welfare of the general public. He said the proposal was consistent with the character of the neighborhood where there were many additions. He said the single-family residential use was in the spirit of the Ordinance in a low to medium density zone. He said substantial justice would be served by granting a proposal to remove the stairs and replace the deck with an addition that would remedy the problem, and there would be no gain in denying the request. Mr. Mulligan said the proposal was consistent with the neighborhood and there was no opposition so there would be no diminution of the surrounding property values. He said the hardship was that it was an odd, triangle shaped lot and the existing structure was already in violation of setbacks. He said any change to the structure would require setback relief so there would be no fair and substantial relationship between the purpose of the Ordinance and its application to the property by replacing an existing open deck with a covered enclosure to give them a little more living space and a safer egress.

Mr. Rheaume agreed and said he did a site walk and observed that it was a very small lot and the applicants were asking for a reasonable use of their property. He said the lot had an odd layout with two streets merging which created a hardship so their request was reasonable.

*The motion to grant the petition as presented and advertised **passed** unanimously with a vote of 7-0.*

III. OTHER BUSINESS

No other business was presented.

VI. ADJOURNMENT

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

Respectfully submitted,

Jane K. Kendall
Acting Secretary