MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE

MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m. **November 19, 2013**

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

EXCUSED: Susan Chamberlin

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

I. APPROVAL OF MINUTES

A) July 24, 2012

B) August 21, 2012

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

Chairman Witham noted that the applicants for Items 8) and 9), the petitions concerning 405 Deer Street and 30 Brewster Street had requested to postpone their petitions.

After a brief discussion regarding concerns that the 405 Deer Street petition involved a notice of violation which would also be delayed and the fact that there was no one there to speak to the petition due to a personal matter, Mr. Mulligan made a motion to postpone the petition for one month only to the December meeting. The motion was seconded by Mr. Moretti and passed by unanimous voice vote.

Regarding the 30 Brewster Street petition, Chairman Witham stated that there had been a letter from the neighborhood committee and the applicants would like additional time to address their concerns. Mr. Mulligan made a motion to postpone the petition until the December meeting. The motion was seconded by Mr. LeMay and passed by unanimous voice vote.

II. PUBLIC HEARINGS – OLD BUSINESS

A) Case # 8-3
Petitioners: 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 s.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.

(This petition was postponed for additional information at the August 20, September 17 and October 15, 2013 meetings.)

Chairman Witham wanted it noted that the submitted plan had an optional deck that was not in the requested variance, so the Board would not address the deck noted as optional. If they decided to pursue it, it would be a separate variance.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech representing the owner, Ms. Beth Gross-Santos, and Mr. John Chagnon, site engineer from Ambit Engineering were present to speak to the application. Attorney Pelech stated that the application had a long history. He had come before the Board back in August, and at that time the Board had raised concerns regarding a number of issues, and the abutters had also raised issues regarding storm water runoff. As a result, the petition was continued. In the interim, they had extensive work done. Mr. Jim Gove from Gove Environmental Services had determined the distance from the edge of the wetlands, and they had applied for a Conditional Use Permit. Mr. Chagnon had done yeoman's work in designing storm water runoff, detention, and rain gardens. The end result was that they received a favorable recommendation from the Conservation Commission and were going before the Planning Board Wednesday night for a Conditional Use Permit. The DPW had reviewed the drainage analysis and wetlands study and had given it their blessing. They were back that evening to seek the variance to construct the home on the lot. They met all the setbacks, and the only issue was the size of the lot and the lot area per dwelling. Attorney Pelech said he would go through the criteria and then turn it over to Mr. Chagnon to explain some of the changes to the plan that have been made from August, tens of thousands of dollars for site changes, storm water runoff, rain gardens, and so on.

Attorney Pelech stated that granting the variance would not be contrary to the public interest or the spirit of the Ordinance. It would not change the essential characteristics of the neighborhood, nor would it be contrary to the public health, safety or welfare. He referred to the applicant's rendering and the architectural drawings of the home and stated that it was a small and well-designed home that fit in the size and scale of the neighborhood. It was not an over-intensification of the use of the lot, and it met all the setback requirements. It was a 1-1/2 story dwelling that was compatible with the other residences in the neighborhood. They did not believe that granting the variance would result in diminishing the value of surrounding properties because it was a tastefully-

designed structure. The site plan was well developed so that no storm water would run off onto adjacent properties, which was a concern of abutters. As a result, the Conservation Commission had voted to recommend approval of this plan to the Planning Department. The DPW had no problem with the drainage analysis, the wetlands analysis, or the storm water management plan, so they did not believe that it would result in diminishing the value of surrounding properties.

Attorney Pelech stated that whether or not substantial justice would be done required the Board to do a balancing test to weigh the hardship upon the applicant/owner against the benefit to the general public. Attorney Pelech stated that the hardship upon the owner/applicant if the variance was denied was not outweighed by some benefit to the general public. The lot was one of many lots in the area which were part of the 1903 sub-division when many 40' x 80' lots were created. This was a combination of a number of the original subdivided lots. The lot in question was larger than many of the lots in the area and one of the few that had not been developed. There were special conditions with regard to the lot that would result in a hardship and required a variance. The only relief requested was to be allowed to build a structure on the lot, which did not meet the square footage requirements of the Zoning Ordinance. Well over 50% of the lots did not meet the square footage requirement, and as a result there was no fair and substantial relationship between the spirit and intent of the Ordinance as it applied to that particular lot. Attorney Pelech added that this was a use allowed by the Ordinance, so it was a reasonable use and met the final criteria. If the Board had questions about all the changes made to the plan since August, Mr. Chagnon could answer them. He had taken it before the City Council and had met with the Planning Board and had designed the storm water management features that were now incorporated into the plan.

Mr. Chagnon stated that the storm water components for the site fell into four categories. The first was the use of infiltration chambers. The site sloped off from the road, and they would bring in a substantial amount of fill to level the site to the road. It would also provide an opportunity to bring in well-drained gravel so that the entire back side of the roof could be infiltrated into that fill area in a chamber that would be below grade, and there would be a lawn area with a chamber below it. The second drainage aspect was a rain garden, which would handle the front side of the roof runoff and the front yard runoff. That was an area where the runoff would collect and infiltrate into the soils. They would treat it and plant foliage to provide an attractive streetscape. The Conservation Commission was happy that it was a front and center type of improvement that would hopefully be a showcase to illustrate that it was an attractive way to filter storm water runoff. The third aspect would be a porous driveway so that the driveway runoff would soak through the driveway and not run off. The fourth item was a buffer enhancement and allocation on the east end of the lot, and they would remove the invasive species currently there and replace it with other species, like silky dogwood and blueberry, which would provide for a better cover and future wildlife enhancements. That area of the lot would then be delineated with a row of trees forever dedicated as a buffer.

Chairman Witham stated that he first wanted to compliment the applicant for the additional material. The Board had had a similar situation with drainage issues on Fairview Drive, and the application stepped it up a few levels from what had been submitted on those petitions. He asked Mr. Chagnon to expand on the feedback from the Conservation Commission, since drainage had been one of the overriding concerns. Mr. Chagnon said that during the summer the abutters had expressed concern about the drainage in that area, which led to the discovery that the lot was close to an existing wetland and therefore in the City's buffer. Volume and treatment were usually the two drainage concerns. In that case, the Conservation Commission's concern was the amount of

runoff and the treatment method, so they compared what would run off from the site in the pre-developed condition and in the developed condition, and they matched it so there would not be additional runoff by infiltrating an amount equal to what got infiltrated by the site soils. The Conservation Commission was more concerned about the treatment methods. The method would treat the runoff before it got into the groundwater.

Chairman Witham said that Mr. Chagnon had mentioned something about the treatment being a model for future projects. Mr. Chagnon stated that the Commissions members had liked the rain garden aspect of it. They had discussed whether or not the rain garden would be a better component or whether it would be better to just plant it as more of a buffer. One of the members had thought that it would be good to put the rain garden in so that people could drive by and see it as an example of what a rain garden was, and the Conservation Commission could mention it to future applicants. Mr. LeMay asked Mr. Chagnon about the annual maintenance that a rain garden would need. Mr. Chagnon said that a rain garden did not require a lot of maintenance. The plants were chosen to grow in that particular environment and would grow well, and if not, they had to be replaced. They would also have to be checked for an accumulation of debris that would clog the water and keep it from going into the soil. Mr. LeMay concluded that the maintenance would have to be done to keep the rain garden functioning as designed. Mr. Chagnon said the maintenance would not be overly burdensome.

Mr. Parrott asked what the nature of the soil was over the site where the house was proposed. Mr. Chagnon said the existing soil was not well-drained and was Group C or D. It was silty instead of gravelly. Mr. Parrott asked if there was a ledge outcrop anywhere on the site. Mr. Chagnon said that there were no visible outcrops. The soil work was done with a hand auger and not a backhoe, but the way the elevations worked, the excavation would not be required to go deep, so he did not anticipate that they would hit ledge putting in the footings or the site components. Mr. Parrott observed that it looked spongy and said he had been out to the site several times. His concern was that if they started to build and ran into ledge or something else, it would not drain at all. There had to be a reason that it retained water and perpetually looked like a wet sponge, so he was trying to figure out what was there along with the relative height of the fill and the house when all was said and done. Mr. Chagnon said that when the silty soils got wet, they bulked up and would not accept any more water, and the storm water ran off. In the proposed condition, the walk-out basement took advantage of the height differential. In the front yard, they would be filling 2’ on the sides where the rain garden was. It was 3’ in the back where the infiltration chamber was and then 4 or 5’, which was the extent of the fill, but the fill would be above the silty material and would be gravel that would act like a sponge to soak up the water. The current soil got saturated quickly and ran off. The new soil they would bring in would make it more like a sponge that just got wet, slicked up and didn’t drain. Mr. Parrott asked if the plan was to take out some of that spongy soil that did not drain very well, excavate it first and then backfill it with better draining soil. Mr. Chagnon stated that the top layers would have to be removed from the organic soil. The new soils would be set on top and the water would flow through the new soil and act in the same way as the soil that was presently there.

Attorney Pelech said they had modified the plan so that they did not need the rear yard setback approval. Chairman Witham checked the legal notice. Mr. Chagnon said that the building was shortened by two feet.

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

With no one rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

Chairman Witham stated that the applicant had done a good job with the site and the engineering of the site. The first time it was presented, they had several abutters with concerns, but no one spoke out that evening. He assumed that the abutters were aware of the new plans or had attended the Conservation Commission meeting. The revised plan may have alleviated the concerns, but it seemed like it was well engineered plan. There had also been a concern with the size of the house, and he found it to be a modest-sized house, a Cape with dormers, and thought that it would blend in with the neighborhood. It looked like they had shrunk the size of the house to eliminate the need for the second variance on the rear yard setbacks, and he was comfortable with where they had taken the project.

*Mr. Mulligan made a motion to **approve** the application as presented and advertised with the variance for the rear yard setback withdrawn as it was no longer needed. Mr. LeMay seconded the motion.*

Mr. Mulligan stated that granting the variance would not be contrary to the public interest. The essential character of the neighborhood would not be altered by placing a modest house in one of the largest lots left in the neighborhood. It would not threaten the health, safety or welfare of the neighborhood. There were concerns with storm water drainage runoff, but the applicant had done a nice job addressing the concerns. With respect to the spirit of the Ordinance, he believed that it would not be contrary because they were staying within a residential zone, namely the Single Residence B Zone, and the purpose of the zone was to encourage residential development in low and medium densities. Granting the variance would result in substantial justice. The loss to the applicant would not be outweighed by any benefit to public if the request were denied. If denied, the applicant would be left with a large vacant space, and the only benefit to the public would be to maintain the status quo, which wasn't great because there were water issues. Granting the variance would not diminish the values of surrounding properties because it would be new construction and it should improve the values of the neighborhood.

Mr. Mulligan stated that literal enforcement of the Ordinance would result in an unnecessary hardship. The special conditions were that it was the largest undeveloped lot in a neighborhood full of nonconforming lots, and it was a lot coverage variance. The applicant had a little under 10,000 square feet where 15,000 square feet were required. The special condition of the lot was that it was substantially larger than all the other lots in close proximity, so there was no fair and substantial relationship between the purpose of the lot coverage ordinance and its application to the property. A residential use on the property was a reasonable one. For all those reasons, the variance should be granted.

Mr. LeMay concurred with Mr. Parrott, and he proposed the stipulation that the storm water management and maintenance plan as presented be part of the application, and that it be required of owners and future owners to maintain the rain garden and the effectiveness of the mitigation that the Board put in place. Mr. Rheaume stated that he would support the motion because he

thought the application made a good case. It was a buildable lot and the applicant had done a lot of work. It was a reasonable-sized home and in keeping with the neighborhood. He shared Mr. LeMay's concern about the long term maintenance with the storm water management system, so it was something to help prod the owners to keep it going for the benefit of both the homeowner and the neighbors, and he would support it. Mr. Parrott added that it was clearly a case where the applicant had taken a good amount of effort to deal with the obvious problems on the site and the concerns of the neighbors as well. It was a good piece of engineering, and if maintained properly, should do the job.

*The motion to **grant** the petition as presented and advertised, with the removal of the request for a variance for the rear yard setback **passed** by a unanimous vote of 7 to 0 with the following stipulation:*

- *That the Stormwater Management Inspection & Maintenance Plan dated October 31, 2013, as submitted and as presented at the meeting, will be followed by the present owner and future owners as a deeded element of the property.*

III. PUBLIC HEARINGS – NEW BUSINESS

1) Case # 11-1
Petitioner: Evon Cooper
Property: 287 Maplewood Avenue
Assessor Plan 141, Lot 36
Zoning District: Mixed Residential Office
Description: Construct one story rear addition.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
   1. A Variance from Section 10.324 to allow a lawful nonconforming building or structure to be added to or enlarged in a manner that does not conform to the requirements of the district.
   2. A Variance from Section 10.521 to allow a right side yard setback of 2.49'± where 10' is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Joseph Reynolds, representing the owner, stated that the variance had been approved back in 2007 but had not been acted upon. He wanted to build the home on the pre-existing footprint of the house. When the house had been renovated in the past, a section of the house was demolished, and he wanted to rebuild that section. A variance was required for the 2.49' setback from the existing building. The house had been totally renovated using state-of-the-art methods and materials, which he would also use. The addition would not create an eyesore to the public or surrounding properties and would not be contrary to the public interest. The applicant was seeking permission to reconstruct a room on an existing foundation, although there was a slight encroachment on the side setback due to the foundation, but otherwise everything met code. The literal enforcement of the provision would create a hardship because they were building on existing foundation. The applicant attempted to observe the requirements of the City Ordinance.

She had wanted to add a deck, but they took the deck back to minimize the impact on the neighborhood. There would be little to no impact on abutting properties. There was a driveway to one side for an apartment building, but there was no sight or view to speak of because it faced a power transformer.

Chairman Witham confirmed that the project had been granted approval in 2007 and had not been acted upon. He asked when the foundation seen in the photos was built. Mr. Reynolds stated that the existing foundation was built when the whole house was renovated and was re-mortared to help maintain the sturdiness of the foundation. He believed that it had been done at the same time as the previous renovations prior to 2007. Mr. Rheaume asked if there was a reason for the indicated precision of the 2.49' setback. Mr. Reynolds said the reason was because it was indicated in the site plan as the precise setback given by the architects, and he wanted to include exactly what was on the site plan and exactly where the wall lined up on the property line.

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

With no one rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

*Mr. Rheaume made a motion to **approve** the application as presented and advertised, with the stipulation that the 2.5' measurement for the setback was agreed on to eliminate the implied precision so that the applicant would have what they needed. Mr. Durbin seconded the motion.*

Mr. Rheaume stated that the variance would not be contrary to the public interest because it was basically creating a small room on the back end of an older building, and it was a pretty common type of thing seen in the neighborhood where small additions had been added to buildings over the years. From an architectural standpoint and a neighborhood viewpoint, it would not be contrary to public interest to see the room re-established in back of the house. The variance would not be against the spirit of the Ordinance. The dimension was 2.5' relative to 10', which would seem to be a significant encroachment, but it was up against an open area on the side of the house and did not come that close to a neighboring building. The change did not affect the light and air for the neighbors. He stated that substantial justice would be done. It would allow the homeowner to continue to make use of a space that had been previously occupied by a former addition to the house and had been demolished. It also had been previously granted by the Board to build, so substantial justice would be carried out by continuing the original approval. The values of surrounding properties would not be diminished because it was a small addition and would add to the use of the house and help increase the values of surrounding properties. For the hardship criteria, it was a unique situation. It was a very old property on a small lot, and it was quite typical in Portsmouth that they would have a 2.5' encroachment, which was reasonable in that situation. He recommended approval with 2.5' as opposed to 2.49 feet.

Mr. Durbin seconded the motion with the stipulation and agreed with Mr. Rheaume's comments. He added that, with respect to the hardship criteria, it was a very tight lot created many years ago, and it created an inherent hardship with any construction on the lot. There was already a lawfully pre-existing foundation element that would be utilized so it was not like there was an expansion of the foundation footprint.

Chairman Witham said they could probably forego the stipulation because the way the variance request was written, it was 2.49' plus or minus, and he thought there was inherent wriggle room and it was cohesive with the way the site plan was drawn. Mr. Rheaume stated that his engineering mentality told him the applicant was implying some sort of precision that didn't exist on the real ground.

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

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2) Case # 11- 2
Petitioners: Jeffrey P. & Jamie E. Barnes
Property: 22 Central Avenue
Assessor Plan 209, Lot 29
Zoning District: General Residence A
Description: Allow a single chair in-home hair salon. Construct left side dormer and stairs.
Requests: The Variances and/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 #19.22 to allow a Home Occupation 2 in a district where the use is allowed by Special Exception.
2. Variance from Section 10.440, Use #19.22 to allow 400 s.f. floor to be used for the Home Occupation where 300 s.f. is the maximum floor area allowed.
3. A Variance from Section 10.324 to allow a lawful nonconforming building or structure to be added to or enlarged in a manner that does not conform to the requirements of the district.
4. A Variance from Section 10.521 to allow a front yard setback of 0'± where 15' is required.
5. A Variance from Section 10.521 to allow building coverage of 26%± where 25% is the maximum allowed.
6. A Variance from Section 10.1112.30 to allow less than two parking spaces to be provided.

SPEAKING IN FAVOR OF THE PETITION

Mr. Lance Powers, contractor from Powers General Contracting, was representing the owner, and the owner, Ms. Barnes, were present to speak to the application. Mr. Powers stated that it was an existing single-family home with an attached single garage. He wanted to build a one-chair home salon in-home business above the garage. The stairs were to allow access for it as it was not practical anywhere throughout the house to allow stairs in the interior for the space above the garage. Currently, the room above the garage was not finished but was an attic space with a full sub-floor in it and was used for storage, so they wanted to put a full dormer on the left side to allow access for head space. The 300 s.f. to 400 s.f. difference was because the garage currently was 20' x 20', and it was difficult to build the room out and finish it off and delete 100 s.f. from it, so they wanted that extra 100' to finish the room off. The addition would not change any drainage aspect. The roof covered the same space, and they would go from a 12-12 pitch up to a 3-12 pitch, in keeping with the characteristics of neighborhood and with the house's architectural features.

They would keep the dormer stepped in so it would be a full dormer but not quite. The stairs came down into the setback area, and currently the whole house did not meet the setback area. It was a very small lot and was situated oddly on the lot, so anything done on the property outside of the existing footprint would need a variance.

Mr. Powers stated that this would not be a business open to the street, and it would be scheduled by appointment, one person at a time. There would be no signs. There was enough parking. The lot had two vehicle spaces. Ms. Barnes could put her car in the garage to make space available for two vehicles. There was no change to the site, other than the stairs coming down, so the only impervious change would be two sonotubes in the landing pad for the stairs. The roofline covered the same area. The window on the side of the house was only for looks to keep the characteristics of the neighborhood.

Chairman Witham stated that, in the site plan, the bottom of the stairs showed a setback of 2' but the advertisement for the variance request was 0'. Mr. Powers said that it should be 2'. The house currently was on all four points on all the setbacks. There was a serious hardship because there was no place for anything. Mr. Rheaume wanted to understand the roofline in the proposed hair salon and asked where the roofline of ceiling heights would be. Mr. Powers said the ceiling heights were cathedral and it was all open peak, and they would keep it that way. There were unique lines inside because of the dormer, and when they did the full dormer on that side, it would be kept open as well. Mr. Rheaume asked if the bathroom in the corner would have a low ceiling height. Mr. Powers said that it would be full height. The peak inside was 11.6', and the wall height was around 9' where the dormer headed into the height. Mr. Rheaume stated that one of the applicant's arguments for needing additional square feet was that some of the floor space was not fully usable because of the way the ceiling heights were configured. Mr. Powers stated that the right front corner had a low ceiling line where the rake came down. There would be storage and perhaps a closet. The layout of the room was sort of difficult to leave off 100 square feet due to the size of the room.

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

With no one rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

*Mr. LeMay made a motion to **approve** the application as presented and advertised. Mr. Parrott seconded the motion.*

Mr. LeMay stated that it was a fairly straightforward request and was a use permitted by the Ordinance by special exception. There would be no hazard to the public or adjacent property on account of potential fire, explosion, or release of toxic materials. The material usage was minimal. There would be no detriment to property values in the vicinity or a change in the essential characteristics of the area on account of parking, access ways, odor, smoke, location, or scale of building, pollutant, noise, gas, dust, and storage of vehicles. This was a relatively low impact type of business, particularly with one chair in the place, and the area had good visibility and room because it was sparse. There would be no creation of a traffic safety hazard or substantial increase in the level of congestion, and no excessive demand on municipal services including but not

limited to water, sewer, waste disposal, policy and fire protection, and schools. There would be no significant increase in storm water runoff.

Mr. LeMay stated that the variance would not be contrary to the public interest. He had gone through the neighborhood and saw that it was residential with no other businesses whatsoever, and he had wondered why the applicant was seeking a variance but then realized that the special exception would fit well. He would have a hard time with a variance for the business use, but with the other impacts, they could meet the variance criteria. The proposed variances were relatively small. There was a setback of 2' give or take, and a small percentage in the increase in building coverage. He thought the spirit of the Ordinance was observed and substantial justice was done. The benefit to the applicant was not outweighed by hardship to the general public. There was no evidence that the values of surrounding properties would be diminished, and the spirit of the Ordinance was also met because the characteristics of the neighborhood would not be changed. Literal enforcement of the Ordinance would result in an unnecessary hardship because the hardship in that case was the very peculiar configuration of the lot and the siting of the house on it, which gave it justification for the 2' setback in the corner.

Mr. Parrott concurred with Mr. LeMay and agreed that it was an odd shaped lot, so much so that it should not even be a lot. Regarding the minimal impact if any on the neighborhood, it was a low traffic area and satisfied both the special exception and variance requirements.

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

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3) Case # 11-3
Petitioners: Judy L. Hiller & John B. Wilkens
Property: 18 Manning Street
Assessor Plan 103, Lot 67
Zoning District: General Residence B
Description: Relocate side entrance landing and stairs to rear.
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 building or structure to be extended, reconstructed, enlarged or structurally altered in a manner that does not conform to the requirements of the district.
2. A Variance from Section 10.516.40 and 10.521 to allow a left side yard setback of 4'± where 5' is required for an open porch and stairs.
3. A Variance from Section 10.516.40 and 10.521 to allow a rear yard setback of 9'± where 19' is required for an open porch and stairs.
4. A Variance from Section 10.521 to allow building coverage of 41.8%± where 41.7%± exists and 30% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

The owners Mr. John Wilkens and Ms. Judy Hiller were present to speak to the application. Ms. Hiller stated that she was there to seek approval for the relocation of the side door to its original

location in the rear. She stated that she wanted to correct the sections that Chairman Witham had quoted. Section 10.516.4 stated that the side setback was 4', and she thought it had been incorrectly transcribed from the plot plan. It was actually an 8' setback. Due to the open porch, it was only half the distance of the original 25' requirement for the setbacks, so it could be 12-1/2' from the rear lot line and 5' from the side lot line. As a result, there was no request for a side setback.

Ms. Walker stated that they would have to clarify the 4 feet. The second point that Ms. Hiller raised referenced the fairly new section, and some members of the Board may not have dealt with it much. Section 10.516.4 allowed for projections into side yards for unenclosed porches or decks or landings, and the distinction was that it could be up to half of the required yard if it were under 4 feet. It could be 6' less than the required yard if it were 4' or more. Consequently, the reason it was posted at 19' was because the Board was unclear at the time whether it was going to be under 4', so they tended to post for the greater relief. Ms. Hiller stated that she thought the height came out at 3.9 feet. Ms. Walker said that it could be corrected to 12.5', as she had suggested, because it was half the required yard. In terms of the left side yard setback where 4 or 5' was required, that was just an interpretation of the site plan that got corrected. Ms. Hiller said that the 4' was the actual depth of the landing itself.

Chairman Witham said that Variance #1 would stay the same, and he asked whether Variance #2 for the left yard setback would be altered. Mr. Wilkins wondered if anyone else had concerns. Ms. Hiller believed it was 8' to the landing but did not know if it was reflected on the drawing. Mr. Wilkins said it was not clear on the exhibit but appeared to be 4 feet. Chairman Witham said it looked like it was 7'2" to the end of the handrail for the side yard. Mr. Parrott asked if the landing was 4' x 7'. Ms. Hiller said it was. Chairman Witham thought they could eliminate Variance #2 because they were showing 7'2" where 5' was required.

Chairman Witham asked what Variance #3 would be. Mr. Wilkins said the same section would be 12-1/2' as long as the height was under 4 feet. Chairman Witham confirmed that it was just 9' where 12.5' was required, and Variance #4 would stay the same, 10% increase in lot coverage. Ms. Hiller said she wanted to reallocate the space so that it got its best utilization. It was a 2-family building, and one of the units would be a rental unit. She also wanted to relocate a bedroom. The existing bedroom in the unit was 11' x 8', and relocating the door would give her space to move the bedroom, which would be 13' x 15'. Moving the door would allow her 1-2 additional parking spaces for the property. Chairman Witham asked how old the house was. Ms. Hiller stated that it was built in 1937. Chairman Witham asked if where they wanted to put the door was where it had been originally located. Ms. Hiller told him yes, and said she had a photo showing a light switch next to the door that was walled up that showed its original location.

Mr. Parrott asked if, with respect to the parking, Ms. Hiller proposed to have two units. Ms. Hiller said it was currently a two-unit building. Mr. Parrott stated that Ms. Hiller proposed to continue the use of two units, which required four parking spaces, and she had only shown three parking spaces. He asked if there was a reason why she hadn't applied for a parking variance. Ms. Hiller thought that she could only fit four cars in the space but showed it as three because she had only one vehicle. Mr. Parrott stated that there was a requirement from the Planning Department that parking spaces be dimensioned on the drawings, but he didn't see any. There were some markings, but he couldn't tell what there were intended for, and they wouldn't be sufficient anyway because back-to-back parking spaces had to be 20' long. He saw 9' x 11' but didn't know what it meant.

Ms. Hiller told him that it was the parking for the back-to-back spaces. Mr. Parrott said that it wasn't big enough. The requirement for off-street parking for two units was two spaces per unit, which would be four in that case. Chairman Witham thought the Board would just need a determination from the Planning Department as to whether it was grandfathered or not a change in use. Mr. Parrott said the building was being structurally modified. Chairman Witham said they needed to know if that triggered the parking requirement above and beyond what existed.

Ms. Walker stated that it was a section of the Ordinance that caused the Planning Department a lot of concern. Mr. Parrott was referring to Section 10.111.2, and she thought if the Board was looking for a recommendation, it would be better to include a request for a variance for parking. That particular section caused a dilemma because there was no change in the use, and the Ordinance was written in such a way that one could interpret it to mean that it required coming into compliance with the parking if there was even a minor modification to the lot. Mr. Parrot thought that was the traditional interpretation of it. The application involved a fairly substantial structural change which would probably require floor plans, yet there were no floor plans involved.

Mr. Mulligan referenced Section 10.1111.20 of the Ordinance, which stated that a use that was nonconforming as to the requirements for off-street parking shall not be enlarged or altered unless off-street parking was provided for in the original building structure uses and all expansions, intensifications and additions are sufficient to satisfy the requirement of the section. The use was not being enlarged or altered, it was the structure that was being altered, and for that reason, he did not believe that the provision required that the pre-existing nonconforming grandfathered use comply with current off-street parking requirements. Chairman Witham thought it was also the previous section that caused them consternation because it referred to buildings and structures being altered. That section of the Ordinance had some issues that they'd like to fix.
He said that the Board had to move forward because the applicants were before them for the variances to move the stair and landing. The Board could vote on whether they wanted the Planning Department to make a determination of the interpretation of the Zoning Ordinance as opposed to the Board flipping through it and saying it needed a variance. Mr. Wilkins stated that the Planning Board asked him to show the parking that would be provided on site. The intent had been to show that parking could be provided, and they had discussed it.

Mr. Rheaume said that a precedent that came to mind was the Pleasant Street application, where they were building an addition and did not have enough parking for the four units in the building. However, the City had previously recognized that it was a 4-unit building, so the Board did not require that the applicant meet the full 4-unit parking need. They could keep the existing parking they had. Mr. Wilkin's application fell into the same situation, and Mr. Rheaume's impression was that the change in use, for example, if they were going from 2 to 3 units, they'd be required to meet the full parking requirements. It was reflected in another case which had been postponed, Case 11-9, where they were going from a 2-unit to a 3-unit building and asking for a parking variance because of it.

Mr. Mulligan stated that Mr. Rheaume was correct. Section 10.1111.10 referred to all new buildings and structures as well as additions to, or changes in use, in existing buildings and structures. Therefore, the use wasn't changing or being added to or being intensified, it was staying the same. It was a pre-existing nonconforming parking situation in that neighborhood. If the Board kept asking people to come back because they had only three parking spaces instead of

four, they were asking an awful lot of tax payers. Mr. Rheaume said that many homes in the City did not have any parking, and now the Board was saying that a person couldn't enlarge their single-family home without providing for parking. It didn't pass the common sense test. Mr. Mulligan said that the Ordinance was big enough that we could flip a coin in favor of the applicant. He didn't see any point in making them come back with parking plans. Ms. Hiller said that she was actually adding parking spaces. Chairman Witham agreed with Mr. Mulligan and Mr. Rheaume and their interpretation. He was comfortable moving forward with the application as presented and advertised, and removing Variance #2.

Mr. Rheaume said he wanted to understand the layout of the two units. Both entries were on the first floor. He asked if the division of the house was front to back. Ms. Hiller said it was up and down. The main entrance for both apartments was in the front, and the first floor had a secondary entrance. Mr. Rheaume verified that the new one they were building had access to the first floor only, and the front door was only one door going into both apartments. Ms. Hiller said it was an entryway hallway, and there was an internal stairway up to the second floor unit entrance.

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

With no one rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

*Mr. Mulligan made a motion to **approve** the application as presented and advertised, which was seconded by Mr. Rheaume.*

Mr. Mulligan stated that it was a relatively straightforward request and a modest change in an existing two-family structure. The ultimate use of the property was not changing, so the variance would not be contrary to the public interest as it would not alter the essential characteristics of the neighborhood, nor would it threaten the health, safety, or welfare of the general public. For that reason, granting the variance would not be contrary to the spirit of the Ordinance. Granting the variance would result in substantial justice. The loss to the applicant if denied would outweigh any gain to the public by applying the Zoning Ordinance. The applicant was just modifying the internal layout of the structure to better take advantage of it and removing one means of egress to move it back to its original location. Granting the variance would not diminish the value of surrounding properties. It was a situation in which additional parking would be made available on site, which would help the neighborhood's scarcity of parking. The encroachment on the rear setback did not appear to affect the neighboring properties. The literal enforcement of the Ordinance would result in an unnecessary hardship. The special condition of the property was that it was an oddly shaped lot set at the intersection of a number of different streets, so there was a limited amount of room to make improvements. It was already violating some of the setbacks. There was no fair and substantial relationship between the purpose of the rear setback requirement that was being violated and its application to the particular property. Relocating the stairs from the side to the rear of the property was a reasonable use of the property.

Mr. Rheaume concurred and said, from the public interest standpoint, moving the staircase to the back of the property enhanced the property. Going up and down the street, it looked neater. In addition, some of the setback issues on the back side of the property were driven by the fact that

the access way to the basement was located there, which forced the location of the stairs to be where they were. That was another aspect of the hardship, so he concurred.

The motion to grant the petition as presented and advertised ***passed*** *by a unanimous vote of 7 to 0. The Board acknowledged that the variance for the left side yard setback was not required as the setback was5', not 4' as advertised. The Board also acknowledged that the variance for the rear yard setback was for 9' where 12.5' was required.*

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4) Case # 11- 4
Petitioner: Great Bay School Training Center
Property: 417 Lafayette Road
Assessor Plan 230, Lot 23
Zoning District: Single Residence B
Description: New lot created by sub-division.
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 13,923 s.f. ± where 15,000 s.f. is the minimum lot size required.
2. A Variance from Section 10.521 to allow a lot area per dwelling unit of 13,923 s.f. ± where 15,000 s.f. is the minimum required.

Mr. Mulligan and Mr. Moretti recused themselves from the petition, leaving five voting members. The applicant was given the option of postponing until there were six members, or moving forward. The applicant chose to move forward.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech on behalf of the applicant, Mr. David Lemieux of Lemieux Builders, and Mr. John Chagnon, the architect from Ambit Engineering, were present to speak to the application. Attorney Pelech told the Board that there were two plans in the packet. One was the variance plan and the other was the plan that went to the Planning Board the previous month. The lot was 31,000 square feet and the minimum lot size in the area was 15,000 square feet, so the applicant had enough square footage for two lots. The second plan was submitted to the Planning Board on October 17, and they had tabled it due to concerns about the configuration of the new boundary line. The Planning Board suggested that they seek a variance to allow a smaller lot but with a straight boundary line. Based on that suggestion, the applicant was before the Board. Looking at the plan that went before the Planning Board, both lots were 15,000 square feet, and the lot line curved to the right and met the requirements of the 15,000 square-foot lot. However, the sub-division regulations ruled that the lot line should be parallel to the street when reasonably practicable.

Chairman Witham asked if Attorney Pelech meant perpendicular. Attorney Pelech said that was correct, it was perpendicular and not parallel. They did not believe that it was reasonably practicable to make things perpendicular when there was a parallelogram. Looking at Andrew Jarvis Dr and Lafayette Rd, it was pretty difficult. When Mr. Chagnon drew the sub-division line to create two 15,000 square-foot lots, Attorney Pelech was surprised when the Planning Board

tabled it and suggested a variance. The Planning Department had said they would not need a variance if they acquired additional land from Great Bay School, but that was not an option. The applicant was not interested is selling additional land and should not be required to buy additional land to meet the requirement that a lot line be perpendicular if reasonably practicable. Therefore, they were before the Board to ask for a variance in accordance with the variance plan submitted that gave a straight boundary line between the two lots almost perpendicular to Lafayette Rd. However, in doing that, Lot 1 became 13,293 square feet, which was about 1,070 square feet short of what was required.

Attorney stated that the criteria to grant a variance were met. First, the boundary line was an imaginary line on the ground but no would saw it, so whether it was in one location or another had no effect on the characteristics of the neighborhood. No one knew where that boundary line was except the abutting owners. It would not alter the essential characteristics of the neighborhood nor threaten the health, safety or welfare of the public nor diminish surrounding property values. Substantial justice would be done because they had a 31,000 square-foot lot, which was more than enough lot area for two 15,000 square-foot lots. He maintained that the hardship on the owner and applicant if the petition were denied would not be outweighed by any benefit to the general public. There was a hardship, given the shape of the two lots and the imposition of the Zoning Ordinance as written. The sub-division regulations, when applied to the application, were unreasonable and would create a hardship. They believed that it was not practicable to create a lot line that was perpendicular to Lafayette Rd and still meet the lot line requirements. Therefore, they were seeking relief from the Board because they did not believe that the purpose and intent of the Ordinance as applied to the property was a fair and substantial relationship. It was a residential district and they were simply subdividing a 31,000 square-foot lot into two lots, which were 17,000 square feet and 13,900 square feet, so the use was reasonable. There was a hardship given the special conditions of the lot. When the sub-division regulations were applied, it cried out for granting the variance.

Mr. Chagnon stated that he had many conversations with the Planning Department, and had appeared before the Planning Board. They did not deny the sub-division, but they tabled it and suggested that the applicant come before the Zoning Board and seek relief. With the invisible boundary line on the ground, there could be an easement that would allow a fence along the abutting property so that neither lot would be impacted by the boundary line and the fact that Lot 1 was 13,923 square feet rather than 15,000 square feet would not diminish its value or make it less suitable as a buildable lot in the City. There were many lots in Portsmouth that were a fraction of 13,923 square feet and had viable single-family residences on them. This was on a corner lot that abutted Andrew Jarvis Dr and Lafayette Rd. There was no argument that they were over-intensifying the use of the lot. They were not overcrowding, and there was ample light and air, so there was no reason why a 13,923 square-foot lot could not be created, and it would satisfy both the Planning Board and the sub-division requirements that the boundary line be almost perpendicular to Lafayette Rd.

Chairman Witham asked which one of the two streets would be proposed for the driveway cut. Mr. Chagnon told him it would be Andrew Jarvis Drive. Mr. Rheaume asked whether, in deference to the Planning Board's second proposal of the relocation of the property line, the applicant could get the additional square footage that they needed. Attorney Pelech said that it was not an option because Great Bay School wanted to do a lot line adjustment. Mr. Rheaume

asked if they could get the additional square footage required if they went straight down. Attorney Pelech said they could if Great Bay School was willing, but they were not.

Chairman Witham wanted to clarify that there were a number of options presented by the Planning Board, and the proposal would be a lot line revision, which was a different process than coming for a variance. The variance was usually the last step that someone would take. Attorney Pelech stated that a lot line revision would require the applicant to acquire additional land from Great Bay. Three options were discussed, and one option agreed to by all was to come before the Zoning Board and seek a variance.

Attorney Pelech said there had been a discussion after the fact that the Planning Board perhaps could approve the curved lot line and have one lot grant an easement to the other so that there would be a straight fence across where the lot line was proposed. Although both lots were 15,000 square feet, a fence would divide it into 13,900 square feet, and perhaps the applicant could buy additional land from Great Bay School so that they would not need a variance. But, the applicant was before the Zoning Board because it was the Planning Board's original suggestion, and it was a reasonable one that could resolve the problem.

Mr. Rheaume asked if Great Bay School currently owned both lots in question. Attorney Pelech said yes.

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

With no one rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

Chairman Witham stated that he had given a lot of thought to the application and spoken to the Planning Department. There was some feeling that the applicant would not need a variance by gaining some land from Great Bay School because they owned the lot and it was possible, but he didn't feel that just because you own another piece of land, you should have to sell that off to make the other one conforming. They had a proposal to make it conforming, and the Planning Board was not comfortable with the angle of the lot line. He found it somewhat challenging that the applicant had a porkchop-shaped lot and they were asked to have perpendicular lot lines. It seemed like the applicant did the best they could and fell slightly short of the lot area required. They could slide the lot line up 6' and meet the lot area requirement, but then they would be creating a nonconforming lot because the house would be 4' from the lot line, so it was almost a Catch-22 situation for them. Therefore, he was comfortable with what the applicant proposed. It was pretty close to the standards, there were other lots across the street similar in size, and to ask them, just because they own another lot, to sell off a chunk to make one conforming, crossed the standard of unreasonable in the Zoning Board's criteria.

*Mr. Durbin made a motion to **approve** the application as presented and advertised. Mr. LeMay seconded the motion.*

Mr. Durbin stated that the variance would not be contrary to the public interest, and the spirit of the Ordinance would be observed. Regarding the public interest, the applicant had an adequately-

sized lot that they could place a single family home on without it being viewed as an encroachment on abutting property owners. The lot size proposed was a bit under the Ordinance, but not substantially enough that it would be contrary to the public interest or would not observe the spirit of the Ordinance. He thought the hardship to the applicant outweighed any benefit to the public if the Board were to deny the project. As for substantial justice, they had a very large lot with perfect lot lines that could be cut in half to create two conforming lots, but they could not do it, and that got into the hardship criteria. There were special conditions related to the configuration of the lot and the boundaries that made more sense to create one legally nonconforming lot that was buildable rather than trying to create one new lawfully conforming lot and run into potential other issues under the Ordinance or subdivision regulations. He found that the proposed use was a reasonable one because a single-family home on the lot was a reasonable use considering the amount of area in which there was to build. He did not find a substantial relationship between the general purpose of the Ordinance and the application to the project. The value of surrounding properties would not be diminished. It was an adequately-sized lot for a single-family home, so for those reasons he moved that the application be approved.

Mr. LeMay said that he agreed 100% with Mr. Durbin that it was an imaginary line, and anyone who had ever been in a property dispute would recognize that the lines were very real and could be a point of contention. In the applicant's case, the variance was in the public interest by having an orderly arrangement of lots and avoiding strange shapes. He saw no detriment to the public whatsoever in granting the variance. It would be nice if everything were nice and square and easily divided up, but that was not the case, so it was a reasonable request.

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

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5) Case # 11-5
Petitioner: Kenneth C. Sullivan
Property: 40 Howard Street
Assessor Plan 103, Lot 61
Zoning District: General Residence B
Description: Construct second story over rear section of existing structure.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.324 to allow a lawful nonconforming building or structure to be added to or enlarged in a manner that does not conform to the requirements of the district.
2. A Variance from Section 10.521 to allow a rear yard setback of 8'± where 25' is required.
3. A Variance from Section 10.521 to allow building coverage of 40%± where 30% is the maximum allowed.

Mr. Mulligan and Mr. Moretti resumed their seats.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech representing the owner, Mr. Sullivan the owner, and Ms. Sarah Houlihan of DeStefano Architects were present to speak to the application. Attorney Pelech told the Board that he wanted to make one thing clear: they were not expanding the footprint of the structure. The existing lot coverage would remain the same. If it was advertised as 40%, that was what existed. With regard to the rear yard setback, they were not getting any closer to the rear property line than where the existing structure was but were simply going up a story. Attorney Pelech stated that the plans had been before the HDC once and would go back again. It was to add a second story to a portion of the one-story existing structure. If there ever was a hardship with regard to a lot, this was it. It was a very small triangular lot in the south end. When a rectangular building was put on a triangular lot, there were problems, and whoever constructed the building knew that because they nipped of a corner of it, resulting in a 7.5' rear yard setback. It was advertised as 8', and they did not intend to expand the footprint.

Attorney Pelech said the photos and the plan showed the existing structure from two different views. Sheet 1 showed the existing gable end with the one-story addition in the rear. That addition was the area that would be reconfigured, which was shown on Sheet 4 or 5. In response to a request from the Planning Department, it was a concept submitted to the HDC. However, the Planning Department wanted more architectural drawings and dimensions, so they submitted some that showed the actual height of the building. What had been submitted to the HDC since that time was different. The massing and dimensions were the same. The HDC liked the concept of the second story fill-in in the gap, but they wanted more detail, so they eliminated much of the glass with traditional clapboards. It was not contrary to the spirit or intent of the Ordinance, and it would not substantially alter the characteristics of the neighborhood or threaten the public health, safety or welfare of the general public. Adding the second story would make it more appropriate for the area's architecture. It would not substantially alter the characteristics of the neighborhood. The spirit or intent of the Ordinance would not be broken. Substantial justice would be done by granting the variance, and the test was the hardship upon the applicant if the variance was denied and outweighed by some benefit to the general public. They did not believe that there was any benefit to the general public by denying the variance. They also did not believe that it would diminish the value of surrounding properties. The abutters were the Wentworth Home. This was an attractive second-story addition that was not visible from the street and would not diminish the values of any surrounding properties.

Attorney Pelech stated that due to the special conditions of the lot, given its shape and size, the strict application of the Ordinance would not create a hardship resulting in the need for a variance. It was a reasonable use because it was a single-family residence and was an allowed use and would continue as a single-family residence. The applicant was just vertically expanding and not changing the footprint. All the setbacks would remain the same, the lot coverage would remain the same, and the proposed height was within the ordinance. The only variance required was whether or not they could expand a legally nonconforming unit, and the expansion was not an expansion into any of the setbacks or resulting in an increase in lot coverage. Therefore, Attorney Pelech believed that they met the five criteria as set forth in the Board's memorandum, and he would be surprised if there was any opposition to the granting of the variance.

Mr. Rheaume said he had a question for Chairman Witham. As Attorney Pelech had pointed out, the plans as presented showed a 7-1/2' rear yard and they were granting a relief of 8', plus or minus. He knew that 2.49' plus or minus was okay, but he wondered if it was good enough to be allowed for a building permit, if granted. Chairman Witham said the Board would want it

corrected to 7-1/2' as presented. The exhibits were sometimes not entirely clear and the application didn't always specify the exact dimensions. Attorney Pelech said that he thought if would be covered if the Board were to put in a condition that the footprint be no closer than the existing building. He had scaled 7-1/2' off a plan and didn't know where the 8' came from. Mr. Rheaume stated that his concern was that the public advertisement was for 8'. If they did not change it to 7-1/2', it wouldn't mesh with their discussions about previous applications having been granted additional relief without public notification. Chairman Witham said that it had been advertised as 8' plus or minus, and they were having a 6" variance, and it was just the scaling off. He was comfortable with it. It would have been different if it was 2 feet. The Board knew they were dealing with a vertical expansion and knew exactly where the line was.

SPEAKING IN OPPOSITION TO THE PETITION

No one rose to speak.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Ms. Catherine Williams Cane told the Board that she was the abutter to the side and rear by two different properties she owned and with all due respect to Mr. Pelech, it was not the Wentworth Home. As long as the footprint was not being expanded, she thought the major impact was the second-floor addition and the fact that it would face a common driveway from her two properties. The second of her two properties was raw land but would eventually be developed. The addition faced the common driveway for the two, and she saw no hardship to them in having it developed in that manner. She was in favor as long as the current footprint was not expanded, and she stated that she was also speaking for the side and rear abutters.

With no one else rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

Chairman Witham stated that he was on the fence with the third variance request. He did not feel that they needed the lot coverage of the variance request because they were not allowing 40%, which existed, so he felt like it was grandfathered. He did feel that the vertical expansion encroached into the setback, so he was not challenging the rear back setback. He saw only the rear yard setback as being required, but they could move ahead with the motion and cover both of them to be safe.

Mr. LeMay agreed with Chairman Witham regarding the lot coverage not being too significant. However, if the only thing in the variance was the lot coverage and someone wanted to go up a second story, it could encroach on a neighbor, so stating it in general was a good thing.

*Mr. Parrott made a motion to **approve** the application as requested and advertised with a rear yard setback of 7.5'. Mr. Mulligan seconded the motion.*

Mr. Parrott stated that it was simple and straightforward. It was a vertical expansion and no increase to the footprint, which was a good thing because it was an odd-shaped lot. Granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance; they were combined, so it was the same one. In the applicant's case, the revised plan

fit in well with the public interest and the spirit of the Ordinance, even though the design did not come under the Board's purview because it was not contrary to the public interest in any way and it was hard to see what the public interest was actually. The spirit of he Ordinance was to allow people to improve and expand, and in the applicant' case, it was expanding vertically, so it suited their purposes better and did not trample on the neighbors. The granting of the variance would do substantial justice. The rights of the individual property owner were balanced between the potential harm to the public, and it clearly tipped to the property owner. The values of the surrounding properties would not be diminished. The modified design of the addition seemed to fit in well and would have no effect on adjacent properties except for perhaps a slight positive effect. As far as unnecessary hardship, they had already touched on the odd-shaped lot, and it was a big house and sited in such a way that anything they would do would involve a variance. It wasn't practical to increase the footprint, and they wanted more space and were going vertically, which made sense. There were special conditions to distinguish it from other properties in the area. It was a hard argument to make in an area where there were so many odd-shaped properties and big houses, but the application had its own unique characteristics in that respect. As a result, he thought it won the hardship test and the Board could vote for the variance.

Mr. Mulligan concurred and said he had nothing to add.

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

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6) Case # 11-6
Petitioner: Grondahl Family LLC
Property: 140 West Road
Assessor Plan 252, Lot 2-1301-1305
Zoning District: Industrial
Description: Parking for a health club.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1112.30 to allow 103 parking spaces where 72 parking spaces exist and 145 parking spaces are required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Malcolm McNeill representing the applicant and Mr. Bob Clark, the project manager, were present to speak to the application. Attorney McNeill stated that it was a unique request for a variance, what he called a command performance variance. He told the Board that they might recall that the applicant had been before them on October 22 for a special exception, which was unanimously approved. There had been no opposition and no abutters present to object. Chairman Witham had raised the issue of whether all parking was necessary and whether it was legally required. He had asked the Board for a straw vote to see whether they would approve the variance for reduction in parking, and the vote was unanimous. Knowing that wasn't the case in terms of what the Board had to have on record, the applicant had tried to be responsive to exactly what the Board had requested.

Attorney McNeill stated that the applicant felt from the outset that 145 spaces for their type of use was not necessary, but was achievable if necessary, for the granting of the special exception. In the interim, there had been discussion with the Planning Department about issues such as how to lay out the site effectively and preserve green space, how to have less impervious surfaces on the site, and how to make the site maneuver better and look better and accommodate the use that was there. The owner clearly felt that the amount of space being required, which was 103 spaces and a significant reduction of 42 spaces, would be adequate for the proposed use to be granted by special exception. Attorney McNeill asked Mr. Clark to show how the plan had changed from the existing condition, what the Board had approved by special exception, and what the applicant was asking for in terms of a variance.

Mr. Clark said the existing plan showed that the parking in the front of the building would not change. There were 28 spaces along both strips, and 16 spaces on the side of the building. The service docks were removed from the back of the building, and it would revert back to green space, allowing for 28 spaces, so 28 spaces would remain with 16 on the side. They striped out the existing pavement on the back of the building for 31 additional spaces. It complied with the proposed parking layout by the Planning Board, an 18' wide drive lane for one way and the angled spaces in the pavement area, so there was a total of 103 spaces. The original application was at 114 spaces. When they had first come in, they had some conversations with Ms. Walker, the planner, and they were looking to gain a few spaces on the side of the building, but they had removed those spaces so the new total was 103 spaces. The other item they were asked to look at was open space. They were required to maintain 20% open space, so they were showing the green area that would remain as well as the additional 3,400 square feet that they were putting back in the back of the building where the service docks were. Therefore, they were at 29.7% open space, which was almost 10% more than required by the zoning code.

Attorney McNeill stated that they were in the unique position of completely complying with the special exception criteria, but they were asking the Board to modify the parking requirement because the Board had felt that it was appropriate, and he thought everyone would agree that the parking requirements for their particular use by special exception was excessive. The variance would not be contrary to public interests. There were no adverse effects by the proposed changes. It was quite to the contrary because it made the whole layout of the building area and lot more attractive. There was no traffic hazard. The amount of parking fit the use and was reasonable, so the public interest was not adversely affected. With regard to the spirit of the Ordinance and weighing that in terms of the public interest and the Ordinance itself, this was a use that was now permitted by the Board by special exception. There was ample parking on the property with no adverse public effects. Mr. Parrott had asked at the last meeting that the applicant be certain that all the parking stalls were the appropriate size, which they were, so the letter of the Ordinance was complied with. Substantial justice would be done and there would be no harm to public. The granting of the variance was allowing an approved use with reasonable parking and reasonable modifications to the parking site for a unique lot in a unique location with a unique use. The value of surrounding properties would not be diminished. The area was basically an industrial zone, and they had shown the design for the building that would improve the appearance of the building. They would also remove some loading docks, have open space and green space, and make the whole area on the corner look better. As for hardship, strict application of the law to their particular use would be unreasonable and a hardship to the applicant. The parking requirements were excessive and onerous for the use approved by special exception. The lot was special and different in terms of it having two frontage points. There was something to be gained from the

changes they were proposing. Special conditions existed with regard to the use and to the lot that indicated its uniqueness. They were attempting to make lemonade out of a lemon as it related to the parking, and make the overall use the same but with reasonable parking and a reasonable layout consistent with what they had heard from the Board the previous time.

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

With no one rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

Chairman Witham stated that the straw vote he had taken based on the parking was in response to the fact that for the applicant to meet the parking requirements, it meant removal of considerable green space and trees on the site. He had determined that there were 46 workstations within the structure, and 145 parking spots seemed excessive.

*Mr. Mulligan made a motion to **approve** the application as presented and advertised. Mr. Parrott seconded the motion.*

Mr. Mulligan said the approval should be a slam dunk. The granting of the variance would not be contrary to public interest or the spirit of the Ordinance. Given the limited relief from the parking requirement that the applicant was requesting the essential characteristics of the neighborhood would not be altered nor the health, safety or welfare of the public threatened. Granting the variance would result in substantial justice. It was probably not a textbook case of substantial justice, but it was a case where the Board practically begged the applicant to come back and request the particular variance, so he thought it met the test. The loss to the applicant would not be outweighed by any gain to the public if the Board were to require them to meet the 145 parking space requirement, so they met that criteria. Granting the variance would not diminish the property values in the surrounding neighborhood. There would be less parking but more green space and more impervious surface, and it would also look better. It was something the Board had urged the applicant to pursue. Regarding the literal enforcement of the Ordinance resulting in an unnecessary hardship criteria, the amount of parking legally required was excessive for their particular use on the lot, so there was no fair and substantial relationship between the Ordinance and its application to the property. The use was a reasonable one. Chairman Witham had discussed the amount of workstations in the facility being less than a third of the amount of parking that was actually required, so there would be plenty of parking as set up in the application. He believed that there were special conditions of the property, and for those reasons the Board should grant the variance.

Mr. Parrott thought that the change was a positive response to the concerns expressed by the Board, which were unusual to say the least, and that everyone would benefit from it. The site would look better and the folks might save some money by not tearing out things that didn't have to be torn down, and the property would look as good as possible. It was one of those cases where everyone won.

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

7) Case # 11-7
Petitioner: Mary R. Hurlburt
Property: 220 Union Street
Assessor Plan 135, Lot 24
Zoning District: General Residence C
Description: New two-story residential structure replacing existing one-story.
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 building or structure to be extended, reconstructed, enlarged or structurally altered in a manner that does not conform to the requirements of the district.
2. A Variance from Section 10.521 to allow construction on a lot with 25.5'± continuous street frontage where 70' is required and a lot depth of 39.7'± where 50' is the minimum required.
3. A Variance from Section 10.521 to allow left and right side yard setbacks of 4.5'± where 10' is required for each setback.
4. A Variance from Section 10.521 to allow a rear yard setback of 7.8'± where 20' is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Peter Agrondia of North Easterly Surveying representing the applicant, and Mr. Paul Swanick of Swanick Builders were present to speak to the application. Mr. Agrondia stated that he was representing 220 Union Street, which was a small ell-shaped lot with an existing one-story house and was built in 1952. It was a camp-style building on cinderblocks and not in good condition. It was currently vacant, and the owner could not afford the upkeep and had moved into an elderly housing facility. The marketability of the property was not good due to its condition, and most people thought it was a teardown. The existing building was 24-1/2' wide and 40' 2" deep, and they were proposing a slightly smaller footprint of 24' wide and 38' deep, so it would be 2' shorter. They were also proposing to center the new structure more on the parcel to give it more breathing room. The building to the right had a setback of 1.7', so a notch was proposed on the new building where the entrance would be to give it a little more space. There would be a roof over the entryway, so the setback would be 4.5' from the roofline, and there would be open space on the second story and under the roof into the entry to allow more breathing room. They needed variances for the lawful nonconforming structure that they were proposing to reconstruct. Mr. Agrondia was not sure why they needed a variance for the second item, but the planner had suggested that they include it. He thought it might be a grandfathered lot, but the way it was explained to him was that once the building was torn down, they'd have to meet the lot size requirements. Therefore, they were asking for a variance for the frontage and lot depth as well. The third variance was for a side setback of 4.5' on each side, and the final variance was for the 7.8' setback on the rear property line.

Granting the variance would not be contrary to public interest because they thought it would be in the public's interest. The new building would revitalize the site, and they would remove a lot of the vegetation that had not been well maintained such as the overgrowth, bamboo, and so on. The spirit of the Ordinance would be observed because the proposed building matched many buildings

in the neighborhood. The building would be well under the maximum because they were proposing a 25' building height. As far as public health and safety, it would be a safer condition because it would increase the space between the buildings. Substantial justice would be done. The benefits to the applicant would outweigh any harm to the general public, which would actually benefit. The value of surrounding properties would not be diminished because a new building would only enhance the value of surrounding properties. Literal enforcement of the Ordinance would result in unnecessary hardship. Looking at the result of the setbacks for the lot, a new building would have a maximum size of 15' square with a bump-out south of it unless they got relief or tried to do upgrades on the existing building, which wouldn't make sense based on its condition.

Mr. Rheaume said Mr. Agrondia had mentioned that the current house had no foundation and asked what the intent was for the new structure. Mr. Agrondia stated that they were considering a crawl space, which was not shown in the architectural drawing. They had done one rendition before he came on board. They were trying to maximize the height but then realized that it wasn't a good idea due to the current sensitivity of building heights, so they came back with new drawings that were not extensive but indicated a crawl space.

Mr. Mulligan said that the plan showed the existing building to the north of the building that was being torn down at 214 Union Street and asked if it was living space or a garage. Mr. Agrondia stated that it was living space that was rented out as a separate unit. Mr. Mulligan assumed that the new building would be a two-story building 4-1/2' from the living space. Mr. Agrondia said it would be 4-1/2' from the property line, and the living space was pretty much on the property line. It was current 1.7', and he referenced the notch they would be building so the roof of the entry would be 4.5' from it. He said that they had a photo of the existing conditions of the building with the sloping odd roof line that was the rental unit.

Mr. Parrott stated that some of the neighbors had expressed concern about the excavation that might have to be done, and he asked Mr. Agrondia how deep the crawl space would be. Mr. Agrondia said it would be approximately 3' with a frost wall. Mr. Parrott asked if there was no ledge that would require heavy blasting or chipping out with a hammer. Mr. Agrondia said there had been no boring done, so he could not say for sure, but ledge wasn't typical of the neighborhood. Mr. Parrott stated that the obvious concern of the neighbors, with respect to other previous construction done in the immediate area, was having new construction so close to their property lines. Blasting or an air hammer would have a bad effect on nearby foundation as well, but it was understandable because the space had such tight quarters.

Mr. Swanick spoke up and stated that, if they excavated, they didn't really need a crawl space to get frost protection for the walls. If they dug and hit ledge, they would not do any blasting or hammering but would just drill and put pins in and then pour the footing to the ledge. Mr. Parrott asked if they were positive that they wouldn't have a change of heart and decide to go for a full basement. Mr. Swanick stated that there would be no full basement. They had just been thinking of a crawl space because there was a back section of the house that had an oil tank enclosure, which they would eliminate because the house had natural gas. The crawl space would only be for frost protection, and they would prefer to do it on a slab, but if they didn't need it, they wouldn't do it.

SPEAKING IN OPPOSITION TO THE PETITION, OR

SPEAKING TO, FOR, OR AGAINST THE PETITION

With no one rising, Chairman Witham closed the public hearing.

DECISION OF THE BOARD

Chairman Witham stated that, when he first read the variance request, the side setbacks were similar to what would be found in the neighborhood and the rear setback was similar for a shed or a garage addition and not necessarily for a house, especially on a small and uniquely-shaped lot. He felt that it was too much house for the site. He said that he used to live a few streets away from the site, so he was very familiar with the surrounding neighborhoods neighborhoods, and the streetscape had a certain density and size of homes. Going back toward the rear yards, everything scaled down to small garages and sheds, and he could not picture a small one-story camp that was rented out as a housing unit. He said that he remembered a project on Cabot Street where someone wanted to tear down an old carriage house and rebuild one with an apartment above. It was approved, but it was built much taller than presented and was very out of scale as it tucked back into the neighborhood's courtyard, where everyone else's backyard filled the corridor with low-scale buildings. He thought the designer and applicant did what they were asked to do and thought it out well, but it was just too much house to put back there. The style of the house reminded him of some of those homes being built on Spinney Road and Atlantic Heights. Referring to the criteria of changing the essential character of the neighborhood, he felt that moving a home of that size and character back and not on the street line did change the character. There were also issues with setbacks because there was a big difference between a garage with a 7-1/2' setback in the rear as opposed to living space and how that impacted the neighbor. He was not opposed to the house being torn down and replaced with something that was in character and on a smaller scale, perhaps a carriage house. The proposed house felt like too much to put back there.

With no further comment or a motion made, Chairman Witham said that he would pass the gavel to Mr. Parrott. Chairman Witham then made a motion to ***deny*** *the application. The motion was seconded by Mr. LeMay.*

Chairman Witham stated that he would carry over his previously-stated comments. He was not opposed to the structure being rebuilt and not particularly opposed to the dimensions and the setbackt. He just felt that it was too much structure for that size lot and setbacks, and it was not on the street front but at the back corridor section of everyone's backyard that formed the neighborhood courtyard. For those reasons, he felt that it did not meet the criteria test of not changing the essential character of the neighborhood. A house like that would have an impact on the character of the neighborhood. He realized that the Board didn't set precedents, but he hated to see a slew of applications come in from people who thought, 'Wow, look at that house they squeezed in on that very undersized lot back there'. Financially, it was a great gain, but that wasn't what drove the Board's decision. He was not sure that granting the variance would do substantial justice. They could get a house back there but the Board had to look at its size, scale and impact. Chairman Witham said that there could be an argument that the application met some of the other criteria, but the applicant had to meet all five. It went against the spirit of the Ordinance, and he was not sure that it was in the public interest to have a home of that size on that site. He knew that it was an unnecessary hardship due to the shape of the lot, but he didn't think the home met the test. Something of a more appropriate size and scale like a carriage house would be more appropriate. For those reasons, he made a motion to deny the application.

Mr. LeMay stated that he agreed with Chairman Witham's comments. It felt like too much house for the lot. He was not sure that he could suggest something specific, but something more acceptable for the lot might be something turning the house 90 degrees so that it fit the back section of the lot better. It was not a specific cure, but it had to be worked out more to come up with something more suitable.

Mr. Rheaume stated that he would support the motion. He was torn when he first looked at the application. At first, he thought it was a bit much and then felt better about it, but Chairman Witham had made some pretty good comments. He was also familiar with the neighborhood, having lived on State Street and having looked at the aerial views. There was quite a variety of architecture as to size shape and density, but they were looking at the back buildings away from the property line. The building appeared to be somewhat higher than what he would expect, although there was another tall structure close by. Perhaps a 1-1/2-story line where the second story was set down somewhat and had some rooflines going down into it might feel a little less imposing that far away from the street line and be more in keeping with the two adjacent houses. He thought that the outbuilding on the neighboring house was simply a type of garage. A question of it being a living space added a real dominating presence right next to something that was actual living space on the adjacent property. It was legitimate to say that it was too much to ask of this particular lot, so he voted in favor of the motion to deny the application.

Mr. Parrott stated that he had the same concerns. He felt it would not be in the public's interest to put that house on a lot. If there weren't a house there, there wouldn't even be a serious proposal to put another house almost in the same spot, with 4.5' side setbacks both ways on a 25' lot that was on the street with a front yard taken up by parking. It was going from something clearly substandard and way past saving to something that was too big and could be scaled down and sided a lot better and be more compatible with the odd lot and the surrounding structures as well. It was a good first try, but it did not pass the test with respect to the compatibility of the motion, so he supported the motion to deny the application.

*The motion to **deny** the petition as presented and advertised **passed** unanimously.*

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8) Case # 11-8
Petitioner: Ghamami Revocable Trust, Sheila Grant, Trustee
Property: 405 Deer Street #7-6
Assessor Plan 118, Lot 26-7
Zoning Districts: Central Business B & Downtown Overlay
Description: Appeal from Administrative Decision
Requests: Appeal from Administrative Decision to issue a violation notice for removal of a center chimney.

This petition was postponed by an earlier vote to the December 17, 2013 meeting, with a specification that this would be the only postponement granted. .

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9) Case # 11-9

Petitioner: M.A. Boccia & V.H.T. Luong Joint Liv. Tr., M.A. Boccia & V.H.T. Luong, Trustees
Property: 30 Brewster Street (26-28)
Assessor Plan 138, Lot 35
Zoning District: General Residence C
Description: Expand third floors of two existing structures, adding one dwelling unit.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.324 to allow a lawful nonconforming building or structure to be added to or enlarged in a manner that does not conform to the requirements of the district.
2. A Variance from Section 10.521 to allow a lot area per dwelling unit of 1,221 ±s.f. where 1,831± s.f. exists and 3,500 s.f. is the minimum required.
3. A Variance from Section 10.521 to allow a right side yard setback of 5'± where 5' exists and 10' is required.
4. A Variance from Section 10.521 to allow a rear yard setback of 0'± where 0' exists and 20' is required.
5. A Variance from Section 10.521 to allow 41.4%± building coverage where 41.6%± exists and 35% is the maximum allowed.
6. A Variance from Section 10.1112.30 to allow 4 parking spaces to be provided where 6 parking spaces are required.

This petition was postponed by an earlier vote to the December 17, 2013 meeting.

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IV. OTHER BUSINESS

No other business was presented.

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V. ADJOURNMENT

It was moved, seconded and passed to adjourn the meeting at 9:38 p.m.

Respectfully submitted,

Joanne Breault, Acting Secretary