

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

**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**August 20, 2013**

**MEMBERS PRESENT:** Chairman David Witham; Vice-Chairman Arthur Parrott; Susan Chamberlin; Christopher Mulligan; Alternate: Patrick Moretti

**EXCUSED:** Derek Durbin and Alternate: Robin Rousseau

**ALSO PRESENT:** Juliet T. H. Walker, Transportation Planner

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**I. APPROVAL OF MINUTES**

A) May 28, 2013

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

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B) Excerpt of Minutes – June 18, 2013 regarding property located at Off Washington Street.

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

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**II. PLANNING DEPARTMENT REPORTS**

A) Update – Electronic Packet Submittal

This item was deferred to the end of the meeting.

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**III. PUBLIC HEARINGS – OLD BUSINESS**

A) Motion for Rehearing regarding property located at Off Washington Street.

Chairman Witham advised the Board that the Request for a Motion for Rehearing regarding the property located Off Washington Street, also known as Strawberry Banke, was not open to public comment. The Board would discuss the motion and make a decision. He noted that some background information had been provided. As the Board knew, in order to grant the Motion for Rehearing, there needed to be new information submitted that had not been available at the time of the hearing, or evidence of a procedural error on their part.

Ms. Chamberlin asked if there was any follow-up on the allegations in the motion that there were violations of the regulations by Strawberry Banke. Attorney Loughlin had addressed them in general by saying that the ones pointed out were grandfathered because the property had been there so long, and she wanted to check with the City and see if there were any current violations. Ms. Walker, Transportation Planner, stated that they were not aware of any violations and reiterated that the Board should only consider what was submitted in the Motion for Rehearing, even though other material was submitted for consideration by Strawberry Banke. Mr. Mulligan asked if the Board had to act on the motion for a time extension before acting on the Motion for Rehearing. Ms. Walker advised that it was up to the parties requesting the motion to grant the extension.

Chairman Witham asked if the Board wanted to discuss what had been submitted which was extensive. He felt that some were points that had previously been made, and he was not convinced that there was new information. Some references were made to his comments about people both for and against on the same street. He stated that he had been speaking in general because there were a lot of side streets and he was not choosing a specific street when he said people were speaking for or against. They also referenced the volume of people who went through Prescott Park on a daily basis. Chairman Witham said that he simply picked a probable number and had no factual information of how many people went through the park. People insinuated that it was a gross exaggeration, yet they did not provide an actual number for how many people did go through the park, so it wasn't enough to steer him either way.

Ms. Chamberlin agreed and did not believe that the comments raised new issues. There were a few minor discrepancies about some of the comments Chairman Witham had made, but it did not rise to the level of an error of law.

Mr. Rheaume stated that he was one of the two members of the Board who voted against the motion to grant. He had gone back through all the information that had been provided, as well as the petition for rehearing. He had reviewed all the letters they had received as well as the Minutes that were carefully captured for that long duration that the Board listened to testimony from the residents of the neighborhood. He hadn't found anything that was not previously mentioned. The one item, as the Chairman had mentioned, were some discrepancies currently in the configuration for the Strawberry Banke that may not fully comply with modern zoning. However, there was no additional evidence that was presented by the petitioners indicating that there had been some kind of error on the part of the Planning Department or by the applicant, Strawberry Banke in regard to those. They simply were existing conditions which many of the applicants had that came before the Board. Existing conditions might not be compliant with current zoning regulations and the Board lets those aspects be and just looks at the zoning in terms of any new applications and what was being proposed for a property at that point in time.

Mr. Rheume added that they had listened to a great deal of testimony. In his review of all the letters, he had found letters from individuals on the same street that were of varying opinion on the matter so he would say that the Chairman's statement was a fair statement. Reviewing the whole length of what was discussed, he felt that they had certainly listened to the public, probably more than even necessary as speakers were allowed folks to come back up multiple times to follow up on their opinions. It was certainly a long evening for them to review all the information. Even though ultimately the outcome was not one that he supported, he felt that the Board deliberated and had a good basis for making the final decision that it did, so he would reject the motion for rehearing and did not see where there was a basis for it.

Chairman Witham thanked Mr. Rheume for his comments and asked for further comments or a motion. Mr. Parrott stated that he thought everyone who was at that meeting could agree this was one of the most thorough hearings they had had on any subject for a long time. Both sides presented their points in cogent fashion and he couldn't imagine anything that was pertinent that had not been brought up. Similar to Mr. Rheume, he had gone back through the whole package, including the very extensive and well done Minutes, and he thought that all the arguments for and against had been made and it was a question of how you felt about it with respect to the criteria. He too found no error in procedure by this Board and, because of the thoroughness of the hearing and the thoroughness of the documentation, he felt there was no new information that had come forward.

*Mr. LeMay made a motion to **deny** the Motion for Rehearing, which was seconded by Mr. Parrott.*

Mr. LeMay said he agreed with Mr. Parrott's concise analysis of the facts. During a long hearing, there were certainly times when people would get off topic, but he found nothing new presented and no legal errors that he could detect. Mr. Parrott concurred and had nothing to add.

*The motion to deny the Rehearing **passed** by a unanimous vote of 7 to 0.*

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B) Case # 7-1

Petitioner: Matthew & Katherine Hatem

Property: 1 Ash Street

Assessor Plan 149, Lot 34

Zoning District: General Residence A

Description: Install 39"±L x 27"±W x 18"±H condenser unit at rear of existing home.

Request: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.521 to allow a rear yard setback of 7'± where 20' is required.
2. A Variance from Section 10.521 to allow building coverage of 28.3%± where 28.2 exists and 25% is the maximum allowed.

*(This petition was postponed at the July 16, 2013 meeting).*

The Board acknowledged that this petition was withdrawn by the applicant prior to the meeting.

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- C) Case # 7-2  
Petitioner: 4 Amigos, LLC  
Property: 1390 & 1400 Lafayette Road  
Assessor Plan 252, Lots 9 & 7  
Zoning District: Gateway  
Description: Install free-standing signs  
Request: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:  
1. A Variance from Section 10.12431 to allow multiple free-standing signs on a lot where only one free-standing sign per lot is allowed.  
2. A Variance from Section 10.1251.20 to allow a free-standing sign to exceed 100 s.f. in area.

*Mr. Parrott made a motion to grant a postponement to the September meeting, which was seconded by Mr. Mulligan and **passed** by unanimous voice vote.*

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#### **IV. PUBLIC HEARINGS – NEW BUSINESS**

- 1) Case # 8-1  
Petitioner: Richard S. Bean  
Property: 324 Parrott Avenue  
Assessor Plan 129, Lot 36  
Zoning District: General Residence A  
Description: Construct a 529± s.f. garage with living space and deck above.  
Construct a 388± s.f. left side deck.  
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:  
1. A Variance from Section 10.321 to allow a lawful nonconforming structure to be extended, reconstructed, enlarged or structurally altered in a manner that is not in conformity with the Ordinance.  
2. A 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.  
3. A Variance from Section 10.521 to allow building coverage of 34%± where 25% is the maximum coverage allowed.  
4. A Variance from Section 10.521 to allow a left side yard setback of 2'± where 10' is the minimum allowed.

*Mr. Parrott made the motion to grant a postponement to the September meeting, which was seconded by Mr. Moretti and **passed** by unanimous voice vote.*

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- 2) Case # 8-2  
Petitioner: Two Boats Realty LLC, owner, Mary Driscoll, applicant  
Property: 279 Richards Avenue

Assessor Plan 130, Lot 53

Zoning District: General Residence A

Description: Construct a 20± x 48'± detached garage.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.521 to allow a left side yard setback of 3'± where 10' is the minimum allowed.

### **SPEAKING IN FAVOR OF THE PETITION**

Ms. Mary Driscoll stated that she was the owner of the property and noted that the name of the property owner had been officially changed to Scary Realty, which was a combination of Scott and Mary. She bought the property in 2008 when the dilapidated 8-car garage at the back took almost the whole width of the property. The photo that the Board members had was taken from the other side of the rear property line and showed a portion of the structure. After purchasing the property, Ms. Driscoll and her husband discovered that the previous owner had been twice notified that it was a hazard needing to be addressed. Their plan was to demolish the structure and build something smaller in the same location, perhaps a 6-car garage. They had thought that the structure was grandfathered, but when they began to tear it down, they discovered that it had been built on cinder blocks instead of slab, so they could not rely on the same footprint. They set it aside for a few years and now wanted to build a structure half the size and more conveniently located. The design and color would be similar to the house, one level with a slightly pitched roof toward the back. Mr. Cracknell had suggested that they deed the property directly behind 285 Richards Avenue back to the Gibsons, who owned the structure, because it would make their lot more conforming. As a result, that became another aspect of their project, namely, the proposed new property line as part of the lot line adjustment that they hoped to do later.

Ms. Driscoll stated that the variance was justified. The granting of an easement would not be contrary to public interest and they ultimately planned to improve the property by converting the existing duplex into two condos, making it possible for additional home ownership. Adding the garage would make it more valuable and not contrary to purposes of the Ordinance because the adjusted lot would still satisfy the minimum lot size building coverage requirement and open space requirements of the Zoning Ordinance, so there would be no overcrowding of land, the frontage would not change the view along Richards Avenue, and the footprint of the existing dwelling would not increase. Another aspect of the plan was the lot line revision which, when completed, would enable the adjoining Gibson lot to be substantially more conforming by more than doubling the existing lot area.

Ms. Driscoll stated that granting of the variance would not be contrary to the spirit and intent of the Ordinance. Although it was closer to the side lot line than allowed, the proposed garage would still be 32.5' away from the existing 7-stall garage on the adjoining lot on the other side. Allowing the garage to be 3' to the lot line would not pose any danger to the health, safety or welfare of the abutter or the general public. Granting the variance would not diminish the value of surrounding properties. A garage was a customary amenity and would be no closer to the side property line than the existing dwelling. Most garages in the neighborhood did not meet the current lot line setback rules, so it would not diminish the value of surrounding properties, and she felt that it would be in keeping with the character of the neighborhood and improve property values.

The hardship element was a big hurdle in seeking a variance, and one of the special conditions about the property went back to when it was created. Ms. Driscoll's lot and the Gibson lot were separated in 1919 by the former owner of both, who carved out the former Gibson lot and gave it a 10' easement on her driveway that remained on her lot and accessed what was now two spaces behind their building. The overall width of her lot and the Gibson lot was small combined with the driveway easement down the center. Both structures were within 10' of the outside lot lines, especially hers, which was 3'. To require that they build the garage to comply with the 10' setback would place the garage 7' closer to the shared lot line, leaving the occupants of both properties insufficient room to move in and out within impinging on the other lot. Under those circumstances and given that there was more than 32' between the proposed garage and the 7-car stall, she felt that there was no rational basis for insisting on the 10' setback.

Ms. Driscoll stated that substantial justice would be done in granting the variance because the proposed use was a reasonable one under all the circumstances, and their desire to use the property as proposed was not outweighed by the reasons behind strict adherence to the provisions of the Ordinance. Given the fact that there was a garage on the lot next door, a garage on their lot was certainly a reasonable use for residential property and there were special conditions in the land.

Chairman Witham noted that Ms. Driscoll had stated that the abutter had a 10' easement over her property where the new property line was going so that there would be access to the back of their property. He asked Ms. Driscoll if she would have new deeds written up to reflect all of the changes. Ms. Driscoll stated that she would but had not created the legal description yet. Chairman Witham asked if the neighbor would have an easement to cross over to her property. Ms. Driscoll stated that the 10' easement did not go to the edge of the driveway, and they had talked about expanding it about 12' or 15' so that it went to the edge of the driveway as well as getting cross easements for going deeper into the lot.

Chairman Witham stated that if Ms. Driscoll was going to have an easement on her property, there would have to be an understanding that when someone backed out of the garage, they could cross over the line to their pavement. He also believed that the mature trees along the property line where the garage went up would not survive the digging of a foundation. It showed the garage at 3' from the property line, and the foundation would have to be dug within 12-18" of the base of the trees, so the roots would not survive. The drawing did not make it clear exactly which tree was on whose lot, but it looked like the property line went through the trees, and it was pretty clear that the trees would be lost. He thought if the garage could slide toward the center of the property a bit to save the trees, there would be room to back out as long as the easements were in place. Ms. Driscoll stated that her surveyor had said that the lot line split the trees, and it was not her intent to take all the trees down. She would like to remove one tree that was unsightly but would need the abutter's approval. Her builder felt that the trees could be saved if he floated a slab.

Chairman Witham asked Ms. Driscoll if she was open to sliding the garage a few feet. Ms. Driscoll stated that a 3' setback was in keeping with the side lot line of the house. Additional space in the center of the yard was also a goal, and if they had a 4' or 5' setback, it would not be unreasonable. Ms. Chamberlin asked where people were currently parking and if it was on the street. Ms. Driscoll said there were seven parking spaces behind the Gibson property. Because her lot angled to the right, five of the spots were here and there were two behind the Gibson house. Ms. Chamberlin asked if that was where they parked, and Ms. Driscoll stated that it was pavement up to the garden. Ms. Chamberlin asked what would happen to the spots when people went into

the garage. Ms. Driscoll said that the second part of the plan was to do the lot line revision, and the land in the back would be deeded to the Gibsons to do what they wanted with it. Ms. Chamberlin asked if Ms. Driscoll expected it to be open space. Ms. Driscoll said she did not know what Mr. Gibson's plans were.

Mr. Jay Gibson told the Board that his property was 285 Richards Avenue and he wanted to voice support for the request. He thought that building a garage 3' from the line rather than the specified 10' would be consistent with the other structures in the neighborhood. He had only two parking spaces and there was no room left in their existing parcel for additional parking. Typically, his tenants parked two cars on the street, so it would allow those cars to come in off the street and would leave the remaining spaces available for additional parking as needed in the neighborhood.

Mr. Mulligan asked how many units the building had, and Mr. Gibson told him two. Mr. Rheume said there had been some discussion about moving the garage back a foot or two away from the property line and asked Mr. Gibson how it would impact the ability of his tenants getting in or out. Mr. Gibson originally felt that the issue was whether or not the garage could be pushed more to the rear of the lot line and away from the house, but then he reasoned that, instead of a 3' setback, there might be 4' or 5' to allow more room for the trees. Mr. Rheume agreed that it would be closer to his property line. Mr. Gibson said he wasn't sure and would take a look at it. He stated that he did not have immediate plans for a garage, but it provided a future opportunity, and he would want to be clear whether or not it would be done by him or someone else.

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

With no one rising, the public hearing was closed.

#### **DECISION OF THE BOARD**

Chairman Witham stated that he was clear about his concerns about the trees. A floating slab was better than digging a cross-wall, but it was still close to the trees. He wanted to see more than 3' but would leave it to the maker of the motion. Even if it moved forward 3' or 4' toward the center, there would still be enough room for people to get in and out of parking spots or the garage as long as those easements were in place. The Gibsons would always have an easement, and maybe the applicant would need an easement as well to back out onto the Gibson property. The drawing showed that it was 22' to back up and turn around, which would suffice, and 18' would suffice. It would be one open paved area and no one would be aware of an invisible lot line, and he was sure that there would be friendly co-existence to handle the arrangements.

Mr. Rheume stated that when he first looked at it, he saw that Ms. Driscoll was trying to keep a straight line with the house, and he had asked if the house would have the same setback, but he recognized Chairman Witham's concern and agreed with it. It would be a plus from the standpoint of providing light and air as well as providing a visual break between the two properties and the two garages. It would be a plus for the abutter and Ms. Driscoll. He stated that he would be in favor of moving the garage back at least one foot. Chairman Witham said he would like to see a 6' stipulation because the layout and flow would still work. His other concern was that the abutter might have to cut down the trees, but trees in that area were part of the cityscape.

Ms. Chamberlin asked what would happen if they made a motion for a 6' setback and the applicant was uncertain because they needed to look into it. Chairman Witham said that the Board could always grant less. Ms. Chamberlin assumed they would have to decide whether to accept it or not. Mr. Rheume asked if the applicant could come back for another opportunity to get it closer if they decided it, or if there was some complication. Chairman Witham said they would deal with Fisher vs. Dover, and it had to be a significant difference. If they stated 6' and the applicant came with 5', Fisher vs. Dover would apply. The Board dealt with those types of setbacks mostly with sheds on cinder blocks that did not impinge on trees, but the structure was a 48' structure. Mr. LeMay said sometimes an old tree was just an old tree, but he agreed that it was workable since there was an option and it didn't cause a hardship to the owner.

Mr. Rheume stated that he was also supportive of the trees remaining and wanted to preserve them. He asked if 3' was really necessary or could they look at something less. Mr. Parrott shared the same concern. He had a small lot himself and knew how important trees were to property values. Given the cross easement and orientation of the houses and the common driveway down the middle, which was odd enough, he thought people would always back across the middle of the lot no matter how the garage was configured.

*Mr. Parrott made a motion to **grant** the petition with a setback of 6' instead of the requested 3'.*

Chairman Witham asked if he would add a stipulation that the construction technique be floating slab without a cross-wall and that best practices be employed to save the trees during construction. Mr. Parrott agreed to the stipulations.

*Mr. LeMay seconded the motion with the stipulations.*

Mr. Parrott said it was a long and narrow lot and configured in an odd fashion, with one corner notched out for a second house and a shared driveway down the middle of the property. He felt that it was odd enough to start out with, and it didn't leave a lot of leeway in which to maneuver. It seemed like a good proposal. Lining up the garage that far back on the lot with the house was not a primary concern, but giving the trees a chance to survive was a primary concern. The proposal to set the building back 6' would not hurt either property owner and would not make it inconvenient to get in or out of the garage as well as a future garage on the right side. For those reasons, it met the test.

Mr. Parrott stated that granting the variance would not be contrary to public interest as it was hard to detect any public interest in the middle of two lots. There was certainly an interest by both parties and both parties agreed, while the third party with the adjacent lot had no opinion and had not shown up or written a letter and so was probably not opposed. Granting the variance would observe the spirit of the Ordinance, which was always to help people make their properties more useful and work better for themselves without hurting someone else.

He stated that substantial justice would be done. There was no overriding public benefit that would be injured or come into play if granted, so the balance test tipped in favor of the applicant. The values of surrounding properties would not be diminished because it was a congested neighborhood to begin with, and preserving trees would be in the interest of the surrounding properties. It would be a new structure built to code, which was desirable, and would be in the style of the house, which was also desirable. They had touched on the hardship criteria in the



beginning and thought it was an odd-shaped lot with a shared driveway. Those were special conditions and difficult to apply normal rules to, given the lot configuration and the location of the houses on the lot. It clearly met all the criteria.

Mr. LeMay concurred with Mr. Parrott and said his prior comments would stand.

Mr. Rheaume stated that he would support the motion as presented. A further consideration was the fact that it was a 20' deep garage, which was more than the Board saw with most garages. If it became necessary, they could get more clearance on the driveway side by making the garage a bit shorter and still be comfortable in meeting the 6' setback.

*The motion to grant the petition as presented and advertised **passed** by a unanimous vote of 7 to 0, with the following stipulations:*

- That the granted variance would be for a 6'± left side yard setback where 3'± was requested.
- That the garage would be constructed on a floating slab foundation.
- That best practices would be employed to preserve the existing trees.

3) Case # 8-3

Petitioner: Beth L. & Marco A. Gross-Santos

Property: Marjorie Street (number not yet assigned)

Assessor Plan 232, Lot 14 (rev.)

Zoning District: Single Residence B

Description: Construct a single family home.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.521 to allow a lot area of 9,596 s.f.± per dwelling unit where 15,000 .f. per dwelling unit is required.
2. A Variance from Section 10.521 to allow a 26.1'± rear yard setback where 30' is the minimum allowed.

### **SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernie Pelech stated that he was representing the owner, Ms. Gross-Santos, who was present at the hearing. He stated that in 1903, three gentlemen from Boston came forward with a plan for Prospect Park, which was then 300 lots where the property was currently situated off Middle Road. All the lots were 40x80', and over the years many of those lots had been combined voluntarily by owners and developed. Lot 232-14, his client's lot that fronted Marjorie Street, was originally three of seven 40x80' lots merged by the City for tax purposes many years ago, and then in April were unmerged by the City Council into seven 40x80' lots. The applicant had submitted and been approved by the Planning Department a voluntary lot merger to take the seven lots and merge them into two lots. Three of the lots had frontage on Marjorie Street, and those were the lots he wanted to discuss. The other four lots had frontage on Lois Street with an existing home.

Attorney Pelech stated that the applicant wanted two variances, one for a rear yard setback for a set of steps which was 26.1' from the property line. The dwelling itself was 30' and met the rear yard setback. The front yard and side yard setbacks were compliant and conforming with the Zoning Ordinance, which was unusual for the neighborhood. The second variance was to allow a dwelling to be constructed on a 9600 s.f. lot where 15,000 s.f. was required. Attorney Pelech passed out a tax map to the Board and stated that he had colored the lots located between Lois, Marjorie and Sylvester Streets. There were 28 lots, and 25 of them were nonconforming in size. The pink lot was the lot in question. The three blue lots were the only ones that were 15,000 s.f. or greater. There were homes that had been constructed on the 3200 s.f. lots, 6400 s.f. lots, and 9600 s.f. lots, and they all derived from the original 1903 40x80' Prospect Park plan. He believed that the five criteria necessary for the Board to grant the two variances would be met.

Attorney Pelech stated that the first two criteria could be dealt with by two single tests, whether or not granting a variance would result in a substantial change in the essential characteristics of the neighborhood, and whether or not it would result in a threat to public health, safety or welfare. If the answer was yes to either question, the Board should deny the variance, but if the answer was no, then granting the variance was not contrary to the spirit of intent of the Ordinance, nor was it contrary to the public interest. Allowing a home to be built on the 9600 s.f. lot was not going to change the essential characteristics of the neighborhood nor threaten the public health, safety or welfare.

Attorney Pelech stated that the criteria regarding whether or not justice would be done by granting the variance could be seen from looking at the old tax map, which had lot sizes in square footages consistent with the Zoning Ordinance rather than the percentage of an acre, making it difficult to compute what the lot size actually was. Substantial justice balanced the hardship on the owner if the variances were denied against some public benefit. Attorney Pelech stated that he saw no public benefit in denying the variances, but he did see hardship on the owner if the variances were denied.

He stated that the surrounding property values would not be diminished by allowing a structure to be constructed on the lot. Lot 37 across the street was seven lots reconfigured into two lots, and a new house had been constructed that fit in well with the neighborhood. His client's lot was wooded and he did not believe that allowing a home to be constructed on that lot would diminish surrounding property values, nor would allowing steps to be 26.1' from the rear property line, especially the other lot that fronted Lois Street, which was also owned by Ms. Gross-Santos. The house was set back the required 30', but because of the floor plan requirements, there was a 4' set of steps that projected from the rear of the house and required the rear setback variance.

There was an inherent hardship in the land that resulted from the strict imposition of the Zoning Ordinance. The Ordinance required a 15,000 s.f. lot size before a dwelling could be constructed in the zone, and it was not in keeping with lot sizes. On the other side of the Case Home, which was Lot 45 consisting of 25 acres, there were a series of additional streets which was near the other portion of Prospect Park and bore the same characteristics as Sylvester, Marjorie and Lois Streets. For some reason, the zoning did not reflect what existed on the ground, so there was a hardship due to the requirement that there be 15,000 s.f. of lot area per dwelling area. An 80' deep lot, a 30' front yard setback, and a 30' rear yard setback did not leave much of a building envelope. Fortunately in the last revision, the City added a provision to the Zoning Ordinance which allowed the averaging of front setbacks of abutting properties, so it allowed this property to have a 15'

setback. Because of the special conditions of the property, granting the variance would certainly not be contrary to what the Board needed to find in order to grant the variance. The use of the property was reasonable because it was an allowed use for a single-family dwelling. There was no fair and substantial relationship between the purpose of the Ordinance as it applied to the particular lot, given the size and depth of the lot and characteristics of the neighborhood and the lots surrounding the subject lot. In conclusion, the five criteria necessary for the Board to grant the variances were met by the application, and the Board would find that the relief requested was minimal.

Mr. Rheume stated that one of the things that had not been submitted was an elevation plan for a house. Attorney Pelech stated that all they had was a footprint, but he believed it would be similar to what was being built across the street, which was a 1-1/2-story Cape being built by the same builder. Mr. Rheume said the Board had something submitted back in March for a larger structure, and he was curious to see the changes and the smaller footprint being discussed. Attorney Pelech said he had not seen any elevation whatsoever and could not answer the question. Mr. Rheume had gone out to look at the lot and found it lower in elevation than the surrounding lots. Attorney Pelech said that Marjorie Street as well as Lois and Sylvester Streets dropped down from Middle Road. The applicant's lot was lower than the lots above it but equal to or a little higher than Lots 23 and 24.

Mr. Parrott asked Attorney Pelech if he knew what the drainage status of Joseph Street was. Attorney Pelech said he didn't know, but he did know that it was a paper street and not constructed, so it could not be traveled. Joseph Street was close to wetlands, and he did not believe that the City had ever deeded it out to abutting property owners. Marjorie, Lois and Sylvester Streets were all no-outlet streets. Mr. Parrot said Joseph Street appeared to be a drainage area. Attorney Pelech agreed.

Mr. Mulligan stated that he had observed that the applicant's house that had frontage on Lois Street was very big and very high, at least three stories, and he asked Attorney Pelech if he was at all concerned that the structure would dominate the one his applicant was now proposing to build. Attorney Pelech said he was not concerned, and the individual who had the lot under agreement and was proposing to build the house was not concerned. There was a considerable setback between the two structures, so that there were adequate rear yards in both. Mr. Mulligan asked what the setback would be from the existing structure on Lois Street. Attorney Pelech said that the existing structure appeared to be at least 30' to 35' from the rear property line for a total of 60'.

#### **SPEAKING IN OPPOSITION TO THE PETITION**

Ms. Sherilyn Higgins of 50 Marjorie Street and Ms. Elaine Langer at 48 Marjorie Street stated that they were on either sides of the lot and their primary concern was with drainage. A brook ran between Lois and Marjorie Streets behind their homes and fed into the Toyota Portsmouth wetlands issue. Ms. Higgins stated that she had spent a lot of money putting in a basement system because she had issues with water in her basement. If it was found in the petitioner's case that there was water coming from somewhere, she wanted to have it reviewed because she did not want more issues with water in her basement. She believed that her house was lower than the land in question and that it went further toward the end of the street. Mr. Mulligan asked if the new home's construction up the street had impacted Ms. Higgins. Ms. Higgins believed it had because

the previous week, her basement system contractor had come over to give her more drainage because she had more water backed up.

Mr. Mulligan asked her if she had noticed an increase of water since the new home had been built, and Ms. Higgins said she believed so because it was across the street and higher than her home. They'd had so much construction done on her little dead-end street that it caused water to come up into her basement, and if there were wetlands on the applicant's lot, it would pose additional problems.

Ms. Langer stated that the lot was spongy and wet, and her concern was that she would have a financial obligation to get water out of her basement again. She previously spent thousands of dollars and would have to do it again due to all of the new construction. She strongly felt that the Board should hire an environmental engineer to study the land before granting approval for the application. She and Ms. Higgins had spent so much money. She also requested that the trees on both sides that soaked up the water remain to help with the water issue.

Mr. Rheaume asked how long each of them had owned their properties. Ms. Langer said she had owned her property since 1995 and had spent \$33,000 to keep water out of her basement. Ms. Higgins stated that she had been in her house for seven years, the first two of which she hadn't had a problem, and then had spent around \$7,000 on the water issue in her basement..

Mr. David Moody of 11 Marjorie Street stated that his house was directly across from the applicant's lot and he had the same concerns about the wetlands area. He had lived there the longest because it was his childhood home. The field was wet field and took in water. It was the lowest area in the neighborhood at that point. He stated that it had not always been that way, that it used to be well manicured and kids would play ball there. His biggest concern was the house. He had seen the rendition and thought it would be suitable for the neighborhood if the house was built as shown. However, if the developer bought the land, he hoped he would stick with the existing plans because he did not want to see a 3-story house across from his 1-1/2 story home built in 1921. He stated that they had had lots of construction recently. In two years, there had been three new houses, and the nearby pond had been modified by engineers and contracts to make a gully, and that may or may not have affected his neighbor. His house took in some water but he hadn't been able to afford repairs. He felt that if the house was built across the street, the foundation in the ground would raise the water table. As long as issues were addressed and the house conformed to the neighborhood, he would be okay with it. Chairman Witham asked if the water had increased in Mr. Moody's basement over the last two years. Mr. Moody was not sure, but he stated that there was an excessive change in the last two years and he always had an issue.

Mr. Parrott asked if, given Mr. Moody's history in the neighborhood, there was typically standing water on the vacant lot after a fair-sized storm. Mr. Moody told him absolutely. He stated that it was not as bad lately due to the current vegetation, but when the lot was mowed, it was a swampy area. Mr. Parrot asked if it was slower to dry out and drain than the other nearby lots. Mr. Moody said that, on a current level, he could not say because he didn't play ball in the field anymore. Mr. Parrot asked if the City had even been requested to look at the drainage situation. Mr. Moody said he was not aware of it. Years before, the City had come to build drainage ways on the road, but the water traveling into the lower area had no catch basins on that side of the street that would channel water from the roadway. He believed the water came from the field.

**SPEAKING TO, FOR, OR AGAINST THE PETITION**

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

**DECISION OF THE BOARD**

Chairman Witham felt the situation was a challenging one. He had no concern with the stairs and the lot area per dwelling unit. There would be five bigger lots, three lots of the same size and 20 smaller lots deemed to be a buildable house lots. However, there was a hydraulic water issue with no engineering report but just testimonies from neighbors, as well as basement situations and history from someone who had lived in the area for quite a while.

Mr. LeMay said that there were a number of people who had mentioned the water situation, and there was no representation as to how it was being dealt with, coupled with the fact that they did not have an elevation, which was a requirement element of the application. He thought that it might be appropriate to continue to the next month to give the applicant the opportunity to provide additional information. Mr. Parrott added that the Planning Department had to contact Public Works. Mr. LeMay said the Board would have to figure out specifically what they wanted, but the fact that they had heard no representations was important, given the recent development. Mr. Rheaume concurred with Mr. LeMay and said that he was disappointed not to have representation of the size of the building other than the footprint on the ground, which was smaller than what had been proposed in March. He saw concerns that reminded him of the Fairview Avenue case because it had the same issues of abutting neighbors with concerns about water displacement. In fairness to the applicant and the neighbors, he believed that the Board should look for the same information as the Fairview Avenue case. Chairman Witham thought that what the Board received from the engineers in the Fairview Avenue case put them in a better position to make a decision. They were not asking for a lot, considering the potential ramifications for abutters, especially given the testimony of what the abutters had spent so far. Water mediation would be a reasonable request if someone wanted to make a motion. Perhaps they could work with the Planning Department and look at the Fairview case.

*Mr. LeMay made a motion to continue to the next regular meeting to give the applicant the opportunity to provide the building elevation indicating what they intended to built on the lot, and also to contact the Department to work out the necessary details for water drainage and runoff, based on the history. Mr. Parrott seconded the motion.*

Mr. LeMay said that his justification was what he had just said. Mr. Parrott said that, considering the obvious problems and pertinent testimony from adjacent homeowners, they would be ill advised to create a spongy building lot that was generally a local drainage area. It was appropriate that they postpone so that additional information could be gathered and the Planning Department could work with Public Work, the City Engineer, and whoever else was appropriate to make a good decision.

Chairman Witham supported the motion and felt that, on the surface, it was a reasonable proposal. However, considering the water issues, he was not confident about approving and saying that there was no detriment to property values when there seemed to be a change of a detriment to those property values. Considering what people had spent so far, the final amount could be significant.

Chairman Witham suggested that the Board continue to look for some elevations to get a sense of what the new structure would look like, and for the applicant to work with the Planning Department to provide the Board with information regarding grade and runoff as well as a statement on behalf of the Planning Department on their sense of impact to the abutters.

*The motion to continue the petition to the September meeting **passed** by a unanimous vote of 7 to 0.*

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4) Case # 8-4

Petitioner: K. C. Realty Trust, owner, Portsmouth Buddhist Center Inc., applicant

Property: 84 Pleasant Street, Ste. 201

Assessor Plan 107, Lot 77

Zoning District: Central Business B

Description: A religious place of assembly.

Requests: The Variances or Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Special Exception under Section 10.440, Use #3.11 to allow a religious place of assembly in a district where such use is allowed by Special Exception.

#### **SPEAKING IN FAVOR OF THE PETITION**

Chairman Witham wanted to let the new Board members know that every two or three years, the applicants had to vacate their space as it was needed by their then current landlords and seek a new location to present before the Board.

Ms. Michele Racine introduced herself and said she was known by her Buddhist name, and she was there to represent the Portsmouth Buddhist Center and seek the special exception described. The Buddhist Center wanted to utilize the office located on the second floor of 84 Pleasant Street, and it would be a lease instead of donated space. The property was zoned for like uses, including public assembly, performance and education. No tenant fit-up was anticipated except for a new carpet and a new toilet. In accordance with the table of uses as cited in their application, Ms. Racine said they required the special exception under six criteria, which she would briefly summarize.

She stated that the standards as provided by the Ordinance for the particular use were permitted by special exception: there were no special requirements for religious uses. No hazard to the public or adjacent property on account of potential fire, explosion or release of toxic materials: the activities of the Portsmouth Buddha Center in offering meditation and Buddhist studies posed no hazards to adjacent properties on account of fire, explosion, or toxic materials. No detriment to property values in the vicinity or change in the essential characteristics of any area including residential neighborhoods or business and industrial districts on account of the location or scale of buildings or other structures, such as parking areas, etc. There were no changes to the structure or site and, given the nature of the teaching use proposed, there was no impact on property values due to the location or scale of the buildings, and so on.

There would be no creation of a traffic safety hazard or substantial increase in the level of traffic congestion in the vicinity: the Portsmouth Buddhist Center's most popular weekly program was the Wednesday evening meditation and study night. Approximately 15-25 people attended regularly. It was held at 40 Congress Street for 16 months and at 99 Bow Street for eight months. The Sunday morning meditation and the occasional weekend introduction to meditation had resulted in fewer than 12 participants. She believed that the use presented no greater parking impact than what would reasonably be anticipated for the space. There would be no excessive demand on municipal services including but not limited to water, sewer, waste disposal, police and fire protection and schools: the use was not fundamentally different from an educational use and would have no discernible impact on the services. There would be no significant increase in storm water runoff onto adjacent property or streets: there would be no changes to the site a part of the religious use.

Ms. Racine stated that they had twice been granted a special exception by the BOA to conduct activities at two donated locations, 99 Bow Street and 40 Congress Street, and they would continue the same activities and programs with meditation classes for new and advanced practitioners as well as classes on Buddhism. They planned to continue exactly as they had been doing if the Board permitted them. There were not aware of any complaints regarding their activities. Three out of their seven governing board members lived or worked in Portsmouth and were in support of their application. She also submitted a floor plan of the office space that they would use.

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

With no one rising, the public hearing was closed.

#### **DECISION OF THE BOARD**

*Ms. Chamberlin made a motion to **grant** the petition as presented. Mr. Rheaume seconded the motion.*

Ms. Chamberlin said the applicant had gone over the review criteria very well and she supported her description. The Board had previously had the Buddhist Center before them and had granted special exceptions with no record of any problems. There was no indication that the Pleasant Street location would be any different than the others. The only criteria that might be impacted was the increase in traffic, but Ms. Racine had testified that 10-25 people met once a week with no significant impact on traffic congestion in the area, so she believed that the criteria were met.

Mr. Rheaume concurred with Ms. Chamberlin. The applicant had done a good job of going over each of the criteria and summarized it well. The only controversy might be the increase in traffic, but the number of people was relatively small compared to many other uses fully permitted in the zone, so he didn't see where they would substantially impact traffic or parking needs in the downtown area. Most of their activities took place in off-peak traffic hours.

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

Mr. Parrott stepped down from the following petition.

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5) Case # 8-5

Petitioner: 63 Humphreys Court Realty Trust & Lynne Fedorowich

Property: 63 Humphreys Court

Assessor Plan 101, Lot 38

Zoning District: General Residence B

Description: Replace existing mudroom & garage with new structures plus second story addition. Replace deck.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.521 to allow a right side yard setback of 2.5'± where 10' is the minimum allowed.
2. A Variance from Section 10.521 to allow building coverage of 36%± where 49%± exists and 30% is the maximum coverage allowed.

### **SPEAKING IN FAVOR OF THE PETITION**

Mr. Bob Cook from Adapt Design presented along with the owner Lynn Federowich. Mr. Cook told the Board that he had had a site survey done since receiving two variances, so there was a slight change to the variances. Initially, the setback had been thought to be 2.5' and was actually 4.5' at one point and 4.2' at another, so the actual amount that they wanted for a variance was a bit less. The site itself was very nonconforming. The Board could see from looking at the dashed line for the buildable area vs. what was actually there that they didn't meet up at all.

Mr. Cook reviewed the criteria stated that granting the variance would not be contrary to the public interest. Taking down the existing structures, which were self-improvements by previous owners, would improve the health, safety and welfare of people occupying around the building. It would make the appearance better and respect the density of the street. The spirit of the Ordinance was observed because the site was nonconforming and they were making improvements to the rear setback and leaving the side setback as it was, so they were working within the tradition of the site as built. There was no perceived threat to public benefit because they were improving it and improving the value of the property by adding a bedroom and taking a very nonconforming two-car depth garage and making it a one-car depth garage with a home office space in the back, which also generally made for a safer environment.

Mr. Cook stated that surrounding property values would not be diminished, and values would actually rise by adding the bedroom and bettering the appearance of the building on the street where a number of other neighbors had improved their properties. It would also bring the current property up to speed. There would be a hardship if it were denied as the owner had purchased the property with the idea for a garage and a mudroom and deck as built. They were seeking to improve the deteriorated state of the existing conditions and adding a bedroom. The owner had four children, and it could be a hardship if the children had to double up in the bedrooms.

Chairman Witham said that the lot coverage was currently 49% and would go down to 36%, for a 13% decrease in lot coverage, and he assumed that the deck was not included in the new lot



coverage, which would make it less than 18 inches for lot coverage. Mr. Cook agreed, based on whether they had measured the grade correctly. Chairman Witham asked if they were also removing a shed, and Mr. Cook said they had discussed it. Chairman Witham said it had been factored into the building coverage. Mr. Cook said, in that case, they would also remove the shed. It would improve the green corridor behind the houses as well.

Chairman Witham asked about the new north elevation. Mr. Cook said they had attended a work session with the HDC and the elevation had been revised. The deck was lowered and stairs were added to the back. Chairman Witham said the lot coverage issue made sense to him then.

Mr. Rheume said he shared the confusion and asked if the existing deck was greater than 18". Mr. Cook said it was, but he was hoping to bring it down. Mr. Rheume stated that the required setback from the rear setback was 25', and he asked if some of the additional construction, including raising the overall height of what they were proposing, needed a variance as well. Chairman Witham told Mr. Cook that the Board understood that he was making it less nonconforming by reducing the rear setback. Mr. Cook stated that one portion would stay one-story as it existed because they were just redoing it and not changing the height. Another portion with a sort of a square part was where they were adding a second story. Mr. Rheume asked if it was set back 25', and Mr. Cook said it was within the 25' setback. Mr. Rheume asked if it was within or beyond. Mr. Cook said it was beyond the setback. Ms. Walker said Mr. Cook would have to comply with the setback and the Board might want to stipulate it.

Ms. Federowich said she had lived in Portsmouth for 22 years and had purchased the house for her children, and another bedroom would certainly lighten up the space. It would be using the existing building, and adding space for the family to have the garage underneath would not be a parking hardship because they would still have parking for two, plus one in the garage. No abutters had said it would have an impact. They were actually thankful that someone was improving the home, and they also liked the idea of adding the natural green corridor at the back so that it would be in line with the other houses. The project would also add value to the other houses; her neighbors had spent a lot of money improving their homes, and her home would be improved as well.

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

With no one rising, the public hearing was closed.

### **DECISION OF THE BOARD**

Chairman Witham stated that the right side yard setback was greater than advertised at 2.5'. The final survey had come back at 4.2', and the building coverage was 36%, where 30% was the maximum allowed and 49% currently existed.

*Mr. Mulligan made a motion to **approve** the petition as advertised with four stipulations: 1) that the rear setback be 4.2' and not as advertised; 2) that they remove the shed that appeared on the plan; 3) that they drop the deck to below 18" over grade; and 4) that the second-story addition be beyond 25' from the rear property line.*

*Mr. Rheaume seconded the motion with a slight modification to the last stipulation, that any work done within 25' of the setback was a reconstruction or shortening of the existing and did not increase the overall size of what was being build.*

Mr. Mulligan stated that the homeowner had made a good point by saying it was good for the neighborhood and the property was getting some needed TLC. The proposed changes were a significant improvement over what existed and not just simply because it would be new and shiny but would eliminate or reduce some of the existing non conformance. There was a lot going for the project, and with the stipulations just mentioned, he went through the applicable criteria for granting the variance.

Mr. Mulligan stated that granting the variance would not be contrary to the public interest. It would not alter the essential character of the neighborhood because it would still be a residential neighborhood and it would not threaten the health, safety and welfare of the public. They were improving the rear yard setback and the lot coverage nonconformity, so it would improve the health, safety and welfare of the public in many ways. Granting the variance would not be contrary to the spirit of the Ordinance. They were moving to a situation of less nonconformity with respect to building coverage and rear yard setback violation, so it was in keeping with the goals of the Ordinance. Granting the variance would result in substantial justice. If the Board denied the application, there would be a loss to the applicant with no balancing gain to the public. If the applicant was not allowed to improve the property in a reasonable manner, it far outweighed any gain to the public by adhering to the strict code of the Ordinance. Granting the variance would not diminish the value of surrounding properties. In fact, it should improve values.

Addressing the hardship test, Mr. Mulligan stated that the special conditions of the property were that it was a very small house on a small lot with significant existing nonconformities, and the applicant was moving toward greater conformity, so for that reason he did not see that there was a fair and substantial relationship between the general purposes of the Ordinance and their application to the property. It was a reasonable use to add an addition and improve a garage, and a mudroom in a residential neighborhood was also a reasonable use. For all those reasons and with the stipulations, he felt it should be granted.

Mr. Rheaume said that the property had a lot of quirky angles that made it difficult for he homeowner to make use of that portion of property. The overall proposal was a good use of existing space, and was tastefully done. They were trying to improve the setbacks to the rear property line, and honoring the 25' setback with some of the added height. There was a slight imposition with the neighboring house due to light and air by moving the structure closer to the street, but the applicant had indicated that she had the concurrence of abutters and they have not had testimony to dispute it. Based on those reasons and the four stipulations, Mr. Rheaume would grant it.

*The motion to grant the petition as presented and advertised **passed** by a unanimous vote of 6 to 0, with the following stipulations:*

- *That the right side yard setback will be 4.2'± as presented by the applicant at the hearing, rather than 2.5'± as advertised.*
- *That the existing shed will be removed.*
- *That the proposed deck will be less than 18" above grade.*

- *That any construction within the 25' rear yard will not exceed the height and footprint of existing structures ensuring that the proposed second story addition will be no closer than 25' to the rear property line.*

Mr. Parrott resumed his seat.

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6) Case # 8-6

Petitioner: Ryan P. & Crystal L. Cronin

Property: 180 Gates Street

Assessor Plan 103, Lot 18

Zoning District: General Residence B

Description: Construct a two-story 12'± x 11'± rear addition.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.321 to allow a lawful nonconforming structure to be extended, reconstructed, enlarged or structurally altered in a manner that is not in conformity with the Ordinance
2. A Variance from Section 10.521 to allow building coverage of 35%± where 32.2%± exists and 30% is the maximum coverage allowed.

### **SPEAKING IN FAVOR OF THE PETITION**

Mr. Ryan Cronin stated that he was the owner of the property and was there to discuss the addition to the house. The main reason for the project was to expand the bathroom. They currently had a 5' x 7' bathroom without a bathtub and had a two-year-old and a one-year-old and were expecting another child, so it had been difficult not having a bathtub in the house.

Mr. Cronin went through the criteria. The variance would not be contrary to the public interest. Permission to allow the construction of the residential addition to the primary residence would not encroach on any neighbor's light and air circulation as the addition was within the current setbacks. The addition would not increase density in the neighborhood or decrease any neighbors' privacy. The general public would not see the addition when looking directly at the front of the residence. The addition would only be seen from the left side of the residence. Several abutters had indicated their approval. He stated that the spirit of the Ordinance would be observed to permit a reasonable use of private property in a manner that did not adversely affect the rights of others or the public welfare. The addition would be constructed to match the architecture of the existing residence and of the neighborhood. The addition would not encroach on the neighbors to the left or right and the boundary lines were inside the current footprint of those neighbors from the left and right side property lines. The proposed addition was off the rear of the residence toward the rear property line. The yard was a large open space that was between his residence and the rear property line, so the addition would not impair the privacy or separation of property of the neighbor. He did not feel that any of his neighbors' rights would be infringed upon with the proposed addition.

Mr. Cronin stated that substantial justice would be done. Granting of the variance would allow them to increase utility of property. The existing residence occupied 32.2% of the lot, and the proposed addition would increase it to 35%. The dimensions of the current bathroom were 5' x 7'.

It was a ¾ bathroom with a single vanity and toilet, and no closet or storage area. The addition would enable them to have a bathroom suitable for children by adding a bathtub and a double vanity sink. It had been very difficult not having a tub, and now there was another child on the way. The first floor in the addition would be a finished playroom. There would be no appreciable impact on the public, while the proposal would have a substantial value to them. The substantial justice balance benefit would be served by granting the variance. Mr. Cronin stated that the values of the surrounding properties would not be diminished. The expansion of their residence with the addition would increase the value of their property and, by extension, other properties in the immediate area. Many abutters had given verbal support of the addition and did not feel that it would be detrimental to the neighborhood. The literal enforcement of the provisions of the Ordinance would not result in an unnecessary hardship. The property sat on a nonconforming lot. The home was constructed around 1750 and now virtually sat right on the property line. The location of the addition was the only reasonable one, and it would not encroach on either of the side property lines.

M. Joe Campobianco of 199 Gates Street stated that he and his wife were definitely in favor of the addition. He also wanted to speak for Pat and Judy Nerbonne of 189 Gates Street who were out of town and asked him to speak in favor of the project.

#### **SPEAKING TO, FOR, OR AGAINST THE PETITION**

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

#### **DECISION OF THE BOARD**

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

Mr. Rheume said it was a straightforward request. What the applicant was proposing was a very modest addition to a modest house on a relatively large lot for the general vicinity, so what they were asking for was very reasonable in that respect. The variance would not be contrary to the public interest. The public interest in the Ordinance was to prevent large structures from being created on small lots. This was a small request for adding on to the back side of the property, was no detriment to the neighborhood, and was not really in the view of most of the neighborhood. Some next door neighbors might see it, but it was in keeping with the nature of the house. The spirit of the Ordinance would be observed. It was about a 2.8% increase in overall lot coverage, from 32.2% which was just a little over the 30% required. It was very reasonable from that point and in keeping with spirit of the Ordinance.

Substantial justice would be done. It would fulfill a basic need for the property owner and growing family in terms of bathroom space, which was a reasonable request, and the first floor beneath would be a sunroom to take advantage of the backroom space for the family. Mr. Mulligan stated that the value of the surrounding properties would not be diminished. It was a tasteful, small addition to a relatively small home, and it would increase the value of the property and most likely surrounding property values. As far as the hardship criteria, owing to special conditions that distinguished it from other properties in the area, the property could not be reasonably used in strict conformance with the Ordinance. It was a relatively large lot overall but still smaller than

expected for the amount of building on it. It was a slightly undersized property, so he believed that the applicant met that condition as well.

Mr. Moretti concurred with Mr. Rheume and thought the applicant had done a great job in locating the house to minimize the impact from the street. He knew that the applicant had worked very hard with the Historic District Commission to get the design and look so that it fit in with the historic district. It was a very modest home, and the applicant was getting the most of what he could out of the property.

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

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7) Case # 8-7

Petitioner: Loehwing & Mulligan Trust, D.J. Loehwing & M. E. Mulligan, Trustees

Property: 130 Thornton Street

Assessor Plan 160, Lot 9

Zoning District: General Residence A

Description: Construct 3' x 5' addition, rear L-shaped deck and steps.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.321 to allow a lawful nonconforming structure to be extended, reconstructed, enlarged or structurally altered in a manner that is not in conformity with the Ordinance.
2. A Variance from Section 10.521 to allow a left side yard setback of 8'± where 10' is the minimum allowed.
3. A Variance from Section 10.521 to allow a rear yard setback of 18'± where 20' is the minimum allowed.
4. A Variance from Section 10.521 to allow building coverage of 35%± where 29%± exists and 25% is the maximum coverage allowed.

### **SPEAKING IN FAVOR OF THE PETITION**

Mr. David Loehwing stated that he was the owner of the property and wanted to enlarge his kitchen by a 3' x 5' one-story addition. His intent was to take the section with a shed roof and put a half bath in the downstairs. He currently had only one bathroom in the upstairs. He would turn the pantry into a bathroom and then take the lost space and construct the addition. They had a three-year-old, so it was important to have more than one bathroom in the house. He also wanted to construct a deck off the back of the house. Parts of the deck would be slightly above 4', and he understood that he could go 50% of the distance to the lot line without a variance if the deck were under 4 feet. Parts of the deck would be under 4' and a part of it would be over 4', so instead of measuring every single foot, he thought it would be safer to get a variance for the entire area. He had spoken to his neighbors, some of whom were present, who were in favor of the addition.

Mr. Loehwing stated that the variance would not be contrary to the public interest. He didn't feel that a 3' x 5' addition and a deck off the back would be contrary to the health, safety or general welfare of the public. The spirit of the Ordinance would be observed because the deck would not

make the use of property more intensive or detract from anyone's enjoyment of the area. He thought that the general nature of the proposal would be in keeping with others in the area. Substantial justice would be done. He did not believe that the construction of a small addition would be contrary to the public interest and the values of the surrounding properties would not be diminished. He felt that constructing a half bath on the ground floor and a small deck in the backyard was a reasonable use of a residential property in the neighborhood. It would increase the value of his property, and his neighbors thought it would increase theirs by extension.

Mr. Loehwing stated that the literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship. The property was a nonconforming one. The top step of the back steps was not big enough to comply with building code. Even if they constructed the steps to code, they would still need a variance because the lot coverage would need to be increased to accommodate a larger top step. So, any modification they made to the property would require a variance, and that was the hardship they were facing.

Mr. Mulligan asked how the applicant was putting in the basement. Mr. Loehwing said it would be through a Sonotube. Mr. Mulligan asked if the bathroom would be above. Mr. Loehwing said no, that the bathroom would be in an existing part of the house. He noted that the shed had a full basement underneath.

Ms. Heather Jenkins of 120 Thornton Street told the Board that they should have received a letter from her husband and herself in support of the addition. It had taken the Loehwings a long time to figure out how to use the existing structure and not go over or extend the back. It had been a painstaking process and worth noting, and they were totally for it.

Ms. Amelia Jones of 139 Thornton Street stated that she was in full support of the variance. She thought it would enhance the value of their house in an appropriate and aesthetic way, and it would also enhance their property value as well as the value of the neighborhood.

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

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

### **DECISION OF THE BOARD**

*Mr. Rheume made a motion to **grant** the petition as requested and advertised. Mr. Parrott seconded the motion.*

Mr. Rheume stated that, in terms of the actual building construction, it was the smallest addition to come before the Board. The deck was also a reasonably-sized addition to the back of the house. It was very straightforward in terms of granting the request.

Mr. Rheume stated that granting the variances would not be contrary to the public interest. The addition on the back was incredibly modest in size and the deck was at the back side of the home and not viewable from the public overall. It appeared to be a positive addition, as indicated by the abutters before them. The spirit of the Ordinance would be observed because it was a relatively small encroachment on the requirements for the area. The 8' side setback was continuing the line

of the house out onto the deck and was very reasonable. It was not the smallest dimensions relative to the property line of 6.5' due to the bay window area on the side of the house, so it was somewhat larger than that. Similarly on the back of the house, 18' vs. the required 20' for the deck was a reasonable encroachment on what was required did not impact light and air. It was only a deck that would not be casting large shadows on nearby buildings.

Mr. Rheume stated that substantial justice would be done because it was a modest improvement to their home, making it more livable and suitable for a growing family. The change provided a little entertainment area onto the back side of it, so overall it would provide justice. The value of the surrounding properties would not be diminished because it was a modest addition that would make the house more saleable. It was improved with another bathroom on the first floor and a deck which would, again, increase the value of the house and increase the abutters' values as well. As far as the hardship criteria, the special condition of the property was the overall small size of lot in addition to the lot line starting at the road, and it met the requirements on that side. The lot line narrowed the lot as it moved to the back, so that was one of the contributing factors as well as the overall depth of the lot being somewhat small. There was sufficient hardship and the applicant's request was a reasonable one.

Mr. Parrot concurred with Mr. Rheume and added that it was certainly within the spirit of the Ordinance because it was a modest proposal to improve the house, and a great majority of the additional lot coverage was open deck, so it would not contribute to a feeling of mass or crowding in the neighborhood. It met all the criteria.

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

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- 8) Case # 8-8  
 Petitioner: Jerry Duberstein Revocable Trust, Jerry Duberstein, Trustee  
 Property: 49 Lawrence Street  
 Assessor Plan 152, Lot 43  
 Zoning District: General Residence A  
 Description: Construct 8' x 12' shed at right, rear of property.  
 Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance from Section 10.521 to allow a right side yard setback of 5' where 10' is required.
  2. A Variance from Section 10.521 to allow building coverage of 35%± where 33.3%± exists and 25% is the maximum coverage allowed.

### **SPEAKING IN FAVOR OF THE PETITION**

Mr. Eben Lewis presented, speaking on behalf of Jerry Duberstein. He stated that the proposal was a modest 8' x 12' shed. The footage of the existing dwelling and the attached deck equated to 1,889 s.f., and the quantified area of the property was 5,662 s.f.. The building coverage for the area was 33%, and, with the addition of the shed, would jump to 35%. As stated in the City of Portsmouth's Assessors Database, the dormer on the property had been constructed on or around

1920. The construction of the dwelling on the property predated the adopted effective amendment dates of the Ordinance and, therefore, there was no fair and substantial relationship that presently existed between the general public purposes of the Ordinance provisions, and their specific application to the property. The proposed construction of a shed on the property was a reasonable one. Furthermore, the property could not be reasonably used in strict compliance with the Ordinance, so the variance was necessary to enable reasonable use of the property. He respectfully requested that the Board grant a variance from the Ordinance and said it would not be contrary to the public interest, the spirit of the Ordinance would be observed, the values of surrounding properties would not be diminished, and the enforcement of the provisions of the Ordinance would result in an unnecessary hardship.

Chairman Witham asked where the shed was in relationship to the photo with the tree in the backyard. Mr. Lewis said the shed was proposed to be constructed 7'-8' south of the large ash tree. Chairman Witham asked if it was south, between the fence and the tree. Mr. Lewis said the shed would be parallel with the fence and south from the northerly border boundary. Chairman Witham said that he was still having a hard time picturing where the tree was but the tree would remain either way and he assumed Mr. Lewis would work around the tree. Mr. Lewis agreed.

Mr. Parrott said they had the footprint of the shed but asked what the height was. Mr. Lewis said it was approximately 9 feet.

#### **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 requested and advertised. Mr. Moretti seconded the motion.*

Mr. Mulligan stated that this was the kind of request that the Board saw fairly frequently, to place an accessory structure such as a shed within the rear yard setback. In that case, there was also a bit of an increase in the amount of lot coverage over what was required. However, he did not believe that the amount of relief requested was extraordinary and was actually rather modest for the particular property.

Mr. Mulligan stated that granting the variance would not be contrary to the public interest because putting a shed in the property's backyard would not alter the essential character of the neighborhood or threaten the health, safety or welfare of the public in any way. Granting the variance would not be contrary to the spirit of the Ordinance because it was in a general residence zone, and the purpose of that zone was dwellings with medium-to-high densities and would not at all be affected by the relief that the application was requesting. It would result in substantial justice because the loss to the applicant would not be outweighed by any benefit to the public if the Board were to deny the variance. With regard to property values, Mr. Mulligan did not see how the surrounding properties would be affected in any way. He stated that literal enforcement of the Ordinance would result in a hardship. The special conditions of the property were that it was currently nonconforming property and the existing structures on the property were built before the



building coverage Ordinance was created, so he did not believe that there was a fair and substantial relationship between the building coverage requirement and its application to the property, specifically for an accessory use such as a shed. If they were looking at tacking on a large addition, it would be a different story, but it was the kind of addition that the Board saw all the time in Portsmouth and was a reasonable use. For those reasons, he felt that the variance should be granted.

Mr. Moretti concurred with Mr. Mulligan's comments and he believed that it was a small request for a shed, which the Board saw numerous times. It seemed to be an ongoing thing. The shed was very small and would give the applicant a very usable space, and he thought that it was positioned well on the lot.

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

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## V. OTHER BUSINESS

### **Update – Electronic Packet Submittal (deferred from the beginning of the meeting)**

Ms. Walker told the Board that the Electronic Packet was in the works for submittal. An issue with the City Council was height requirements becoming a Conditional Use Approval before the Zoning Board, which would be something totally new for the Board. If it went through the City Council, it would go through a work session so that the Board would know what was expected of them.

Mr. LeMay asked whether it would be a special exception or some other task within the scope of the RSA for the responsibilities of the Board. Ms. Walker said it would be the Conditional Use Permit, and by statute the Board can be the permit granting authority. It would be something new, in addition to the special exception variances that the Board currently granted.

Chairman Witham said he had concerns with it because they were going to be high-profile projects with presentations that could go on and on. The gist of the height approvals in the Downtown area had to do with mass and scale, and once a year or so, the Board had to put on their HDC hat when something got appealed or came before them. It was usually something minor and not something in terms of taking away a floor height from a project, which was a million dollar implication. The City had a Board that specialized in that type of thing, namely the Historic District Commission and the toughest issue that the HDC grappled with and that needed their expertise was scale and proportion. To ask the Board to wear that hat and then pass it back to the HDC and tell them to make it look good was a challenging hat for the Board to wear. Chairman Witham also felt that the Board would be putting the HDC in a difficult position if they granted a Conditional Use Permit saying the item was okay, and then it got to the HDC and they did not agree because they had good reasons that the Board didn't know anything about. The HDC could deny it and it would go back to the Board to appeal something that the Board had previously approved. It could get messy at times. Chairman Witham was also concerned that there were no specific criteria, background, or knowledge required to be a Board member. People chose to do so because they were interested and good at it, and for them to suddenly be expected to deal with HDC-type issues like mass and

scale posed a challenge. The HDC had a lot of headaches, especially lately, so he had reservations and would like to know what the thought-out version of it was before it got dropped into their laps.

Mr. LeMay said it would be nice if the Board had clear criteria. Chairman Witham said that they could attend the next meeting on September 3. He said he would gather more information. He said he might go before the City Council and state his position, but if the group felt strongly about it, they could speak as a group. He suggested that they forward their questions to Ms. Walker.

Mr. Rheume stated that he had concerns with some of the criteria that had been proposed. The bulk of it was mass, scale, and architectural elements which the Board didn't normally deal with and didn't have much expertise in, so it would be a large learning curve. Perhaps there was a way that they could bring in the HDC as a consultant to the process, but it could add that much more complication. Mr. Parrott did not understand who would have the final say if a ruling was submitted to the Planning Department. He thought it had to be an individual, not a group. Ms. Walker said that it could be specified. Mr. Parrott told her to pick someone. Ms. Walker said she would pick the Planning Director.

Chairman Witham suggested that the plans be 11" x17" because 8-1/2" x 11" was difficult to read at times. Ms. Walker said the plans could be any size. Chairman Witham said that most people didn't have the printers to develop 11" x17" sheets. Ms. Walker said they had to have a motion to change any rules and regulations and asked if the Board wanted her to come back with a final version before ruling on it. Mr. Parrott said they would like a final version and the rest of the Board concurred.

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## **VI. ADJOURNMENT**

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 9:30 p.m.

Respectfully submitted,

Joann Breault  
Acting Administrative Clerk