

**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 19, 2014

MEMBERS PRESENT: Chairman David Witham; Vice-Chairman Arthur Parrott; Derek Durbin; Charles LeMay; Christopher Mulligan; David Rheame; Alternates: Jeremiah Johnson and Patrick Moretti

MEMBERS EXCUSED: Susan Chamberlin

ALSO PRESENT: Juliet Walker, Planning Department

Chairman Witham welcomed Mr. Jeremiah Johnson, a local architect, as an alternate member of the Board. He advised that, due to an absence and a number of expected recusals, Mr. Johnson would be voting on several cases.

I. APPROVAL OF MINUTES

- A) April 22, 2014
- B) May 20, 2014
- C) May 29, 2014
- D) June 17, 2014
- E) July 15, 2014

In separate unanimous voice votes, it was moved, seconded and passed to approve all sets of Minutes with minor corrections.

II. MOTIONS FOR REHEARING

A) Motion for Rehearing by Applicants regarding 746 Middle Road.

Mr. Durbin recused himself from this item. Chairman Witham said Mr. Johnson was not present for the initial hearing and would not be voting.

Mr. Mulligan said he had read the materials in depth and would support the request for rehearing. He was not entirely convinced by the applicant's substantive arguments, but he agreed with the procedural arguments. He added that the tax map and line drawing submitted may have affected the way he looked at the application compared to a fully engineered plan.

Chairman Witham said the submittal for rehearing was well thought out, but the dimensions and variance requests were the same so the reasons for his decision would not change even if a survey and plan to scale were presented.

Mr. Rheume said he also felt the request for rehearing was thorough, but an argument that the applicant could build a garage instead of a house didn't hold for him because there was no economic advantage for a garage compared to a subdivision for another house. He said there might be enough room for the existing home, but requesting that the Ordinance be cut in half with 50' of relief to add another house and access driveway would change the general character of the neighborhood and was the tipping point for him.

Chairman Witham said he also went through the Minutes of the meeting and noted that Mr. Mulligan had pointed out that the lot had not been involuntarily merged. It had always been a single lot with a bare minimum of street frontage and cutting it in half would be too much.

Mr. LeMay made a motion to deny the request for a rehearing of the petition and Vice-Chair Parrott seconded the motion.

Mr. LeMay said he did not see any new facts in the request and there was much opposition to show there was no support from the neighbors.

Vice-Chair Parrott agreed with all the previous comments that the request was well presented, but the facts what they were and he didn't think rehashing them would change his mind.

The motion to deny a rehearing passed by a vote of 5-1, with Mr. Mulligan opposing.

B) Motion for Rehearing by Applicants regarding 304 Leslie Drive.

Mr. Durbin returned to his seat. Chairman Witham announced that he and Mr. Mulligan would be recusing themselves from this discussion as they were not present at the original hearing. He reiterated that three positive votes would be necessary for a majority vote to pass. The gavel was passed to Vice-Chair Parrott.

Mr. Rheume said he would be in favor of a rehearing considering the applicant's point that the motion to grant failed to pass by a tied vote and a motion to deny was not made, although that vote may very well have been tied as well because of an equal number of Board members voting. He felt that raised an interesting procedural question. He stated that there was no discussion at the meeting about the specific concerns of the Board that resulted in the failure to pass. There was nothing that the applicant could use to go back and amend their proposal so that it might be acceptable to the Board and be sufficiently different so that it would not raise a question of Fisher v. Dover. He felt the applicant deserved an opportunity to come back before the Board and at least hear their concerns regarding the proposal.

Vice Chair Parrott asked if that was a motion and Mr. Rheume said he intended it to be discussion but if there was nothing further, he would make a motion.

*Mr. Rheaume made a motion to **grant** the request for a rehearing to be held at the next meeting of the Board. Mr. LeMay seconded the motion.*

Mr. Rheaume stated that he would bring forward his previous comments. He felt the applicant deserved an opportunity to come back before the Board and there might or might not be a different outcome but they would at least understand the Board's concerns.

Mr. LeMay said a failure to get enough votes simply meant a request didn't pass and he didn't think that should be a referendum on routine procedure. In this case, while the outcome was definitive in not having enough votes to pass a positive motion, the reasons for not granting were unclear and he felt the applicant was owed a clarity of judgment on this.

Vice-Chair Parrott said he recalled that the quality and depth of discussion was not up to the Board's usual standards and thought they could do a better job of explaining their reasoning.

*The motion to grant a rehearing **passed** by a vote of 5-0.*

Vice-Chair Parrott announced that the petition would be heard at the next regular meeting.

Mr. Mulligan and Chairman Witham returned to their seats and Vice-Chair Parrott turned over the gavel to Chairman Witham.

Chairman Witham noted that he wasn't present for the meeting, but had read the Minutes and the Request for Rehearing and agreed that it was unique in that the reasons to grant the petition were addressed but after that motion did not pass there were no reasons given for denying, which was unusual.

III. PUBLIC HEARINGS – OLD BUSINESS

- 1) Case # 7-3
Petitioner: Christine V. Crockett Revocable Trust
Property: 209 Gosport Road
Assessor Plan 224, Lot 10-12
Zoning District: Single Residence A
Description: Construct a new single family home within 75' of a saltwater marsh.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
 1. A Variance from Section 10.301(6) – 1982 Zoning Ordinance to allow a structure 75'± from a saltwater marsh where a minimum of 100' is required.
(This petition was postponed from the July 15, 2014 meeting.)

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin appeared before the Board on behalf of the applicants. Also in attendance was John Chagnon of Ambit Engineering.

Attorney Loughlin said the applicant purchased the lot in the Woodlands 25 years ago, along with the adjacent lot. He said it was one of highest taxed lots in the City because it was in Tucker's Cove. He said it was subdivided and the site plan was approved around 1995. He said the Wetlands Act was implemented in the 1970's. He said 100' of wetlands buffer seemed drastic at the time, so no one questioned it when the Portsmouth School District built Little Harbor School on the edge of the salt marsh. He said the applicability to Tucker's Cove was challenged in Superior Court after the City adopted their Inland Wetlands Ordinance and it was decided that the Ordinance only affected wetlands over 25' square feet and did not apply to this subdivision or lot. He said DES already approved the wetlands crossing as shown with 600' square feet of impact.

Attorney Loughlin said the applicant filed for a Conditional Use Permit and a wetlands crossing. He said they attended the March 2014 Conservation Commission and were asked for more information. He said there were no requests for the building footprint at that time, but Mr. Chagnon prepared the application for DES who wanted to see the entire lot and the impact to the wetlands. He said they met with Peter Britz, Environmental Planner on April 2, 2014 who wanted an opinion from legal counsel. He said they filed their Conditional Use Permit with the Planning Board on May 8, 2014 and it was decided that the lot was vested and they would not need the Conditional Use Permit. He said the three State permits were included in the packet.

Attorney Loughlin reviewed the criteria and said granting the request for a single-family home in a residential zone would not be contrary to the public interest as it would not alter the essential character of the neighborhood or threaten the public health, safety or welfare. He said the lot was assessed at \$400,000 everyone would like a vacant lot next door that someone else purchased and paid taxes on, but that was not the test. He said there would be no reasonable use of the property without relief and substantial justice would be done in granting the application. He said this was the only place they could put the home without wetlands fill and although the deck would be in the tidal buffer, the impact would be under 6%. He said He said it would not be in the side setback the use was approved and anticipated on the lot since the subdivision in 1995

Attorney Loughlin said the purpose of the wetland buffer was to reduce erosion, help the ecological balance and control source pollutants. He said this lot would have more undisturbed buffer than any other in Tuckers Cove because there would be no fertilized lawn running to the water as stipulated by wetlands regulations and would be in the spirit of the Ordinance. He said the Army Corp of Engineers reviewed the project, including the dredge and fill of wetlands, determined that it would have a minimal accumulative impact, and approved the work on February 11, 2014. He said DES also determined that the proposal provided the least impact with the wetlands crossing at the most narrow portion, with site grading to direct runoff away from abutting property into a rain garden and buffer plantings that would preserve the functions of the tidal buffer zone and increase property values.

Attorney Loughlin said literal enforcement of the Ordinance would result in an unnecessary hardship on the applicants who had paid property taxes on the lots for 23 years. He said there were special conditions with ledge outcroppings near the water and a wetlands lot that dictated where the building would be located. He said the wetlands increased over the years, narrowing the building envelope and best management practices dictated the way the lots could be developed. He said the owner of one of the lots next door built a retaining wall six years ago, which was not an issue then, but detention ponds were called for today. He said the proposed use for a single-family home in a residential district was a reasonable one.

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Mr. Rheume asked if there was any intent for the kind of boat gear that was standard for lots along Sagamore Creek and Attorney Loughlin said they were not aware of any such plans. Mr. Rheume asked if that would require a separate permit and Attorney Loughlin said it would.

Mr. Mulligan asked if the building envelope had become more restricted because the uplands had become reduced and Attorney Loughlin there was no buffer issue, but the increased wetlands dictated where the building could be located. Mr. Mulligan asked if the increase of wetlands was due to other building lots and Attorney Loughlin said it might have been due to the lot next door as well as the construction of the road with culverts and catch basins.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Mulligan said constructing a single-family home within a residential sub-division was a permitted use and all of the setbacks and dimensional requirements would be observed. He said although there would be an incursion into the tidal wetlands buffer, granting the variance would not be contrary to the public interest or the spirit of the Ordinance because the essential character of the neighborhood would not be substantially altered by adding another single-family residence to the subdivision. He said the applicant provided materials indicating that the proposal would have the least adverse impact to the wetlands so that the health, safety and welfare of the public would not be compromised.

Mr. Mulligan said denying the variance would result in a substantial injustice to the applicant and the loss would not be outweighed by any gain to the public. He said the applicant could not reasonably use the property without the relief. He said the proposal met all the frontage, depth, setbacks, lot coverage and open space requirements and would not diminish the value of surrounding properties. He said there had been no local opposition, nor did he think that any opposition would be well founded.

Mr. Mulligan said the special conditions of the property were that the amount of wetlands and buildable space had changed from the time the applicants acquired the lot. He said a point made in the presentation was that the existing built environment contributed to that condition so he thought there was no fair and substantial relationship between the purpose of the tidal wetlands buffer protections and its application to the property. He said the use was clearly reasonable and the literal enforcement of the Ordinance would result in an unnecessary hardship.

Mr. Durbin agreed with Mr. Mulligan's comments and said they might look at it differently if it were not a vested buildable lot, but he thought that was a significant factor in his decision to second the approval of the request. He said from a legal perspective, something would be built there and the applicant demonstrated that this proposal would be the alternative resulting in the

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least ecological impact alternative on the lot and surrounding environment. He said the proposal would be consistent with other built lots in the neighborhood. He said the wetlands constraints created an inherent hardship with building on the land and the encroachment into the salt marsh buffer of 75' was somewhat "de minimus" considering that the State requirement for building within the shoreline was 50'.

Mr. Rheume said the Board typically dealt with dimensions and use, and occasionally wore HDC hats, but in this case, they had to wear wetlands scientist hats. He said the facts presented from experts such as the Army Corps of Engineers and the DES were compelling and gave him the confidence that this proposal would not have a negative impact on the wetland buffer zone.

The motion passed by a vote of 7-0.

IV. PUBLIC HEARINGS – NEW BUSINESS

1) Case # 8-1

Petitioners: Weakes Revocable Trust, Danny and Rachel Weakes, Trustees

Property: 35 Davis Road

Assessor Plan 258, Lot 24

Zoning District: Single Residence B

Description: Construct 18'± x 16'± shed

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

1. Variances from Section 10.521 to allow a front yard setback of 27'4"± where 30' is required and a rear yard setback of 8.2'± where 10' is required for an accessory structure.
2. A Variance from Section 10.571 to allow an accessory structure to be located in a required front yard.

SPEAKING IN FAVOR OF THE PETITION

Mr. Dan Weakes appeared before the Board and stated that he removed his shed that was in disrepair and thought he would be grand-fathered when replacing it, but found out later he needed a variance. He submitted letter of support from his neighbors.

Mr. Weakes said the original shed was at the side of his oddly shaped lot on a cul-de-sac and he considered moving it, but found there was nowhere else to put it because he had a septic tank and leach field in the open space in the back yard. He said he built the shed to match the architecture of his home and it would not affect the surrounding property values.

Chairman Witham asked if he placed the shed in roughly in same location and he said he placed it within approximately 5' of the other shed.

Mr. Rheume said the original shed appeared smaller and further over and wondered why he put the new shed closer to driveway. Mr. Weakes said he was a technician with quite a bit of equipment and placed the shed closer for easier access in winter.

Mr. Rheaume asked why the placement of the shed was considered in the front yard and Ms. Walker said it was because it was measured from the street frontage.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

*Mr. Durbin made a motion to **grant** the petition as presented and advertised and Mr. LeMay seconded the motion.*

Mr. Durbin reviewed the criteria, noting that granting the variance would not be contrary to the public interest because the replaced shed was close to the previous location and didn't appear to affect any abutters. He said the proposal respected the light, air and space between properties, observing the spirit of the Ordinance. He said substantial justice will be done and to deny the application would be a detriment to the property owner which would not be outweighed by any benefit to the public.

Mr. Durbin said the special conditions that distinguished the lot from other properties in the area was that it was an odd shaped lot located on a cul-de-sac and the shed was considered to be in the front yard with street frontage. He said the relief requested was minimal and there was no fair and substantial relationship between the general public purposes of the Ordinance and their application to the property. He said having an accessory structure was a reasonable use of the property.

Mr. LeMay agreed that the proposal was modest and would have no impact on surrounding properties.

*The motion **passed** by a vote of 7-0.*

- 2) Case # 8-2
 - Petitioners: Mark A. and Deborah Chag
 - Property: 404 Middle Street
 - Assessor Plan 136, Lot 21
 - Zoning District: Mixed Residential Office
 - Description: Convert existing barn to single-family dwelling.
 - 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 to be added to or enlarged without conforming to the requirements of the Ordinance.
 2. Variances from Section 10.521 to allow the following:
 - a) A lot area per dwelling unit of 5,436.5 s.f. ± where 7,500 s.f. is required;
 - b) A rear yard setback of 0'± where 15' is required; and
 - c) A right side yard setback of 2'± where 10' is required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin appeared before the Board with applicant Deborah Chag and architect, Dan Rawling.

Attorney Loughlin said the family lived in the home that was built in 1880 for 25 years and had invested time and money into preserving the property. He said they wanted to downsize and wanted to stay in the neighborhood by converting their vacant barn into residential space for them, raising the barn to create parking underneath, adding a porch, a deck and terrace and reconstructing the existing extension. He said the project would also require approval from the HDC.

Attorney Loughlin detailed the building and lot dimensions and setbacks, stating that their lot size per dwelling unit was higher than surrounding properties. He said the lot was in a peninsula of mixed residential and office use and would not be contrary to the public interest, as the essential character of the neighborhood would not be changed because a new building would not be added.

Attorney Loughlin reviewed the criteria and said the project would not be contrary to the spirit and intent of the Ordinance. The largest part of relief needed was for 7,500 s.f. for each dwelling unit and they would preserve the existing facility. He said Ms. Chag spoke with most of her neighbors and provided a petition, letters and emails indicating support, from more than 21 neighbors. He said there were unique aspects to property and this was a unique project for a permitted use.

Mr. Rheume asked why different scenarios for parking were shown on the plan. Attorney Loughlin said they needed four spaces for this use so they were showing how they could get four spaces on the lot whether the barn was raised up or not. Mr. Rheume said the concern would be that there would be too much parking if the garage were raised up for parking. The applicant, Ms. Deborah Chag of 404 Middle Street, said the intent was to have two cars under the structure and two spaces connecting to the existing house so they could keep the parcel green.

Mr. Moretti asked if the single-story building in the back was new and architect Dan Rawling of 401 Middle Street said they were doing reconstruction on the other building. Mr. Moretti said it appeared to be a pleasing design, but he was concerned with raising the building on the existing foundation that had a 0' setback from the lot line.

Vice-Chair Parrott inquired about the trees and Ms. Chag said she spoke with a tree service company and was told the butternut was dead and the hemlock was buckling the chicken coop, causing structural damage so they would take those trees down, but the oak would remain. Vice-Chair Parrott asked about the other trees on Middle Street and Ms. Chag said they would leave those alone.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Chairman Witham said Portsmouth's historic and architectural heritage was important to preserve and he was a strong proponent for preserving barns though he realized they were no longer used for horses and carriages as originally intended. He said in this situation a dwelling unit could be a reasonable use and he had converted another barn to a dwelling unit down the street himself. He said he was familiar with Mr. Rawling's stunning work on Middle Street, but he was concerned that raising a barn 8' in the air to gain additional space underneath could jeopardize the look, feel and integrity of the structure. He said he understood the building would need to be raised to restore the foundation, but he thought it would be asking a lot to put a three-story wall and overhanging eaves on a 0' setback on the property line near a neighbor and some effort should be made to move the building from the property line for drainage and maintenance.

Mr. LeMay said he agreed 100% with Chairman Witham's comments, specifically that it should be moved back a couple of feet to allow for maintenance. He added that the HDC might have more to say on the matter, but he thought the barn would look as if it was boosted up on a platform.

Mr. Mulligan said 0' setbacks were common in this neighborhood and large useable yards were not so common. He said he was hesitant to support moving the structure off the side yard setback closer to the middle of a backyard, compromising one of the few properties on the street with a useful, private and unique yard and lawn.

Chairman Witham said he thought this was an opportunity to lessen runoff from the eaves onto another property. He said the barn also directly abutted a museum home and raising the barn would impact the architectural integrity.

Mr. Rheume said he was torn with the proposal as well. He said it was an odd building with no street frontage in a tight triangle that was not currently overwhelming with homes there. He said the barn would appear taller when raised and thrown up against the property line and it was not his personal aesthetic, but he would leave that up to the HDC. He noted that parking would use up some of the open space.

Vice-Chair Parrott said he thought the issue of moving the building off the property line was significant. He said the Board had seen quite a few projects over the years with zero setbacks and he never liked approving them, but on the other hand, this was a chance to make some corrections. He said there would be advantages to parties on both sides of the property line in moving the building off the property line from an aesthetic point of view and from a practical point of view for construction and maintenance.

*Vice-Chair Parrott made a motion to **grant** the petition as presented and advertised with the stipulation that the 0' setback of the structure be moved from 2' away from the property line toward the center of the lot. Mr. Moretti seconded the motion.*

Vice-Chair Parrott reviewed the criteria, noting that granting the variances would not be contrary to the public interest because this was a well established neighborhood, almost exclusively residential on that block and the public interest would be well served to continue a residential use. He said the structure wouldn't look any different, except taller and he thought the building

wouldn't be very visible with all the trees around it. He said the spirit of the Ordinance would be observed in that the features of the building would be retained except for raising the first floor and the project fit into the neighborhood. He said it might look different, but on balance, he thought it was a good use of the building and the large investment of time and money in the redesign and remaking of interior would be a benefit to the neighborhood in preserving a building that might deteriorate over time. He said substantial justice would be done, as it would be more advantageous to this applicant to approve the application than it would be to the public to deny it.

Vice-Chair Parrott said the values of surrounding properties would not be diminished because there was no change in the use or configuration of the lot. He said the applicant said they would try to save as much of the foliage as possible and the substantial part of the new building with a porch would face toward the center of the property and there would be a board fence that would conceal the changes to the property that backed up to the Moffatt Ladd house. He said the special conditions that distinguished the property from others in the area were that this was a secondary structure that sat on the property line in the corner. He said the density would not be greater than many of the adjacent properties in terms of units per square foot and it would not look any different except for being upgraded and taller.

Mr. Moretti said he concurred with Vice-Chair Parrott's comments and moving the new foundation 2' would alleviate some of the concern with the 0' setback.

Mr. Rheume said that he was fine with everything except the stipulation and would not support the motion. He said they were talking about a structure that had been in that location for years.

Chairman Witham said he supported the residential use, but he had concerns with the setback though that was not his main grievance. He said he would not support the motion because he did not feel the proposal would preserve the integrity of the barn by boosting it up 10' in the air. He said there were high barns with sections underneath on farmlands, but that was not how they were built in Portsmouth and this would be the tallest and oddest-looking barn in Portsmouth. He said there were times when the Board denied 0' setbacks for sheds for a variety of issues and he was surprised at the comfort level with a three-story vertical wall with a 0' setback for what was essentially an accessory structure.

Mr. LeMay said he shared the same concerns and would not support the motion. He said the HDC would have an additional say over the raising of the building.

Ms. Walker said there were two proposals under consideration by the HDC. She said the Planning Department expressed concern over the HDC approving an alternate plan so that the applicant would have to return to the Board for approval of a different design.

The motion passed by a vote of 4-3 with Mr. Rheume, Mr. LeMay and Chairman Witham opposing.

- 3) Case # 8-3
 - Petitioner: Rye Atlantic Properties, LLC
 - Property: 361 Islington Street
 - Assessor Plan 144, Lot 23
 - Zoning District: Mixed Residential Business

Description: Detailing automobiles.

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

1. A Variance from Section 10.440 to allow the detailing of automobiles in a district where this use is not allowed.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin outlined the applicant's request and the history of this property. He said Rye Atlantic had been developing long-term plans for this property, but they were looking for a use in the interim, but at the site, a former gas station was challenging. He said this was a low impact proposal for auto detailing. They were applying for a variance for the use for auto detailing, which would be subject to whatever conditions that the Board might feel would be appropriate.

Attorney Loughlin reviewed the criteria and said there would be no diminution in the value of surrounding properties as it was currently a closed gas station awaiting improvements. He said the use would not be contrary to the public interest as the zone encouraged business, residential and office uses including other service stations. He said substantial justice would be done by allowing a benign use that would cause no harm to the neighborhood and would fit in with other existing uses. It would not be contrary to the spirit of the Ordinance. Again, this was a mixed use zone. He felt it was a close call as to whether this was a permitted use or one by special exception so that the spirit of the Ordinance would not be violated. Attorney Loughlin stated that literal enforcement of the Ordinance would result in an unnecessary hardship due to the special circumstances he had outlined earlier which included the restrictions on the uses of the property and the issues with former service stations including cleaning up leaking storage tanks and waiting for the time when the site will be right for a complete redevelopment. He concluded that all five of the criteria were met.

Chairman Witham asked if all the washing of vehicles would occur inside the building. Attorney Loughlin stated that was his understanding. It would not be like an automatic car wash operation. Mr. Rheume said one concern might be the accumulation of vehicles on the property and asked how many cars would be on the lot at any time. Mr. Michael Labrie said 16 spaces currently existed. Mr. Josh Liberty, the operator of the business had said the detailing was a one day process and he anticipated doing 4-6 vehicles a day with none remaining overnight, typically. They didn't anticipate that the majority of the parking spaces would be utilized. Mr. Josh Liberty stated that a detail was usually 2-3 hours. This would not be a hang-out for cars or people. In response to a question from Mr. Rheume about what improvements they would make to distinguish the property from looking like a closed gas station, Mr. Liberty stated that they would like to freshen up the building, as they were allowed, changing the doors in front and adding windows, fresh paint and lighting. Mr. LeMay asked for confirmation that there would be no display or cars for sale or cars sold on the site. Mr. Liberty confirmed there would not. Mr. Parrott asked for assurance that it would not be used for tow operations and Mr. Liberty said he could guarantee that 100%.

Attorney Bernie Pelech spoke on his own behalf and said the property had degraded over the years and this would be an appropriate use that would not change the character of the neighborhood. As a resident he would be in favor of anything that would allow improvement of the site.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Mark Quinlivan of 383 Islington Street, Mr. Dan Hale of 356 Islington Street, Ms. Virginia Vaughn of 366 Islington Street and Mr. Joseph Vaughn of 366 Islington Street all opposed the petition. Their concerns included a use that was prohibited, control over car washing and the lack of a plan to prevent soapy water from draining onto neighboring properties. They felt this could be a foot in the door to auto repair and painting.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. James Beal of 286 Cabot Street spoke in favor of the petition but felt that the issue of waste water should be addressed if the petition were granted as water dumps onto Cabot Street and to McDonough due to the grade.

Mr. Rheume noted that one of the standards for a special exception was that there would not be any excessive demands on municipal services which would include water and sewer. Mr. Labrie stated that any water generated within the building would be collected by a water recycling system. They would agree to that as a contingency. They had invested money in architectural and engineering plans and this would not be a foot in the door for further auto uses. This would be a benign use of an existing building. They would not put in any use that would further contamination. Regarding the 30-year moratorium on residential use, he clarified that was part of a deed restriction with Getty which includes this as a standard part of their operating procedure. Mr. Quinlivan stated that the standard should be the requirements to meet the variance and the other issues were superfluous and reiterated his objections to the petition. He felt no unnecessary hardship had been shown. Mr. Josh Liberty said he would only be detailing cars, not painting, and they would not be dumping chemical pollutants onto the ground. That was the only purpose for the building.

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Chairman Witham asked Ms. Walker for clarification that the stipulation recommended by the Planning Department was to send this for site plan review and that would deal with the water issues, municipal services and lighting

Ms. Juliet Walker, Planner, noted for the Board's consideration the Planning Department comments in their memorandum where it was noted that, if the variance should be granted, there was not an automatic threshold for this property which would require them to go through site plan review. It was the Department's feeling that, if possible, a condition be placed on a positive motion that the site plan review process would go forward to receive Technical Advisory Committee review and Planning Board approval of the conditions of the site.

Mr. Mulligan asked if site review would also entail review of the proposed water recycling system and Ms. Walker stated that would be one of the issues, particularly as it could have impacts on the municipal water system and DPW had that expertise. Mr. Rheume felt overall that there was potential to do something good for the neighborhood as a whole. His concerns were that they needed to understand what they were approving which was the basis for their questions on issues

such as parking, car sales, automotive repair, etc. It was a struggle as this was a variance for something that was not defined in the Ordinance and what would be meant if they approved this for an auto detailing business. He asked Ms. Walker if the Planning Department had any references that they could provide to arrive at a commonly accepted definition for what constituted auto detailing business. He felt this business could be a positive for the neighborhood as a whole, utilizing a property that was a detriment for many reasons. He noted the concerns of some of the abutters who would prefer a residence across from them, but also noted that the applicant had represented that was not possible for a certain period. He stated there were also a number of businesses along Islington Street, including active gas stations which certainly created a lot more noise than just cars moving in and out. He felt this could be a business that could be compatible with the current structure on the property and he would want to see the applicant following through with their representations on improvements and giving it a new look and feel. He supported the idea of a site plan review.

Mr. LeMay stated that one of his concerns was the potential for creep of the business and he felt there should be some strong restrictions in that regard even beyond what site review might impose. This was due to the nature of the business and he felt some stipulations, such as no outside storage of vehicles overnight, would be appropriate. He was also concerned about lighting and light pollution, which site plan review could address.

Chairman Witham cautioned the Board against micromanaging. It was presented a certain way and he felt they had an understanding of what was being requested. He recommended they go forward and, if there was a positive motion, add a stipulation that the Planning Department send the application to site review.

Ms. Walker noted for the Board that outdoor storage was an allowed accessory use in that district. If they wished a definition of auto detailing, she felt the Planning Department could do that but she also felt it was helpful to know the specific concerns of the Board. Mr. Rheume asked where she had pointed that out and she responded that there was an accessory use related to storage of motor vehicles at the end of the use table.

*Mr. Mulligan made a motion to **grant** the petition as presented and advertised with the stipulation that the applicant submit their plan to site review as suggested by the Planning Department. Mr. Moretti seconded the motion.*

Mr. Mulligan stated that the application was for an automobile detailing business on this site which was sprinkled amongst a number of businesses and also, because this was a Mixed Residential Business Zone, several residences as well. He agreed that this was a relatively benign use compared to some of the uses permitted either by right or special exception in the zone, such as convenience stores and funeral parlors. He also agreed with the applicant that this was a close call on whether or not this was permitted as a trade use due to the ambiguity arising from the fact that auto detailing is not specifically defined in the Zoning Ordinance.

Mr. Mulligan stated that he felt, on balance, that the essential character of the neighborhood would not be altered by the introduction of this automobile detailing facility as had been presented. As Mr. Rheume had described, there were full service stations and convenience stores on Islington Street in the same zone. There would also be no threat to the public health, safety or welfare and, for those reasons, granting the variance would not be contrary to the public interest or the spirit of

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the Ordinance. Granting the variances would result in substantial justice where the loss to the applicant is weighed against any gain to the public. He stated that the application had limitations due to the prior uses as a gas station so he felt the property owner should be allowed some flexibility. He didn't see any gain to the public in leaving this property vacant and agreed with the speaker who felt the property would be improved.

Mr. Mulligan stated that the value of surrounding properties would not be diminished. While the point was raised that the applicant had not provided what would be considered legally admissible evidence but that was not the standard to which the Board had to adhere. The Board was entitled to use common sense and he felt most people would agree that the property as it sat was an eyesore. This was an opportunity to spruce it up which, he felt, would positively affect the surrounding property values, particularly as it would be subject to site review and the Planning Board would have an opportunity to weigh in on technical issues with the property.

Regarding unnecessary hardship, Mr. Mulligan stated that the special conditions of the property were the facts that it was a relatively large lot for that part of Islington Street and located on a corner. It had a preexisting structure that couldn't be used for its original purpose. The deed and other restrictions forbid residential uses for the foreseeable future as well as gas station uses. These were all special conditions of the property distinguishing it from others in the area so that there was no fair and substantial relationship between the Table of Uses, as interpreted by the Planning Department to forbid auto detailing, and its application to this property. He felt the use was a reasonable one for the property and, with the stipulation, should be approved.

Mr. Moretti agreed and commented that Islington Street was a gateway into the City. This was another commercial business on the street and he did not see any diminution in property values by what he termed an improvement for the street.

Mr. Rheaume said he had some hesitancy, and he understood the concerns expressed by the abutters for the value of surrounding properties, but he agreed with Mr. Mulligan's comments that there were other gas stations and residential improvements in the neighborhood so he did not believe there would be a diminution of surrounding property values.

The motion passed by a vote of 7-0.

Mr. Mulligan recused himself for the following petition Mr. Johnson assumed a voting seat.

- 4) Case # 8-4
 - Petitioner: Jane A. Shannon Revocable Trust, Brian Shannon, Trustee
 - Property: 194 Wibird Street
 - Assessor Plan 148, Lot 1
 - Zoning District: General Residence A
 - Description: Create a new lot for the purpose of constructing a single-family residence.
 - 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 continuous street frontage of 57.52'± where 100' is the minimum required.

SPEAKING IN FAVOR OF THE PETITION

Attorney John Bosen appeared before the Board with the applicant, Mr. Brian Shannon, and Mr. Alex Ross, his engineer. Attorney Bosen provided copies of his narrative to the Board. He said there were three lots prior to a merger and then the property had been subdivided into two and restored to its pre-merger state since 1898.

Attorney Bosen reviewed the criteria and said the proposal would not be contrary to the public interest or contrary to the spirit and intent of the Ordinance. He said it was a non-conforming lot with less frontage, but the plans were for a modest house that would be consistent with surrounding homes. He said they were not asking for relief that would threaten the health, safety or welfare of surrounding properties. He said substantial justice would be done by granting the variance and the lot suffered from the same frontage conditions as surrounding properties. He said the values of surrounding properties would not be diminished by granting. He said the special condition of the property creating a hardship was that it was a lot of record for over 100 years that didn't meet current zoning and would require relief.

Mr. Alex Ross, engineer and surveyor said the City was re-working Wibird Street, installing catch basins and they would work with DPW to adequately take care of runoff. Chairman Witham asked if they would tie into the City's system. Mr. Ross said they already did, but the 4" line was not adequate. He said he anticipated that larger or more lines, additional catch basins and under drains would be added.

Mr. Rheume asked if they would do a site plan review. Ms. Walker said she was not sure because it was a single-family residence. Mr. Ross said they would not, but they would still work with DPW on drainage issues and improvements.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Leslie Stevens of 151 Park Street, Ms. Janet Grote of 168 Wibird Street, Ms. Mary Real of 555 Lincoln Street, Ms. Sage Clark of 582 Lincoln Avenue, Mr. Bill Townsend of 161 Wibird Street all expressed concern for excess water and flooding in the area, though many said they would have no objections if the water could be dealt with. They stated that they would like the Board to address drainage and suggested an independent review of the drainage system. Chairman Witham advised that the Board could add a stipulation to a positive motion but could not personally oversee engineering.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Bosen said they would address the water concerns through a multi-step process, first requesting a variance and then going before the Planning Board to address water issues.

Mr. Ross said the lot had been treated as low point drainage area and he was confident that they would be able to address the concerns of the abutters at the Planning Board meeting. Mr. Parrott

asked if they had done anything with test pits or an independent assessment of actual conditions. Mr. Ross said that they had surveyed and examined the site but there was no independent study.

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

DECISION OF THE BOARD

Chairman Witham noted that there were concerns about drainage raised by abutters of which the applicant was aware. While there was no definitive design plan in place, it appeared that was a step to be taken when presented to the Planning Board with overview of the Department of Public Works. Ms. Walker stated that she wanted to make it clear to the Board that, while it had been represented that drainage would be addressed if this went to the Planning Board for subdivision, it was within the Board's power to determine if this was enough of a concern to request an independent review to be done at this time. There was a discussion among Chairman Witham, Mr. LeMay, Mr. Rheume, Mr. Parrott and Ms. Walker about the best way to deal with the drainage issue and whether it was best for this Board to deal with it through an independent study or tie a positive motion to future review and action of the Planning Board through a stipulation.

*Mr. Rheume made a motion to **grant** the petition as presented and advertised with the following stipulations:*

- 1. That they submit their plan to the Planning Board for a subdivision and site review*
- 2. That any structure have a right side setback of 19' from the joint property line shown as Tax map 148, Lot 2 on the submitted plans.*

He stated that the reason for the second stipulation was the 9' width of the 0.15 acre lot plus the 10' setback (from the property line of Tax Map 14, Lot 1) just to keep the setback distance from the home by adding in that little lot. Mr. Durbin seconded the motion with the stipulations.

Mr. Rheume noted that the water and drainage issues presented by the neighbors were a concern and the stipulations would allow those to be properly addressed by another Board, which would present another opportunity for the neighbors to express their concerns. He stated that the current petition was for a large lot which would be subdivided into two smaller lots which did not meet the street frontage requirement, even with the addition of the small segment shown as Lot 3 on the plans. To allow additional distance and light and air, he had added a stipulation. He stated that granting the variance would not be contrary to the public interest as the general characteristics of the neighborhood would be maintained. About 50% of the lots had a smaller width than the proposed lot and there was a certain rhythm as you went along the street with regard to distances and separation. With the stipulation, he felt the water issues would be addressed and satisfy the public interest.

Mr. Rheume stated that the spirit of the Ordinance would be observed. While the relief was fairly substantial, the applicant was trying to add a little more width by incorporating a smaller lot so that the frontage could be as close to the Ordinance requirements as possible. In the substantial justice test, this was a lot of record and would allow the property owner to make full use of the lot, assuming that the drainage and other issues could be worked out with the Planning Board. He stated that there was no public interest that would outweigh the property owner's right to move forward and make full use of the property. He stated that the value of surrounding properties

would not be diminished by adding in a new home in rhythm with others on the street. The neighborhood feedback had been positive and the stipulation would help protect setbacks against structures encroaching too closely. The height of the proposed home was in keeping with others in the neighborhood.

In the unnecessary hardship test, Mr. Rheume stated that the special conditions included the fact that this was an existing lot of record that had a certain width and the general nature of all the remaining properties in the neighborhood. He stated that building a single-family home which met all the setbacks on the property was a reasonable use.

Mr. Durbin agreed with Mr. Rheume’s comments and added that he this had been an involuntarily merged lot that was not merged with rights according to State statute.

Chairman Witham called for a vote to grant the petition with two stipulations, the first being that the proposal would go before the Planning Board for site plan review with regard to the subdivision and their standard oversight, with an emphasis on site drainage and sourcing of the water both in regard to storm water and potential springfed. The second stipulation would be that there would be a right side yard setback of 19’ as outlined by Mr. Rheume. Mr. Rheume clarified that was along the length of the property for Tax Map #148, Lot 2, with the rear portion of the lot continuing to maintain the existing 10’ right side setback.

The motion passed by a vote of 6-1 with Vice-Chair Parrott opposing.

Mr. Mulligan returned to his seat and Chairman Witham announced that Mr. Rheume was recusing himself and Mr. Johnson would be voting in his place.

- 5) Case # 8-5
 - Petitioner: Andrew S. Martin
 - Property: 230 McDonough Street
 - Assessor Plan 144, Lot 37
 - Zoning District: General Residence C
 - Description: Add a right-side dormer within existing footprint.
 - 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 to be added to or enlarged without conforming to the requirements of the Ordinance.
 2. A Variance from Section 10.521 to allow a 5’± right side yard setback where 10’ is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Andrew Martin said his attic space was the only dry storage in his home and a too small opening created a hardship in gaining access. He said he would like to install a standard size door, which would require raising the roof by 40”.

Mr. Martin said there would be about ten more clapboards on the west side of the house and he spoke with his neighbor on that side who said she would have no problem with the proposal, and he didn't think there would be any diminution of property values or would cause any harm to the public.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

*Vice-Chair Parrott made a motion to **grant** the petition as presented and advertised which was seconded by Mr. LeMay.*

Vice-Chair Parrott reviewed the criteria, noting that granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance that encouraged people to improve their homes. He said substantial justice would be done by making the house more useful for the owner and subsequent owners. He said the values of surrounding properties would not be diminished because it was a small addition that would have a positive affect on the property values. He said the special condition that distinguished the property from others was that it was a congested house with an attic that was difficult to access and this proposal would make the home more useful.

Mr. LeMay added that it was a small increase to the property.

*The motion **passed** by a vote of 7-0.*

- 6) Case # 8-6
 - Petitioner: Thea Murphy
 - Property: 67 Mark Street
 - Assessor Plan 116, Lot 51
 - Zoning District: Mixed Residential Office
 - Description: Replace front porch and bulkhead with covered portico and storage locker.
 - 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 to be extended, reconstructed, enlarged or structurally altered without conforming to the requirements of the Ordinance.
 2. Variances from Section 10.521 to allow the following:
 - a) A front yard setback of 2'± where 5' is required;
 - b) A left side yard setback of 0.44'± where 10' is required; and
 - c) Building coverage of 42.2%± where 40% is the maximum allowed.

DECISION OF THE BOARD

*Vice-Chair Parrott moved to **postpone** the hearing to the September meeting at the applicant's request and Mr. Rheume seconded the motion.*

*The motion to **postpone** the hearing passed unanimously by a voice vote.*

Mr. Mulligan recused himself from the following petition. Mr. Johnson assuming a voting seat.

7) Case # 8-7

Petitioners: Paul E. Berton Living Trust, Paul Berton, Trustee, and Jane A. Ewell Living Trust

Property: 482 Broad Street

Assessor Plan 221, Lot 63

Zoning District: General Residence A

Description: Construct four free-standing dwelling units with an 18'± wide driveway.

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

1. A Variance from Section 10.513 to allow four free-standing dwellings on a lot where no more than one free-standing dwelling is allowed.
2. A Variance from Section 10.1114.20 to allow an 18'± maneuvering aisle where a 24' maneuvering aisle is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Paul Berton appeared before the Board and said they were requesting a variance for four units on a large lot.

Mr. Mike Sievert with MJS Engineering said they were proposing to remove the single family home and construct four new single family homes. He outlined the placement, elevations and appearance of the units and said all the setback requirements were met. They had met with someone in the Planning Department and were told they would need a second variance for the driveway width so he submitted an addendum with the criteria.

Mr. Sievert said the table of uses allowed multi-family units, in the district and the proposal would meet the intention of the district for single family. He said the proposal would maintain the character of the neighborhood and surrounding property values would not be diminished with detached units, which would produce greater value and allow greater privacy. He said the unique size and narrowness of the property was a special condition that distinguished it from other properties in the neighborhood and denying the request would cause hardship on the applicant. Substantial justice would be done by granting the variance as construction of the detached units would not have any greater impact than combined dwelling units

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Bernie Pelech appeared before the Board on behalf of abutters Mr. and Mrs. Carmichael and Mr. and Mrs. Underhill. Attorney Pelech and read their letter into the record and submitted copies to Board.

Attorney Pelech said it was an ambitious proposal, but the Ordinance required that there be no more than one single-family dwelling per lot. He said there was no hardship because other properties were also long and narrow and the applicant could have a 4-unit multi-family dwelling without a variance. He said the spirit and intent of the Ordinance would be violated because the Ordinance existed to prevent an over intensification and there would be a diminution of surrounding property values.

Mr. Peter Weeks of Weeks Real Estate, speaking on behalf of two abutters on Broad Street said the Board had to find the application met all the criteria and he did not believe it met any. Mr. Weeks said the proposal would diminish the value of surrounding properties and asked members of the public who were opposed to stand up.

Mr. Henry Mellynchuck of 458 Street, Mr. William Ehler of 153 Pinehurst Road, Ms. Michelle Richard of 479 Board Street, Ms. Nancy Andrews of 61 Sagamore Avenue, Ms. Linda Barnaby, an abutter to the property, Mr. Dana Skippington of Broad Street, and Mr. Dan Wyand of 65 Pinehurst Road all said they were concerned for the effect the proposal would have on their property values in a neighborhood of one home per lot. There wasn't adequate room for snow storage and they felt there would be water runoff. They maintained that a 24' maneuvering aisle was needed for safety reasons

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Sievert clarified that four dwelling units were allowed in one principal building and they were proposing separate buildings. He said they would reduce the amount of impervious surfaces and use landscaping buffers to improve drainage. He stated that an 18' wide maneuvering aisle was adequate for fire truck access

Mr. Berton outlined a meeting he had with someone in the Planning Department where Ms. Walker was not present. He felt it had been suggested that the units be detached, which was why they went in that direction. He felt that some of the objections were from people who were opposed to a property that mainly met all of today's standards in a neighborhood where few did.

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

DECISION OF THE BOARD

Chairman Witham said the Board was not privy to discussions in the Planning Department and Ms. Walker said she wasn't familiar with the discussions either so that couldn't factor into their decision.

Chairman Witham said the Board was often reluctant to allow two dwelling units on a lot, let alone four. He said there were patterns, but multi units on the same lot were not common in the City with the exception of the project on Marston Street near Hannaford's so he couldn't support the proposal.

*Mr. LeMay made a motion to **deny** the petition as presented and advertised and Mr. Rheaume seconded the motion.*

Mr. LeMay said the proposal had the appearance of a mini subdivision.. He said individual units would be worth more, but the look was not consistent and could diminish surrounding property values and would be contrary to the public interest. He added that there was no hardship.

Mr. Rheume echoed Mr. LeMay’s remarks and said the application fell down on the hardship criteria because the lot was far from unique. He said four separate units in a town house arrangement was a business incentive, but it was four times what was allowed and there was nothing in the neighborhood like it. He said the driveway also did not meet the spirit of the Ordinance because it was too small for fire apparatus to access the back units.

Mr. Moretti stated that he hoped the applicant had not been misled and could come forward with a proposal that would be in the character of the neighborhood.

*The motion to **deny** the petition **passed** by a vote of 7-0.*

V. OTHER BUSINESS

No other business was presented.

VI. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 11:40 p.m.

Respectfully submitted,

Jane K. Kendall
Acting Secretary

**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 19, 2014

MEMBERS PRESENT: Chairman David Witham; Vice-Chairman Arthur Parrott; Derek Durbin; Charles LeMay; Christopher Mulligan; David Rheame; Alternates: Jeremiah Johnson and Patrick Moretti

MEMBERS EXCUSED: Susan Chamberlin

ALSO PRESENT: Juliet Walker, Planning Department

Chairman Witham welcomed Mr. Jeremiah Johnson, a local architect, as an alternate member of the Board. He advised that, due to an absence and a number of expected recusals, Mr. Johnson would be voting on several cases.

I. APPROVAL OF MINUTES

- A) April 22, 2014
- B) May 20, 2014
- C) May 29, 2014
- D) June 17, 2014
- E) July 15, 2014

In separate unanimous voice votes, it was moved, seconded and passed to approve all sets of Minutes with minor corrections.

II. MOTIONS FOR REHEARING

A) Motion for Rehearing by Applicants regarding 746 Middle Road.

Mr. Durbin recused himself from this item. Chairman Witham said Mr. Johnson was not present for the initial hearing and would not be voting.

Mr. Mulligan said he had read the materials in depth and would support the request for rehearing. He was not entirely convinced by the applicant's substantive arguments, but he agreed with the procedural arguments. He added that the tax map and line drawing submitted may have affected the way he looked at the application compared to a fully engineered plan.

Chairman Witham said the submittal for rehearing was well thought out, but the dimensions and variance requests were the same so the reasons for his decision would not change even if a survey and plan to scale were presented.

Mr. Rheume said he also felt the request for rehearing was thorough, but an argument that the applicant could build a garage instead of a house didn't hold for him because there was no economic advantage for a garage compared to a subdivision for another house. He said there might be enough room for the existing home, but requesting that the Ordinance be cut in half with 50' of relief to add another house and access driveway would change the general character of the neighborhood and was the tipping point for him.

Chairman Witham said he also went through the Minutes of the meeting and noted that Mr. Mulligan had pointed out that the lot had not been involuntarily merged. It had always been a single lot with a bare minimum of street frontage and cutting it in half would be too much.

Mr. LeMay made a motion to deny the request for a rehearing of the petition and Vice-Chair Parrott seconded the motion.

Mr. LeMay said he did not see any new facts in the request and there was much opposition to show there was no support from the neighbors.

Vice-Chair Parrott agreed with all the previous comments that the request was well presented, but the facts what they were and he didn't think rehashing them would change his mind.

The motion to deny a rehearing passed by a vote of 5-1, with Mr. Mulligan opposing.

B) Motion for Rehearing by Applicants regarding 304 Leslie Drive.

Mr. Durbin returned to his seat. Chairman Witham announced that he and Mr. Mulligan would be recusing themselves from this discussion as they were not present at the original hearing. He reiterated that three positive votes would be necessary for a majority vote to pass. The gavel was passed to Vice-Chair Parrott.

Mr. Rheume said he would be in favor of a rehearing considering the applicant's point that the motion to grant failed to pass by a tied vote and a motion to deny was not made, although that vote may very well have been tied as well because of an equal number of Board members voting. He felt that raised an interesting procedural question. He stated that there was no discussion at the meeting about the specific concerns of the Board that resulted in the failure to pass. There was nothing that the applicant could use to go back and amend their proposal so that it might be acceptable to the Board and be sufficiently different so that it would not raise a question of Fisher v. Dover. He felt the applicant deserved an opportunity to come back before the Board and at least hear their concerns regarding the proposal.

Vice Chair Parrott asked if that was a motion and Mr. Rheume said he intended it to be discussion but if there was nothing further, he would make a motion.

*Mr. Rheaume made a motion to **grant** the request for a rehearing to be held at the next meeting of the Board. Mr. LeMay seconded the motion.*

Mr. Rheaume stated that he would bring forward his previous comments. He felt the applicant deserved an opportunity to come back before the Board and there might or might not be a different outcome but they would at least understand the Board's concerns.

Mr. LeMay said a failure to get enough votes simply meant a request didn't pass and he didn't think that should be a referendum on routine procedure. In this case, while the outcome was definitive in not having enough votes to pass a positive motion, the reasons for not granting were unclear and he felt the applicant was owed a clarity of judgment on this.

Vice-Chair Parrott said he recalled that the quality and depth of discussion was not up to the Board's usual standards and thought they could do a better job of explaining their reasoning.

*The motion to grant a rehearing **passed** by a vote of 5-0.*

Vice-Chair Parrott announced that the petition would be heard at the next regular meeting.

Mr. Mulligan and Chairman Witham returned to their seats and Vice-Chair Parrott turned over the gavel to Chairman Witham.

Chairman Witham noted that he wasn't present for the meeting, but had read the Minutes and the Request for Rehearing and agreed that it was unique in that the reasons to grant the petition were addressed but after that motion did not pass there were no reasons given for denying, which was unusual.

III. PUBLIC HEARINGS – OLD BUSINESS

- 1) Case # 7-3
Petitioner: Christine V. Crockett Revocable Trust
Property: 209 Gosport Road
Assessor Plan 224, Lot 10-12
Zoning District: Single Residence A
Description: Construct a new single family home within 75' of a saltwater marsh.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
 1. A Variance from Section 10.301(6) – 1982 Zoning Ordinance to allow a structure 75'± from a saltwater marsh where a minimum of 100' is required.
(This petition was postponed from the July 15, 2014 meeting.)

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin appeared before the Board on behalf of the applicants. Also in attendance was John Chagnon of Ambit Engineering.

Attorney Loughlin said the applicant purchased the lot in the Woodlands 25 years ago, along with the adjacent lot. He said it was one of highest taxed lots in the City because it was in Tucker's Cove. He said it was subdivided and the site plan was approved around 1995. He said the Wetlands Act was implemented in the 1970's. He said 100' of wetlands buffer seemed drastic at the time, so no one questioned it when the Portsmouth School District built Little Harbor School on the edge of the salt marsh. He said the applicability to Tucker's Cove was challenged in Superior Court after the City adopted their Inland Wetlands Ordinance and it was decided that the Ordinance only affected wetlands over 25' square feet and did not apply to this subdivision or lot. He said DES already approved the wetlands crossing as shown with 600' square feet of impact.

Attorney Loughlin said the applicant filed for a Conditional Use Permit and a wetlands crossing. He said they attended the March 2014 Conservation Commission and were asked for more information. He said there were no requests for the building footprint at that time, but Mr. Chagnon prepared the application for DES who wanted to see the entire lot and the impact to the wetlands. He said they met with Peter Britz, Environmental Planner on April 2, 2014 who wanted an opinion from legal counsel. He said they filed their Conditional Use Permit with the Planning Board on May 8, 2014 and it was decided that the lot was vested and they would not need the Conditional Use Permit. He said the three State permits were included in the packet.

Attorney Loughlin reviewed the criteria and said granting the request for a single-family home in a residential zone would not be contrary to the public interest as it would not alter the essential character of the neighborhood or threaten the public health, safety or welfare. He said the lot was assessed at \$400,000 everyone would like a vacant lot next door that someone else purchased and paid taxes on, but that was not the test. He said there would be no reasonable use of the property without relief and substantial justice would be done in granting the application. He said this was the only place they could put the home without wetlands fill and although the deck would be in the tidal buffer, the impact would be under 6%. He said He said it would not be in the side setback the use was approved and anticipated on the lot since the subdivision in 1995

Attorney Loughlin said the purpose of the wetland buffer was to reduce erosion, help the ecological balance and control source pollutants. He said this lot would have more undisturbed buffer than any other in Tuckers Cove because there would be no fertilized lawn running to the water as stipulated by wetlands regulations and would be in the spirit of the Ordinance. He said the Army Corp of Engineers reviewed the project, including the dredge and fill of wetlands, determined that it would have a minimal accumulative impact, and approved the work on February 11, 2014. He said DES also determined that the proposal provided the least impact with the wetlands crossing at the most narrow portion, with site grading to direct runoff away from abutting property into a rain garden and buffer plantings that would preserve the functions of the tidal buffer zone and increase property values.

Attorney Loughlin said literal enforcement of the Ordinance would result in an unnecessary hardship on the applicants who had paid property taxes on the lots for 23 years. He said there were special conditions with ledge outcroppings near the water and a wetlands lot that dictated where the building would be located. He said the wetlands increased over the years, narrowing the building envelope and best management practices dictated the way the lots could be developed. He said the owner of one of the lots next door built a retaining wall six years ago, which was not an issue then, but detention ponds were called for today. He said the proposed use for a single-family home in a residential district was a reasonable one.

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Mr. Rheume asked if there was any intent for the kind of boat gear that was standard for lots along Sagamore Creek and Attorney Loughlin said they were not aware of any such plans. Mr. Rheume asked if that would require a separate permit and Attorney Loughlin said it would.

Mr. Mulligan asked if the building envelope had become more restricted because the uplands had become reduced and Attorney Loughlin there was no buffer issue, but the increased wetlands dictated where the building could be located. Mr. Mulligan asked if the increase of wetlands was due to other building lots and Attorney Loughlin said it might have been due to the lot next door as well as the construction of the road with culverts and catch basins.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Mulligan said constructing a single-family home within a residential sub-division was a permitted use and all of the setbacks and dimensional requirements would be observed. He said although there would be an incursion into the tidal wetlands buffer, granting the variance would not be contrary to the public interest or the spirit of the Ordinance because the essential character of the neighborhood would not be substantially altered by adding another single-family residence to the subdivision. He said the applicant provided materials indicating that the proposal would have the least adverse impact to the wetlands so that the health, safety and welfare of the public would not be compromised.

Mr. Mulligan said denying the variance would result in a substantial injustice to the applicant and the loss would not be outweighed by any gain to the public. He said the applicant could not reasonably use the property without the relief. He said the proposal met all the frontage, depth, setbacks, lot coverage and open space requirements and would not diminish the value of surrounding properties. He said there had been no local opposition, nor did he think that any opposition would be well founded.

Mr. Mulligan said the special conditions of the property were that the amount of wetlands and buildable space had changed from the time the applicants acquired the lot. He said a point made in the presentation was that the existing built environment contributed to that condition so he thought there was no fair and substantial relationship between the purpose of the tidal wetlands buffer protections and its application to the property. He said the use was clearly reasonable and the literal enforcement of the Ordinance would result in an unnecessary hardship.

Mr. Durbin agreed with Mr. Mulligan's comments and said they might look at it differently if it were not a vested buildable lot, but he thought that was a significant factor in his decision to second the approval of the request. He said from a legal perspective, something would be built there and the applicant demonstrated that this proposal would be the alternative resulting in the

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least ecological impact alternative on the lot and surrounding environment. He said the proposal would be consistent with other built lots in the neighborhood. He said the wetlands constraints created an inherent hardship with building on the land and the encroachment into the salt marsh buffer of 75' was somewhat "de minimus" considering that the State requirement for building within the shoreline was 50'.

Mr. Rheume said the Board typically dealt with dimensions and use, and occasionally wore HDC hats, but in this case, they had to wear wetlands scientist hats. He said the facts presented from experts such as the Army Corps of Engineers and the DES were compelling and gave him the confidence that this proposal would not have a negative impact on the wetland buffer zone.

The motion passed by a vote of 7-0.

IV. PUBLIC HEARINGS – NEW BUSINESS

1) Case # 8-1

Petitioners: Weakes Revocable Trust, Danny and Rachel Weakes, Trustees

Property: 35 Davis Road

Assessor Plan 258, Lot 24

Zoning District: Single Residence B

Description: Construct 18'± x 16'± shed

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

1. Variances from Section 10.521 to allow a front yard setback of 27'4"± where 30' is required and a rear yard setback of 8.2'± where 10' is required for an accessory structure.
2. A Variance from Section 10.571 to allow an accessory structure to be located in a required front yard.

SPEAKING IN FAVOR OF THE PETITION

Mr. Dan Weakes appeared before the Board and stated that he removed his shed that was in disrepair and thought he would be grand-fathered when replacing it, but found out later he needed a variance. He submitted letter of support from his neighbors.

Mr. Weakes said the original shed was at the side of his oddly shaped lot on a cul-de-sac and he considered moving it, but found there was nowhere else to put it because he had a septic tank and leach field in the open space in the back yard. He said he built the shed to match the architecture of his home and it would not affect the surrounding property values.

Chairman Witham asked if he placed the shed in roughly in same location and he said he placed it within approximately 5' of the other shed.

Mr. Rheume said the original shed appeared smaller and further over and wondered why he put the new shed closer to driveway. Mr. Weakes said he was a technician with quite a bit of equipment and placed the shed closer for easier access in winter.

Mr. Rheaume asked why the placement of the shed was considered in the front yard and Ms. Walker said it was because it was measured from the street frontage.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Durbin made a motion to grant the petition as presented and advertised and Mr. LeMay seconded the motion.

Mr. Durbin reviewed the criteria, noting that granting the variance would not be contrary to the public interest because the replaced shed was close to the previous location and didn't appear to affect any abutters. He said the proposal respected the light, air and space between properties, observing the spirit of the Ordinance. He said substantial justice will be done and to deny the application would be a detriment to the property owner which would not be outweighed by any benefit to the public.

Mr. Durbin said the special conditions that distinguished the lot from other properties in the area was that it was an odd shaped lot located on a cul-de-sac and the shed was considered to be in the front yard with street frontage. He said the relief requested was minimal and there was no fair and substantial relationship between the general public purposes of the Ordinance and their application to the property. He said having an accessory structure was a reasonable use of the property.

Mr. LeMay agreed that the proposal was modest and would have no impact on surrounding properties.

The motion passed by a vote of 7-0.

- 2) Case # 8-2
 - Petitioners: Mark A. and Deborah Chag
 - Property: 404 Middle Street
 - Assessor Plan 136, Lot 21
 - Zoning District: Mixed Residential Office
 - Description: Convert existing barn to single-family dwelling.
 - 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 to be added to or enlarged without conforming to the requirements of the Ordinance.
 2. Variances from Section 10.521 to allow the following:
 - a) A lot area per dwelling unit of 5,436.5 s.f. ± where 7,500 s.f. is required;
 - b) A rear yard setback of 0'± where 15' is required; and
 - c) A right side yard setback of 2'± where 10' is required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin appeared before the Board with applicant Deborah Chag and architect, Dan Rawling.

Attorney Loughlin said the family lived in the home that was built in 1880 for 25 years and had invested time and money into preserving the property. He said they wanted to downsize and wanted to stay in the neighborhood by converting their vacant barn into residential space for them, raising the barn to create parking underneath, adding a porch, a deck and terrace and reconstructing the existing extension. He said the project would also require approval from the HDC.

Attorney Loughlin detailed the building and lot dimensions and setbacks, stating that their lot size per dwelling unit was higher than surrounding properties. He said the lot was in a peninsula of mixed residential and office use and would not be contrary to the public interest, as the essential character of the neighborhood would not be changed because a new building would not be added.

Attorney Loughlin reviewed the criteria and said the project would not be contrary to the spirit and intent of the Ordinance. The largest part of relief needed was for 7,500 s.f. for each dwelling unit and they would preserve the existing facility. He said Ms. Chag spoke with most of her neighbors and provided a petition, letters and emails indicating support, from more than 21 neighbors. He said there were unique aspects to property and this was a unique project for a permitted use.

Mr. Rheume asked why different scenarios for parking were shown on the plan. Attorney Loughlin said they needed four spaces for this use so they were showing how they could get four spaces on the lot whether the barn was raised up or not. Mr. Rheume said the concern would be that there would be too much parking if the garage were raised up for parking. The applicant, Ms. Deborah Chag of 404 Middle Street, said the intent was to have two cars under the structure and two spaces connecting to the existing house so they could keep the parcel green.

Mr. Moretti asked if the single-story building in the back was new and architect Dan Rawling of 401 Middle Street said they were doing reconstruction on the other building. Mr. Moretti said it appeared to be a pleasing design, but he was concerned with raising the building on the existing foundation that had a 0' setback from the lot line.

Vice-Chair Parrott inquired about the trees and Ms. Chag said she spoke with a tree service company and was told the butternut was dead and the hemlock was buckling the chicken coop, causing structural damage so they would take those trees down, but the oak would remain. Vice-Chair Parrott asked about the other trees on Middle Street and Ms. Chag said they would leave those alone.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Chairman Witham said Portsmouth's historic and architectural heritage was important to preserve and he was a strong proponent for preserving barns though he realized they were no longer used for horses and carriages as originally intended. He said in this situation a dwelling unit could be a reasonable use and he had converted another barn to a dwelling unit down the street himself. He said he was familiar with Mr. Rawling's stunning work on Middle Street, but he was concerned that raising a barn 8' in the air to gain additional space underneath could jeopardize the look, feel and integrity of the structure. He said he understood the building would need to be raised to restore the foundation, but he thought it would be asking a lot to put a three-story wall and overhanging eaves on a 0' setback on the property line near a neighbor and some effort should be made to move the building from the property line for drainage and maintenance.

Mr. LeMay said he agreed 100% with Chairman Witham's comments, specifically that it should be moved back a couple of feet to allow for maintenance. He added that the HDC might have more to say on the matter, but he thought the barn would look as if it was boosted up on a platform.

Mr. Mulligan said 0' setbacks were common in this neighborhood and large useable yards were not so common. He said he was hesitant to support moving the structure off the side yard setback closer to the middle of a backyard, compromising one of the few properties on the street with a useful, private and unique yard and lawn.

Chairman Witham said he thought this was an opportunity to lessen runoff from the eaves onto another property. He said the barn also directly abutted a museum home and raising the barn would impact the architectural integrity.

Mr. Rheume said he was torn with the proposal as well. He said it was an odd building with no street frontage in a tight triangle that was not currently overwhelming with homes there. He said the barn would appear taller when raised and thrown up against the property line and it was not his personal aesthetic, but he would leave that up to the HDC. He noted that parking would use up some of the open space.

Vice-Chair Parrott said he thought the issue of moving the building off the property line was significant. He said the Board had seen quite a few projects over the years with zero setbacks and he never liked approving them, but on the other hand, this was a chance to make some corrections. He said there would be advantages to parties on both sides of the property line in moving the building off the property line from an aesthetic point of view and from a practical point of view for construction and maintenance.

*Vice-Chair Parrott made a motion to **grant** the petition as presented and advertised with the stipulation that the 0' setback of the structure be moved from 2' away from the property line toward the center of the lot. Mr. Moretti seconded the motion.*

Vice-Chair Parrott reviewed the criteria, noting that granting the variances would not be contrary to the public interest because this was a well established neighborhood, almost exclusively residential on that block and the public interest would be well served to continue a residential use. He said the structure wouldn't look any different, except taller and he thought the building

wouldn't be very visible with all the trees around it. He said the spirit of the Ordinance would be observed in that the features of the building would be retained except for raising the first floor and the project fit into the neighborhood. He said it might look different, but on balance, he thought it was a good use of the building and the large investment of time and money in the redesign and remaking of interior would be a benefit to the neighborhood in preserving a building that might deteriorate over time. He said substantial justice would be done, as it would be more advantageous to this applicant to approve the application than it would be to the public to deny it.

Vice-Chair Parrott said the values of surrounding properties would not be diminished because there was no change in the use or configuration of the lot. He said the applicant said they would try to save as much of the foliage as possible and the substantial part of the new building with a porch would face toward the center of the property and there would be a board fence that would conceal the changes to the property that backed up to the Moffatt Ladd house. He said the special conditions that distinguished the property from others in the area were that this was a secondary structure that sat on the property line in the corner. He said the density would not be greater than many of the adjacent properties in terms of units per square foot and it would not look any different except for being upgraded and taller.

Mr. Moretti said he concurred with Vice-Chair Parrott's comments and moving the new foundation 2' would alleviate some of the concern with the 0' setback.

Mr. Rheume said that he was fine with everything except the stipulation and would not support the motion. He said they were talking about a structure that had been in that location for years.

Chairman Witham said he supported the residential use, but he had concerns with the setback though that was not his main grievance. He said he would not support the motion because he did not feel the proposal would preserve the integrity of the barn by boosting it up 10' in the air. He said there were high barns with sections underneath on farmlands, but that was not how they were built in Portsmouth and this would be the tallest and oddest-looking barn in Portsmouth. He said there were times when the Board denied 0' setbacks for sheds for a variety of issues and he was surprised at the comfort level with a three-story vertical wall with a 0' setback for what was essentially an accessory structure.

Mr. LeMay said he shared the same concerns and would not support the motion. He said the HDC would have an additional say over the raising of the building.

Ms. Walker said there were two proposals under consideration by the HDC. She said the Planning Department expressed concern over the HDC approving an alternate plan so that the applicant would have to return to the Board for approval of a different design.

The motion passed by a vote of 4-3 with Mr. Rheume, Mr. LeMay and Chairman Witham opposing.

- 3) Case # 8-3
 - Petitioner: Rye Atlantic Properties, LLC
 - Property: 361 Islington Street
 - Assessor Plan 144, Lot 23
 - Zoning District: Mixed Residential Business

Description: Detailing automobiles.

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

1. A Variance from Section 10.440 to allow the detailing of automobiles in a district where this use is not allowed.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin outlined the applicant's request and the history of this property. He said Rye Atlantic had been developing long-term plans for this property, but they were looking for a use in the interim, but at the site, a former gas station was challenging. He said this was a low impact proposal for auto detailing. They were applying for a variance for the use for auto detailing, which would be subject to whatever conditions that the Board might feel would be appropriate.

Attorney Loughlin reviewed the criteria and said there would be no diminution in the value of surrounding properties as it was currently a closed gas station awaiting improvements. He said the use would not be contrary to the public interest as the zone encouraged business, residential and office uses including other service stations. He said substantial justice would be done by allowing a benign use that would cause no harm to the neighborhood and would fit in with other existing uses. It would not be contrary to the spirit of the Ordinance. Again, this was a mixed use zone. He felt it was a close call as to whether this was a permitted use or one by special exception so that the spirit of the Ordinance would not be violated. Attorney Loughlin stated that literal enforcement of the Ordinance would result in an unnecessary hardship due to the special circumstances he had outlined earlier which included the restrictions on the uses of the property and the issues with former service stations including cleaning up leaking storage tanks and waiting for the time when the site will be right for a complete redevelopment. He concluded that all five of the criteria were met.

Chairman Witham asked if all the washing of vehicles would occur inside the building. Attorney Loughlin stated that was his understanding. It would not be like an automatic car wash operation. Mr. Rheume said one concern might be the accumulation of vehicles on the property and asked how many cars would be on the lot at any time. Mr. Michael Labrie said 16 spaces currently existed. Mr. Josh Liberty, the operator of the business had said the detailing was a one day process and he anticipated doing 4-6 vehicles a day with none remaining overnight, typically. They didn't anticipate that the majority of the parking spaces would be utilized. Mr. Josh Liberty stated that a detail was usually 2-3 hours. This would not be a hang-out for cars or people. In response to a question from Mr. Rheume about what improvements they would make to distinguish the property from looking like a closed gas station, Mr. Liberty stated that they would like to freshen up the building, as they were allowed, changing the doors in front and adding windows, fresh paint and lighting. Mr. LeMay asked for confirmation that there would be no display or cars for sale or cars sold on the site. Mr. Liberty confirmed there would not. Mr. Parrott asked for assurance that it would not be used for tow operations and Mr. Liberty said he could guarantee that 100%.

Attorney Bernie Pelech spoke on his own behalf and said the property had degraded over the years and this would be an appropriate use that would not change the character of the neighborhood. As a resident he would be in favor of anything that would allow improvement of the site.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Mark Quinlivan of 383 Islington Street, Mr. Dan Hale of 356 Islington Street, Ms. Virginia Vaughn of 366 Islington Street and Mr. Joseph Vaughn of 366 Islington Street all opposed the petition. Their concerns included a use that was prohibited, control over car washing and the lack of a plan to prevent soapy water from draining onto neighboring properties. They felt this could be a foot in the door to auto repair and painting.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. James Beal of 286 Cabot Street spoke in favor of the petition but felt that the issue of waste water should be addressed if the petition were granted as water dumps onto Cabot Street and to McDonough due to the grade.

Mr. Rheume noted that one of the standards for a special exception was that there would not be any excessive demands on municipal services which would include water and sewer. Mr. Labrie stated that any water generated within the building would be collected by a water recycling system. They would agree to that as a contingency. They had invested money in architectural and engineering plans and this would not be a foot in the door for further auto uses. This would be a benign use of an existing building. They would not put in any use that would further contamination. Regarding the 30-year moratorium on residential use, he clarified that was part of a deed restriction with Getty which includes this as a standard part of their operating procedure. Mr. Quinlivan stated that the standard should be the requirements to meet the variance and the other issues were superfluous and reiterated his objections to the petition. He felt no unnecessary hardship had been shown. Mr. Josh Liberty said he would only be detailing cars, not painting, and they would not be dumping chemical pollutants onto the ground. That was the only purpose for the building.

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Chairman Witham asked Ms. Walker for clarification that the stipulation recommended by the Planning Department was to send this for site plan review and that would deal with the water issues, municipal services and lighting

Ms. Juliet Walker, Planner, noted for the Board's consideration the Planning Department comments in their memorandum where it was noted that, if the variance should be granted, there was not an automatic threshold for this property which would require them to go through site plan review. It was the Department's feeling that, if possible, a condition be placed on a positive motion that the site plan review process would go forward to receive Technical Advisory Committee review and Planning Board approval of the conditions of the site.

Mr. Mulligan asked if site review would also entail review of the proposed water recycling system and Ms. Walker stated that would be one of the issues, particularly as it could have impacts on the municipal water system and DPW had that expertise. Mr. Rheume felt overall that there was potential to do something good for the neighborhood as a whole. His concerns were that they needed to understand what they were approving which was the basis for their questions on issues

such as parking, car sales, automotive repair, etc. It was a struggle as this was a variance for something that was not defined in the Ordinance and what would be meant if they approved this for an auto detailing business. He asked Ms. Walker if the Planning Department had any references that they could provide to arrive at a commonly accepted definition for what constituted auto detailing business. He felt this business could be a positive for the neighborhood as a whole, utilizing a property that was a detriment for many reasons. He noted the concerns of some of the abutters who would prefer a residence across from them, but also noted that the applicant had represented that was not possible for a certain period. He stated there were also a number of businesses along Islington Street, including active gas stations which certainly created a lot more noise than just cars moving in and out. He felt this could be a business that could be compatible with the current structure on the property and he would want to see the applicant following through with their representations on improvements and giving it a new look and feel. He supported the idea of a site plan review.

Mr. LeMay stated that one of his concerns was the potential for creep of the business and he felt there should be some strong restrictions in that regard even beyond what site review might impose. This was due to the nature of the business and he felt some stipulations, such as no outside storage of vehicles overnight, would be appropriate. He was also concerned about lighting and light pollution, which site plan review could address.

Chairman Witham cautioned the Board against micromanaging. It was presented a certain way and he felt they had an understanding of what was being requested. He recommended they go forward and, if there was a positive motion, add a stipulation that the Planning Department send the application to site review.

Ms. Walker noted for the Board that outdoor storage was an allowed accessory use in that district. If they wished a definition of auto detailing, she felt the Planning Department could do that but she also felt it was helpful to know the specific concerns of the Board. Mr. Rheume asked where she had pointed that out and she responded that there was an accessory use related to storage of motor vehicles at the end of the use table.

*Mr. Mulligan made a motion to **grant** the petition as presented and advertised with the stipulation that the applicant submit their plan to site review as suggested by the Planning Department. Mr. Moretti seconded the motion.*

Mr. Mulligan stated that the application was for an automobile detailing business on this site which was sprinkled amongst a number of businesses and also, because this was a Mixed Residential Business Zone, several residences as well. He agreed that this was a relatively benign use compared to some of the uses permitted either by right or special exception in the zone, such as convenience stores and funeral parlors. He also agreed with the applicant that this was a close call on whether or not this was permitted as a trade use due to the ambiguity arising from the fact that auto detailing is not specifically defined in the Zoning Ordinance.

Mr. Mulligan stated that he felt, on balance, that the essential character of the neighborhood would not be altered by the introduction of this automobile detailing facility as had been presented. As Mr. Rheume had described, there were full service stations and convenience stores on Islington Street in the same zone. There would also be no threat to the public health, safety or welfare and, for those reasons, granting the variance would not be contrary to the public interest or the spirit of

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the Ordinance. Granting the variances would result in substantial justice where the loss to the applicant is weighed against any gain to the public. He stated that the application had limitations due to the prior uses as a gas station so he felt the property owner should be allowed some flexibility. He didn't see any gain to the public in leaving this property vacant and agreed with the speaker who felt the property would be improved.

Mr. Mulligan stated that the value of surrounding properties would not be diminished. While the point was raised that the applicant had not provided what would be considered legally admissible evidence but that was not the standard to which the Board had to adhere. The Board was entitled to use common sense and he felt most people would agree that the property as it sat was an eyesore. This was an opportunity to spruce it up which, he felt, would positively affect the surrounding property values, particularly as it would be subject to site review and the Planning Board would have an opportunity to weigh in on technical issues with the property.

Regarding unnecessary hardship, Mr. Mulligan stated that the special conditions of the property were the facts that it was a relatively large lot for that part of Islington Street and located on a corner. It had a preexisting structure that couldn't be used for its original purpose. The deed and other restrictions forbid residential uses for the foreseeable future as well as gas station uses. These were all special conditions of the property distinguishing it from others in the area so that there was no fair and substantial relationship between the Table of Uses, as interpreted by the Planning Department to forbid auto detailing, and its application to this property. He felt the use was a reasonable one for the property and, with the stipulation, should be approved.

Mr. Moretti agreed and commented that Islington Street was a gateway into the City. This was another commercial business on the street and he did not see any diminution in property values by what he termed an improvement for the street.

Mr. Rheaume said he had some hesitancy, and he understood the concerns expressed by the abutters for the value of surrounding properties, but he agreed with Mr. Mulligan's comments that there were other gas stations and residential improvements in the neighborhood so he did not believe there would be a diminution of surrounding property values.

The motion passed by a vote of 7-0.

Mr. Mulligan recused himself for the following petition Mr. Johnson assumed a voting seat.

- 4) Case # 8-4
 - Petitioner: Jane A. Shannon Revocable Trust, Brian Shannon, Trustee
 - Property: 194 Wibird Street
 - Assessor Plan 148, Lot 1
 - Zoning District: General Residence A
 - Description: Create a new lot for the purpose of constructing a single-family residence.
 - 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 continuous street frontage of 57.52'± where 100' is the minimum required.

SPEAKING IN FAVOR OF THE PETITION

Attorney John Bosen appeared before the Board with the applicant, Mr. Brian Shannon, and Mr. Alex Ross, his engineer. Attorney Bosen provided copies of his narrative to the Board. He said there were three lots prior to a merger and then the property had been subdivided into two and restored to its pre-merger state since 1898.

Attorney Bosen reviewed the criteria and said the proposal would not be contrary to the public interest or contrary to the spirit and intent of the Ordinance. He said it was a non-conforming lot with less frontage, but the plans were for a modest house that would be consistent with surrounding homes. He said they were not asking for relief that would threaten the health, safety or welfare of surrounding properties. He said substantial justice would be done by granting the variance and the lot suffered from the same frontage conditions as surrounding properties. He said the values of surrounding properties would not be diminished by granting. He said the special condition of the property creating a hardship was that it was a lot of record for over 100 years that didn't meet current zoning and would require relief.

Mr. Alex Ross, engineer and surveyor said the City was re-working Wibird Street, installing catch basins and they would work with DPW to adequately take care of runoff. Chairman Witham asked if they would tie into the City's system. Mr. Ross said they already did, but the 4" line was not adequate. He said he anticipated that larger or more lines, additional catch basins and under drains would be added.

Mr. Rheume asked if they would do a site plan review. Ms. Walker said she was not sure because it was a single-family residence. Mr. Ross said they would not, but they would still work with DPW on drainage issues and improvements.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Leslie Stevens of 151 Park Street, Ms. Janet Grote of 168 Wibird Street, Ms. Mary Real of 555 Lincoln Street, Ms. Sage Clark of 582 Lincoln Avenue, Mr. Bill Townsend of 161 Wibird Street all expressed concern for excess water and flooding in the area, though many said they would have no objections if the water could be dealt with. They stated that they would like the Board to address drainage and suggested an independent review of the drainage system. Chairman Witham advised that the Board could add a stipulation to a positive motion but could not personally oversee engineering.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Bosen said they would address the water concerns through a multi-step process, first requesting a variance and then going before the Planning Board to address water issues.

Mr. Ross said the lot had been treated as low point drainage area and he was confident that they would be able to address the concerns of the abutters at the Planning Board meeting. Mr. Parrott

asked if they had done anything with test pits or an independent assessment of actual conditions. Mr. Ross said that they had surveyed and examined the site but there was no independent study.

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

DECISION OF THE BOARD

Chairman Witham noted that there were concerns about drainage raised by abutters of which the applicant was aware. While there was no definitive design plan in place, it appeared that was a step to be taken when presented to the Planning Board with overview of the Department of Public Works. Ms. Walker stated that she wanted to make it clear to the Board that, while it had been represented that drainage would be addressed if this went to the Planning Board for subdivision, it was within the Board's power to determine if this was enough of a concern to request an independent review to be done at this time. There was a discussion among Chairman Witham, Mr. LeMay, Mr. Rheume, Mr. Parrott and Ms. Walker about the best way to deal with the drainage issue and whether it was best for this Board to deal with it through an independent study or tie a positive motion to future review and action of the Planning Board through a stipulation.

*Mr. Rheume made a motion to **grant** the petition as presented and advertised with the following stipulations:*

- 1. That they submit their plan to the Planning Board for a subdivision and site review*
- 2. That any structure have a right side setback of 19' from the joint property line shown as Tax map 148, Lot 2 on the submitted plans.*

He stated that the reason for the second stipulation was the 9' width of the 0.15 acre lot plus the 10' setback (from the property line of Tax Map 14, Lot 1) just to keep the setback distance from the home by adding in that little lot. Mr. Durbin seconded the motion with the stipulations.

Mr. Rheume noted that the water and drainage issues presented by the neighbors were a concern and the stipulations would allow those to be properly addressed by another Board, which would present another opportunity for the neighbors to express their concerns. He stated that the current petition was for a large lot which would be subdivided into two smaller lots which did not meet the street frontage requirement, even with the addition of the small segment shown as Lot 3 on the plans. To allow additional distance and light and air, he had added a stipulation. He stated that granting the variance would not be contrary to the public interest as the general characteristics of the neighborhood would be maintained. About 50% of the lots had a smaller width than the proposed lot and there was a certain rhythm as you went along the street with regard to distances and separation. With the stipulation, he felt the water issues would be addressed and satisfy the public interest.

Mr. Rheume stated that the spirit of the Ordinance would be observed. While the relief was fairly substantial, the applicant was trying to add a little more width by incorporating a smaller lot so that the frontage could be as close to the Ordinance requirements as possible. In the substantial justice test, this was a lot of record and would allow the property owner to make full use of the lot, assuming that the drainage and other issues could be worked out with the Planning Board. He stated that there was no public interest that would outweigh the property owner's right to move forward and make full use of the property. He stated that the value of surrounding properties

would not be diminished by adding in a new home in rhythm with others on the street. The neighborhood feedback had been positive and the stipulation would help protect setbacks against structures encroaching too closely. The height of the proposed home was in keeping with others in the neighborhood.

In the unnecessary hardship test, Mr. Rheume stated that the special conditions included the fact that this was an existing lot of record that had a certain width and the general nature of all the remaining properties in the neighborhood. He stated that building a single-family home which met all the setbacks on the property was a reasonable use.

Mr. Durbin agreed with Mr. Rheume’s comments and added that he this had been an involuntarily merged lot that was not merged with rights according to State statute.

Chairman Witham called for a vote to grant the petition with two stipulations, the first being that the proposal would go before the Planning Board for site plan review with regard to the subdivision and their standard oversight, with an emphasis on site drainage and sourcing of the water both in regard to storm water and potential springfed. The second stipulation would be that there would be a right side yard setback of 19’ as outlined by Mr. Rheume. Mr. Rheume clarified that was along the length of the property for Tax Map #148, Lot 2, with the rear portion of the lot continuing to maintain the existing 10’ right side setback.

The motion passed by a vote of 6-1 with Vice-Chair Parrott opposing.

Mr. Mulligan returned to his seat and Chairman Witham announced that Mr. Rheume was recusing himself and Mr. Johnson would be voting in his place.

- 5) Case # 8-5
 - Petitioner: Andrew S. Martin
 - Property: 230 McDonough Street
 - Assessor Plan 144, Lot 37
 - Zoning District: General Residence C
 - Description: Add a right-side dormer within existing footprint.
 - 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 to be added to or enlarged without conforming to the requirements of the Ordinance.
 2. A Variance from Section 10.521 to allow a 5’± right side yard setback where 10’ is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Andrew Martin said his attic space was the only dry storage in his home and a too small opening created a hardship in gaining access. He said he would like to install a standard size door, which would require raising the roof by 40”.

Mr. Martin said there would be about ten more clapboards on the west side of the house and he spoke with his neighbor on that side who said she would have no problem with the proposal, and he didn't think there would be any diminution of property values or would cause any harm to the public.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

*Vice-Chair Parrott made a motion to **grant** the petition as presented and advertised which was seconded by Mr. LeMay.*

Vice-Chair Parrott reviewed the criteria, noting that granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance that encouraged people to improve their homes. He said substantial justice would be done by making the house more useful for the owner and subsequent owners. He said the values of surrounding properties would not be diminished because it was a small addition that would have a positive affect on the property values. He said the special condition that distinguished the property from others was that it was a congested house with an attic that was difficult to access and this proposal would make the home more useful.

Mr. LeMay added that it was a small increase to the property.

*The motion **passed** by a vote of 7-0.*

- 6) Case # 8-6
 - Petitioner: Thea Murphy
 - Property: 67 Mark Street
 - Assessor Plan 116, Lot 51
 - Zoning District: Mixed Residential Office
 - Description: Replace front porch and bulkhead with covered portico and storage locker.
 - 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 to be extended, reconstructed, enlarged or structurally altered without conforming to the requirements of the Ordinance.
 2. Variances from Section 10.521 to allow the following:
 - a) A front yard setback of 2'± where 5' is required;
 - b) A left side yard setback of 0.44'± where 10' is required; and
 - c) Building coverage of 42.2%± where 40% is the maximum allowed.

DECISION OF THE BOARD

*Vice-Chair Parrott moved to **postpone** the hearing to the September meeting at the applicant's request and Mr. Rheume seconded the motion.*

*The motion to **postpone** the hearing passed unanimously by a voice vote.*

Mr. Mulligan recused himself from the following petition. Mr. Johnson assuming a voting seat.

7) Case # 8-7

Petitioners: Paul E. Berton Living Trust, Paul Berton, Trustee, and Jane A. Ewell Living Trust

Property: 482 Broad Street

Assessor Plan 221, Lot 63

Zoning District: General Residence A

Description: Construct four free-standing dwelling units with an 18'± wide driveway.

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

1. A Variance from Section 10.513 to allow four free-standing dwellings on a lot where no more than one free-standing dwelling is allowed.
2. A Variance from Section 10.1114.20 to allow an 18'± maneuvering aisle where a 24' maneuvering aisle is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Paul Berton appeared before the Board and said they were requesting a variance for four units on a large lot.

Mr. Mike Sievert with MJS Engineering said they were proposing to remove the single family home and construct four new single family homes. He outlined the placement, elevations and appearance of the units and said all the setback requirements were met. They had met with someone in the Planning Department and were told they would need a second variance for the driveway width so he submitted an addendum with the criteria.

Mr. Sievert said the table of uses allowed multi-family units, in the district and the proposal would meet the intention of the district for single family. He said the proposal would maintain the character of the neighborhood and surrounding property values would not be diminished with detached units, which would produce greater value and allow greater privacy. He said the unique size and narrowness of the property was a special condition that distinguished it from other properties in the neighborhood and denying the request would cause hardship on the applicant. Substantial justice would be done by granting the variance as construction of the detached units would not have any greater impact than combined dwelling units

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Bernie Pelech appeared before the Board on behalf of abutters Mr. and Mrs. Carmichael and Mr. and Mrs. Underhill. Attorney Pelech and read their letter into the record and submitted copies to Board.

Attorney Pelech said it was an ambitious proposal, but the Ordinance required that there be no more than one single-family dwelling per lot. He said there was no hardship because other properties were also long and narrow and the applicant could have a 4-unit multi-family dwelling without a variance. He said the spirit and intent of the Ordinance would be violated because the Ordinance existed to prevent an over intensification and there would be a diminution of surrounding property values.

Mr. Peter Weeks of Weeks Real Estate, speaking on behalf of two abutters on Broad Street said the Board had to find the application met all the criteria and he did not believe it met any. Mr. Weeks said the proposal would diminish the value of surrounding properties and asked members of the public who were opposed to stand up.

Mr. Henry Mellynchuck of 458 Street, Mr. William Ehler of 153 Pinehurst Road, Ms. Michelle Richard of 479 Board Street, Ms. Nancy Andrews of 61 Sagamore Avenue, Ms. Linda Barnaby, an abutter to the property, Mr. Dana Skippington of Broad Street, and Mr. Dan Wyand of 65 Pinehurst Road all said they were concerned for the effect the proposal would have on their property values in a neighborhood of one home per lot. There wasn't adequate room for snow storage and they felt there would be water runoff. They maintained that a 24' maneuvering aisle was needed for safety reasons

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Sievert clarified that four dwelling units were allowed in one principal building and they were proposing separate buildings. He said they would reduce the amount of impervious surfaces and use landscaping buffers to improve drainage. He stated that an 18' wide maneuvering aisle was adequate for fire truck access

Mr. Berton outlined a meeting he had with someone in the Planning Department where Ms. Walker was not present. He felt it had been suggested that the units be detached, which was why they went in that direction. He felt that some of the objections were from people who were opposed to a property that mainly met all of today's standards in a neighborhood where few did.

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

DECISION OF THE BOARD

Chairman Witham said the Board was not privy to discussions in the Planning Department and Ms. Walker said she wasn't familiar with the discussions either so that couldn't factor into their decision.

Chairman Witham said the Board was often reluctant to allow two dwelling units on a lot, let alone four. He said there were patterns, but multi units on the same lot were not common in the City with the exception of the project on Marston Street near Hannaford's so he couldn't support the proposal.

*Mr. LeMay made a motion to **deny** the petition as presented and advertised and Mr. Rheaume seconded the motion.*

Mr. LeMay said the proposal had the appearance of a mini subdivision.. He said individual units would be worth more, but the look was not consistent and could diminish surrounding property values and would be contrary to the public interest. He added that there was no hardship.

Mr. Rheume echoed Mr. LeMay’s remarks and said the application fell down on the hardship criteria because the lot was far from unique. He said four separate units in a town house arrangement was a business incentive, but it was four times what was allowed and there was nothing in the neighborhood like it. He said the driveway also did not meet the spirit of the Ordinance because it was too small for fire apparatus to access the back units.

Mr. Moretti stated that he hoped the applicant had not been misled and could come forward with a proposal that would be in the character of the neighborhood.

*The motion to **deny** the petition **passed** by a vote of 7-0.*

V. OTHER BUSINESS

No other business was presented.

VI. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 11:40 p.m.

Respectfully submitted,

Jane K. Kendall
Acting Secretary

**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 19, 2014

MEMBERS PRESENT: Chairman David Witham; Vice-Chairman Arthur Parrott; Derek Durbin; Charles LeMay; Christopher Mulligan; David Rheame; Alternates: Jeremiah Johnson and Patrick Moretti

MEMBERS EXCUSED: Susan Chamberlin

ALSO PRESENT: Juliet Walker, Planning Department

Chairman Witham welcomed Mr. Jeremiah Johnson, a local architect, as an alternate member of the Board. He advised that, due to an absence and a number of expected recusals, Mr. Johnson would be voting on several cases.

I. APPROVAL OF MINUTES

- A) April 22, 2014
- B) May 20, 2014
- C) May 29, 2014
- D) June 17, 2014
- E) July 15, 2014

In separate unanimous voice votes, it was moved, seconded and passed to approve all sets of Minutes with minor corrections.

II. MOTIONS FOR REHEARING

A) Motion for Rehearing by Applicants regarding 746 Middle Road.

Mr. Durbin recused himself from this item. Chairman Witham said Mr. Johnson was not present for the initial hearing and would not be voting.

Mr. Mulligan said he had read the materials in depth and would support the request for rehearing. He was not entirely convinced by the applicant's substantive arguments, but he agreed with the procedural arguments. He added that the tax map and line drawing submitted may have affected the way he looked at the application compared to a fully engineered plan.

Chairman Witham said the submittal for rehearing was well thought out, but the dimensions and variance requests were the same so the reasons for his decision would not change even if a survey and plan to scale were presented.

Mr. Rheume said he also felt the request for rehearing was thorough, but an argument that the applicant could build a garage instead of a house didn't hold for him because there was no economic advantage for a garage compared to a subdivision for another house. He said there might be enough room for the existing home, but requesting that the Ordinance be cut in half with 50' of relief to add another house and access driveway would change the general character of the neighborhood and was the tipping point for him.

Chairman Witham said he also went through the Minutes of the meeting and noted that Mr. Mulligan had pointed out that the lot had not been involuntarily merged. It had always been a single lot with a bare minimum of street frontage and cutting it in half would be too much.

Mr. LeMay made a motion to deny the request for a rehearing of the petition and Vice-Chair Parrott seconded the motion.

Mr. LeMay said he did not see any new facts in the request and there was much opposition to show there was no support from the neighbors.

Vice-Chair Parrott agreed with all the previous comments that the request was well presented, but the facts what they were and he didn't think rehashing them would change his mind.

The motion to deny a rehearing passed by a vote of 5-1, with Mr. Mulligan opposing.

B) Motion for Rehearing by Applicants regarding 304 Leslie Drive.

Mr. Durbin returned to his seat. Chairman Witham announced that he and Mr. Mulligan would be recusing themselves from this discussion as they were not present at the original hearing. He reiterated that three positive votes would be necessary for a majority vote to pass. The gavel was passed to Vice-Chair Parrott.

Mr. Rheume said he would be in favor of a rehearing considering the applicant's point that the motion to grant failed to pass by a tied vote and a motion to deny was not made, although that vote may very well have been tied as well because of an equal number of Board members voting. He felt that raised an interesting procedural question. He stated that there was no discussion at the meeting about the specific concerns of the Board that resulted in the failure to pass. There was nothing that the applicant could use to go back and amend their proposal so that it might be acceptable to the Board and be sufficiently different so that it would not raise a question of Fisher v. Dover. He felt the applicant deserved an opportunity to come back before the Board and at least hear their concerns regarding the proposal.

Vice Chair Parrott asked if that was a motion and Mr. Rheume said he intended it to be discussion but if there was nothing further, he would make a motion.

*Mr. Rheaume made a motion to **grant** the request for a rehearing to be held at the next meeting of the Board. Mr. LeMay seconded the motion.*

Mr. Rheaume stated that he would bring forward his previous comments. He felt the applicant deserved an opportunity to come back before the Board and there might or might not be a different outcome but they would at least understand the Board's concerns.

Mr. LeMay said a failure to get enough votes simply meant a request didn't pass and he didn't think that should be a referendum on routine procedure. In this case, while the outcome was definitive in not having enough votes to pass a positive motion, the reasons for not granting were unclear and he felt the applicant was owed a clarity of judgment on this.

Vice-Chair Parrott said he recalled that the quality and depth of discussion was not up to the Board's usual standards and thought they could do a better job of explaining their reasoning.

*The motion to grant a rehearing **passed** by a vote of 5-0.*

Vice-Chair Parrott announced that the petition would be heard at the next regular meeting.

Mr. Mulligan and Chairman Witham returned to their seats and Vice-Chair Parrott turned over the gavel to Chairman Witham.

Chairman Witham noted that he wasn't present for the meeting, but had read the Minutes and the Request for Rehearing and agreed that it was unique in that the reasons to grant the petition were addressed but after that motion did not pass there were no reasons given for denying, which was unusual.

III. PUBLIC HEARINGS – OLD BUSINESS

- 1) Case # 7-3
Petitioner: Christine V. Crockett Revocable Trust
Property: 209 Gosport Road
Assessor Plan 224, Lot 10-12
Zoning District: Single Residence A
Description: Construct a new single family home within 75' of a saltwater marsh.
Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
 1. A Variance from Section 10.301(6) – 1982 Zoning Ordinance to allow a structure 75'± from a saltwater marsh where a minimum of 100' is required.
(This petition was postponed from the July 15, 2014 meeting.)

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin appeared before the Board on behalf of the applicants. Also in attendance was John Chagnon of Ambit Engineering.

Attorney Loughlin said the applicant purchased the lot in the Woodlands 25 years ago, along with the adjacent lot. He said it was one of highest taxed lots in the City because it was in Tucker's Cove. He said it was subdivided and the site plan was approved around 1995. He said the Wetlands Act was implemented in the 1970's. He said 100' of wetlands buffer seemed drastic at the time, so no one questioned it when the Portsmouth School District built Little Harbor School on the edge of the salt marsh. He said the applicability to Tucker's Cove was challenged in Superior Court after the City adopted their Inland Wetlands Ordinance and it was decided that the Ordinance only affected wetlands over 25' square feet and did not apply to this subdivision or lot. He said DES already approved the wetlands crossing as shown with 600' square feet of impact.

Attorney Loughlin said the applicant filed for a Conditional Use Permit and a wetlands crossing. He said they attended the March 2014 Conservation Commission and were asked for more information. He said there were no requests for the building footprint at that time, but Mr. Chagnon prepared the application for DES who wanted to see the entire lot and the impact to the wetlands. He said they met with Peter Britz, Environmental Planner on April 2, 2014 who wanted an opinion from legal counsel. He said they filed their Conditional Use Permit with the Planning Board on May 8, 2014 and it was decided that the lot was vested and they would not need the Conditional Use Permit. He said the three State permits were included in the packet.

Attorney Loughlin reviewed the criteria and said granting the request for a single-family home in a residential zone would not be contrary to the public interest as it would not alter the essential character of the neighborhood or threaten the public health, safety or welfare. He said the lot was assessed at \$400,000 everyone would like a vacant lot next door that someone else purchased and paid taxes on, but that was not the test. He said there would be no reasonable use of the property without relief and substantial justice would be done in granting the application. He said this was the only place they could put the home without wetlands fill and although the deck would be in the tidal buffer, the impact would be under 6%. He said He said it would not be in the side setback the use was approved and anticipated on the lot since the subdivision in 1995

Attorney Loughlin said the purpose of the wetland buffer was to reduce erosion, help the ecological balance and control source pollutants. He said this lot would have more undisturbed buffer than any other in Tuckers Cove because there would be no fertilized lawn running to the water as stipulated by wetlands regulations and would be in the spirit of the Ordinance. He said the Army Corp of Engineers reviewed the project, including the dredge and fill of wetlands, determined that it would have a minimal accumulative impact, and approved the work on February 11, 2014. He said DES also determined that the proposal provided the least impact with the wetlands crossing at the most narrow portion, with site grading to direct runoff away from abutting property into a rain garden and buffer plantings that would preserve the functions of the tidal buffer zone and increase property values.

Attorney Loughlin said literal enforcement of the Ordinance would result in an unnecessary hardship on the applicants who had paid property taxes on the lots for 23 years. He said there were special conditions with ledge outcroppings near the water and a wetlands lot that dictated where the building would be located. He said the wetlands increased over the years, narrowing the building envelope and best management practices dictated the way the lots could be developed. He said the owner of one of the lots next door built a retaining wall six years ago, which was not an issue then, but detention ponds were called for today. He said the proposed use for a single-family home in a residential district was a reasonable one.

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Mr. Rheume asked if there was any intent for the kind of boat gear that was standard for lots along Sagamore Creek and Attorney Loughlin said they were not aware of any such plans. Mr. Rheume asked if that would require a separate permit and Attorney Loughlin said it would.

Mr. Mulligan asked if the building envelope had become more restricted because the uplands had become reduced and Attorney Loughlin there was no buffer issue, but the increased wetlands dictated where the building could be located. Mr. Mulligan asked if the increase of wetlands was due to other building lots and Attorney Loughlin said it might have been due to the lot next door as well as the construction of the road with culverts and catch basins.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

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

Mr. Mulligan said constructing a single-family home within a residential sub-division was a permitted use and all of the setbacks and dimensional requirements would be observed. He said although there would be an incursion into the tidal wetlands buffer, granting the variance would not be contrary to the public interest or the spirit of the Ordinance because the essential character of the neighborhood would not be substantially altered by adding another single-family residence to the subdivision. He said the applicant provided materials indicating that the proposal would have the least adverse impact to the wetlands so that the health, safety and welfare of the public would not be compromised.

Mr. Mulligan said denying the variance would result in a substantial injustice to the applicant and the loss would not be outweighed by any gain to the public. He said the applicant could not reasonably use the property without the relief. He said the proposal met all the frontage, depth, setbacks, lot coverage and open space requirements and would not diminish the value of surrounding properties. He said there had been no local opposition, nor did he think that any opposition would be well founded.

Mr. Mulligan said the special conditions of the property were that the amount of wetlands and buildable space had changed from the time the applicants acquired the lot. He said a point made in the presentation was that the existing built environment contributed to that condition so he thought there was no fair and substantial relationship between the purpose of the tidal wetlands buffer protections and its application to the property. He said the use was clearly reasonable and the literal enforcement of the Ordinance would result in an unnecessary hardship.

Mr. Durbin agreed with Mr. Mulligan's comments and said they might look at it differently if it were not a vested buildable lot, but he thought that was a significant factor in his decision to second the approval of the request. He said from a legal perspective, something would be built there and the applicant demonstrated that this proposal would be the alternative resulting in the

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least ecological impact alternative on the lot and surrounding environment. He said the proposal would be consistent with other built lots in the neighborhood. He said the wetlands constraints created an inherent hardship with building on the land and the encroachment into the salt marsh buffer of 75' was somewhat "de minimus" considering that the State requirement for building within the shoreline was 50'.

Mr. Rheume said the Board typically dealt with dimensions and use, and occasionally wore HDC hats, but in this case, they had to wear wetlands scientist hats. He said the facts presented from experts such as the Army Corps of Engineers and the DES were compelling and gave him the confidence that this proposal would not have a negative impact on the wetland buffer zone.

The motion passed by a vote of 7-0.

IV. PUBLIC HEARINGS – NEW BUSINESS

1) Case # 8-1

Petitioners: Weakes Revocable Trust, Danny and Rachel Weakes, Trustees

Property: 35 Davis Road

Assessor Plan 258, Lot 24

Zoning District: Single Residence B

Description: Construct 18'± x 16'± shed

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

1. Variances from Section 10.521 to allow a front yard setback of 27'4"± where 30' is required and a rear yard setback of 8.2'± where 10' is required for an accessory structure.
2. A Variance from Section 10.571 to allow an accessory structure to be located in a required front yard.

SPEAKING IN FAVOR OF THE PETITION

Mr. Dan Weakes appeared before the Board and stated that he removed his shed that was in disrepair and thought he would be grand-fathered when replacing it, but found out later he needed a variance. He submitted letter of support from his neighbors.

Mr. Weakes said the original shed was at the side of his oddly shaped lot on a cul-de-sac and he considered moving it, but found there was nowhere else to put it because he had a septic tank and leach field in the open space in the back yard. He said he built the shed to match the architecture of his home and it would not affect the surrounding property values.

Chairman Witham asked if he placed the shed in roughly in same location and he said he placed it within approximately 5' of the other shed.

Mr. Rheume said the original shed appeared smaller and further over and wondered why he put the new shed closer to driveway. Mr. Weakes said he was a technician with quite a bit of equipment and placed the shed closer for easier access in winter.

Mr. Rheaume asked why the placement of the shed was considered in the front yard and Ms. Walker said it was because it was measured from the street frontage.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

*Mr. Durbin made a motion to **grant** the petition as presented and advertised and Mr. LeMay seconded the motion.*

Mr. Durbin reviewed the criteria, noting that granting the variance would not be contrary to the public interest because the replaced shed was close to the previous location and didn't appear to affect any abutters. He said the proposal respected the light, air and space between properties, observing the spirit of the Ordinance. He said substantial justice will be done and to deny the application would be a detriment to the property owner which would not be outweighed by any benefit to the public.

Mr. Durbin said the special conditions that distinguished the lot from other properties in the area was that it was an odd shaped lot located on a cul-de-sac and the shed was considered to be in the front yard with street frontage. He said the relief requested was minimal and there was no fair and substantial relationship between the general public purposes of the Ordinance and their application to the property. He said having an accessory structure was a reasonable use of the property.

Mr. LeMay agreed that the proposal was modest and would have no impact on surrounding properties.

*The motion **passed** by a vote of 7-0.*

- 2) Case # 8-2
 - Petitioners: Mark A. and Deborah Chag
 - Property: 404 Middle Street
 - Assessor Plan 136, Lot 21
 - Zoning District: Mixed Residential Office
 - Description: Convert existing barn to single-family dwelling.
 - 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 to be added to or enlarged without conforming to the requirements of the Ordinance.
 2. Variances from Section 10.521 to allow the following:
 - a) A lot area per dwelling unit of 5,436.5 s.f. ± where 7,500 s.f. is required;
 - b) A rear yard setback of 0'± where 15' is required; and
 - c) A right side yard setback of 2'± where 10' is required.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin appeared before the Board with applicant Deborah Chag and architect, Dan Rawling.

Attorney Loughlin said the family lived in the home that was built in 1880 for 25 years and had invested time and money into preserving the property. He said they wanted to downsize and wanted to stay in the neighborhood by converting their vacant barn into residential space for them, raising the barn to create parking underneath, adding a porch, a deck and terrace and reconstructing the existing extension. He said the project would also require approval from the HDC.

Attorney Loughlin detailed the building and lot dimensions and setbacks, stating that their lot size per dwelling unit was higher than surrounding properties. He said the lot was in a peninsula of mixed residential and office use and would not be contrary to the public interest, as the essential character of the neighborhood would not be changed because a new building would not be added.

Attorney Loughlin reviewed the criteria and said the project would not be contrary to the spirit and intent of the Ordinance. The largest part of relief needed was for 7,500 s.f. for each dwelling unit and they would preserve the existing facility. He said Ms. Chag spoke with most of her neighbors and provided a petition, letters and emails indicating support, from more than 21 neighbors. He said there were unique aspects to property and this was a unique project for a permitted use.

Mr. Rheume asked why different scenarios for parking were shown on the plan. Attorney Loughlin said they needed four spaces for this use so they were showing how they could get four spaces on the lot whether the barn was raised up or not. Mr. Rheume said the concern would be that there would be too much parking if the garage were raised up for parking. The applicant, Ms. Deborah Chag of 404 Middle Street, said the intent was to have two cars under the structure and two spaces connecting to the existing house so they could keep the parcel green.

Mr. Moretti asked if the single-story building in the back was new and architect Dan Rawling of 401 Middle Street said they were doing reconstruction on the other building. Mr. Moretti said it appeared to be a pleasing design, but he was concerned with raising the building on the existing foundation that had a 0' setback from the lot line.

Vice-Chair Parrott inquired about the trees and Ms. Chag said she spoke with a tree service company and was told the butternut was dead and the hemlock was buckling the chicken coop, causing structural damage so they would take those trees down, but the oak would remain. Vice-Chair Parrott asked about the other trees on Middle Street and Ms. Chag said they would leave those alone.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Chairman Witham said Portsmouth's historic and architectural heritage was important to preserve and he was a strong proponent for preserving barns though he realized they were no longer used for horses and carriages as originally intended. He said in this situation a dwelling unit could be a reasonable use and he had converted another barn to a dwelling unit down the street himself. He said he was familiar with Mr. Rawling's stunning work on Middle Street, but he was concerned that raising a barn 8' in the air to gain additional space underneath could jeopardize the look, feel and integrity of the structure. He said he understood the building would need to be raised to restore the foundation, but he thought it would be asking a lot to put a three-story wall and overhanging eaves on a 0' setback on the property line near a neighbor and some effort should be made to move the building from the property line for drainage and maintenance.

Mr. LeMay said he agreed 100% with Chairman Witham's comments, specifically that it should be moved back a couple of feet to allow for maintenance. He added that the HDC might have more to say on the matter, but he thought the barn would look as if it was boosted up on a platform.

Mr. Mulligan said 0' setbacks were common in this neighborhood and large useable yards were not so common. He said he was hesitant to support moving the structure off the side yard setback closer to the middle of a backyard, compromising one of the few properties on the street with a useful, private and unique yard and lawn.

Chairman Witham said he thought this was an opportunity to lessen runoff from the eaves onto another property. He said the barn also directly abutted a museum home and raising the barn would impact the architectural integrity.

Mr. Rheume said he was torn with the proposal as well. He said it was an odd building with no street frontage in a tight triangle that was not currently overwhelming with homes there. He said the barn would appear taller when raised and thrown up against the property line and it was not his personal aesthetic, but he would leave that up to the HDC. He noted that parking would use up some of the open space.

Vice-Chair Parrott said he thought the issue of moving the building off the property line was significant. He said the Board had seen quite a few projects over the years with zero setbacks and he never liked approving them, but on the other hand, this was a chance to make some corrections. He said there would be advantages to parties on both sides of the property line in moving the building off the property line from an aesthetic point of view and from a practical point of view for construction and maintenance.

*Vice-Chair Parrott made a motion to **grant** the petition as presented and advertised with the stipulation that the 0' setback of the structure be moved from 2' away from the property line toward the center of the lot. Mr. Moretti seconded the motion.*

Vice-Chair Parrott reviewed the criteria, noting that granting the variances would not be contrary to the public interest because this was a well established neighborhood, almost exclusively residential on that block and the public interest would be well served to continue a residential use. He said the structure wouldn't look any different, except taller and he thought the building

wouldn't be very visible with all the trees around it. He said the spirit of the Ordinance would be observed in that the features of the building would be retained except for raising the first floor and the project fit into the neighborhood. He said it might look different, but on balance, he thought it was a good use of the building and the large investment of time and money in the redesign and remaking of interior would be a benefit to the neighborhood in preserving a building that might deteriorate over time. He said substantial justice would be done, as it would be more advantageous to this applicant to approve the application than it would be to the public to deny it.

Vice-Chair Parrott said the values of surrounding properties would not be diminished because there was no change in the use or configuration of the lot. He said the applicant said they would try to save as much of the foliage as possible and the substantial part of the new building with a porch would face toward the center of the property and there would be a board fence that would conceal the changes to the property that backed up to the Moffatt Ladd house. He said the special conditions that distinguished the property from others in the area were that this was a secondary structure that sat on the property line in the corner. He said the density would not be greater than many of the adjacent properties in terms of units per square foot and it would not look any different except for being upgraded and taller.

Mr. Moretti said he concurred with Vice-Chair Parrott's comments and moving the new foundation 2' would alleviate some of the concern with the 0' setback.

Mr. Rheume said that he was fine with everything except the stipulation and would not support the motion. He said they were talking about a structure that had been in that location for years.

Chairman Witham said he supported the residential use, but he had concerns with the setback though that was not his main grievance. He said he would not support the motion because he did not feel the proposal would preserve the integrity of the barn by boosting it up 10' in the air. He said there were high barns with sections underneath on farmlands, but that was not how they were built in Portsmouth and this would be the tallest and oddest-looking barn in Portsmouth. He said there were times when the Board denied 0' setbacks for sheds for a variety of issues and he was surprised at the comfort level with a three-story vertical wall with a 0' setback for what was essentially an accessory structure.

Mr. LeMay said he shared the same concerns and would not support the motion. He said the HDC would have an additional say over the raising of the building.

Ms. Walker said there were two proposals under consideration by the HDC. She said the Planning Department expressed concern over the HDC approving an alternate plan so that the applicant would have to return to the Board for approval of a different design.

The motion passed by a vote of 4-3 with Mr. Rheume, Mr. LeMay and Chairman Witham opposing.

- 3) Case # 8-3
 - Petitioner: Rye Atlantic Properties, LLC
 - Property: 361 Islington Street
 - Assessor Plan 144, Lot 23
 - Zoning District: Mixed Residential Business

Description: Detailing automobiles.

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

1. A Variance from Section 10.440 to allow the detailing of automobiles in a district where this use is not allowed.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin outlined the applicant's request and the history of this property. He said Rye Atlantic had been developing long-term plans for this property, but they were looking for a use in the interim, but at the site, a former gas station was challenging. He said this was a low impact proposal for auto detailing. They were applying for a variance for the use for auto detailing, which would be subject to whatever conditions that the Board might feel would be appropriate.

Attorney Loughlin reviewed the criteria and said there would be no diminution in the value of surrounding properties as it was currently a closed gas station awaiting improvements. He said the use would not be contrary to the public interest as the zone encouraged business, residential and office uses including other service stations. He said substantial justice would be done by allowing a benign use that would cause no harm to the neighborhood and would fit in with other existing uses. It would not be contrary to the spirit of the Ordinance. Again, this was a mixed use zone. He felt it was a close call as to whether this was a permitted use or one by special exception so that the spirit of the Ordinance would not be violated. Attorney Loughlin stated that literal enforcement of the Ordinance would result in an unnecessary hardship due to the special circumstances he had outlined earlier which included the restrictions on the uses of the property and the issues with former service stations including cleaning up leaking storage tanks and waiting for the time when the site will be right for a complete redevelopment. He concluded that all five of the criteria were met.

Chairman Witham asked if all the washing of vehicles would occur inside the building. Attorney Loughlin stated that was his understanding. It would not be like an automatic car wash operation. Mr. Rheume said one concern might be the accumulation of vehicles on the property and asked how many cars would be on the lot at any time. Mr. Michael Labrie said 16 spaces currently existed. Mr. Josh Liberty, the operator of the business had said the detailing was a one day process and he anticipated doing 4-6 vehicles a day with none remaining overnight, typically. They didn't anticipate that the majority of the parking spaces would be utilized. Mr. Josh Liberty stated that a detail was usually 2-3 hours. This would not be a hang-out for cars or people. In response to a question from Mr. Rheume about what improvements they would make to distinguish the property from looking like a closed gas station, Mr. Liberty stated that they would like to freshen up the building, as they were allowed, changing the doors in front and adding windows, fresh paint and lighting. Mr. LeMay asked for confirmation that there would be no display or cars for sale or cars sold on the site. Mr. Liberty confirmed there would not. Mr. Parrott asked for assurance that it would not be used for tow operations and Mr. Liberty said he could guarantee that 100%.

Attorney Bernie Pelech spoke on his own behalf and said the property had degraded over the years and this would be an appropriate use that would not change the character of the neighborhood. As a resident he would be in favor of anything that would allow improvement of the site.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Mark Quinlivan of 383 Islington Street, Mr. Dan Hale of 356 Islington Street, Ms. Virginia Vaughn of 366 Islington Street and Mr. Joseph Vaughn of 366 Islington Street all opposed the petition. Their concerns included a use that was prohibited, control over car washing and the lack of a plan to prevent soapy water from draining onto neighboring properties. They felt this could be a foot in the door to auto repair and painting.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. James Beal of 286 Cabot Street spoke in favor of the petition but felt that the issue of waste water should be addressed if the petition were granted as water dumps onto Cabot Street and to McDonough due to the grade.

Mr. Rheume noted that one of the standards for a special exception was that there would not be any excessive demands on municipal services which would include water and sewer. Mr. Labrie stated that any water generated within the building would be collected by a water recycling system. They would agree to that as a contingency. They had invested money in architectural and engineering plans and this would not be a foot in the door for further auto uses. This would be a benign use of an existing building. They would not put in any use that would further contamination. Regarding the 30-year moratorium on residential use, he clarified that was part of a deed restriction with Getty which includes this as a standard part of their operating procedure. Mr. Quinlivan stated that the standard should be the requirements to meet the variance and the other issues were superfluous and reiterated his objections to the petition. He felt no unnecessary hardship had been shown. Mr. Josh Liberty said he would only be detailing cars, not painting, and they would not be dumping chemical pollutants onto the ground. That was the only purpose for the building.

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Chairman Witham asked Ms. Walker for clarification that the stipulation recommended by the Planning Department was to send this for site plan review and that would deal with the water issues, municipal services and lighting

Ms. Juliet Walker, Planner, noted for the Board's consideration the Planning Department comments in their memorandum where it was noted that, if the variance should be granted, there was not an automatic threshold for this property which would require them to go through site plan review. It was the Department's feeling that, if possible, a condition be placed on a positive motion that the site plan review process would go forward to receive Technical Advisory Committee review and Planning Board approval of the conditions of the site.

Mr. Mulligan asked if site review would also entail review of the proposed water recycling system and Ms. Walker stated that would be one of the issues, particularly as it could have impacts on the municipal water system and DPW had that expertise. Mr. Rheume felt overall that there was potential to do something good for the neighborhood as a whole. His concerns were that they needed to understand what they were approving which was the basis for their questions on issues

such as parking, car sales, automotive repair, etc. It was a struggle as this was a variance for something that was not defined in the Ordinance and what would be meant if they approved this for an auto detailing business. He asked Ms. Walker if the Planning Department had any references that they could provide to arrive at a commonly accepted definition for what constituted auto detailing business. He felt this business could be a positive for the neighborhood as a whole, utilizing a property that was a detriment for many reasons. He noted the concerns of some of the abutters who would prefer a residence across from them, but also noted that the applicant had represented that was not possible for a certain period. He stated there were also a number of businesses along Islington Street, including active gas stations which certainly created a lot more noise than just cars moving in and out. He felt this could be a business that could be compatible with the current structure on the property and he would want to see the applicant following through with their representations on improvements and giving it a new look and feel. He supported the idea of a site plan review.

Mr. LeMay stated that one of his concerns was the potential for creep of the business and he felt there should be some strong restrictions in that regard even beyond what site review might impose. This was due to the nature of the business and he felt some stipulations, such as no outside storage of vehicles overnight, would be appropriate. He was also concerned about lighting and light pollution, which site plan review could address.

Chairman Witham cautioned the Board against micromanaging. It was presented a certain way and he felt they had an understanding of what was being requested. He recommended they go forward and, if there was a positive motion, add a stipulation that the Planning Department send the application to site review.

Ms. Walker noted for the Board that outdoor storage was an allowed accessory use in that district. If they wished a definition of auto detailing, she felt the Planning Department could do that but she also felt it was helpful to know the specific concerns of the Board. Mr. Rheume asked where she had pointed that out and she responded that there was an accessory use related to storage of motor vehicles at the end of the use table.

*Mr. Mulligan made a motion to **grant** the petition as presented and advertised with the stipulation that the applicant submit their plan to site review as suggested by the Planning Department. Mr. Moretti seconded the motion.*

Mr. Mulligan stated that the application was for an automobile detailing business on this site which was sprinkled amongst a number of businesses and also, because this was a Mixed Residential Business Zone, several residences as well. He agreed that this was a relatively benign use compared to some of the uses permitted either by right or special exception in the zone, such as convenience stores and funeral parlors. He also agreed with the applicant that this was a close call on whether or not this was permitted as a trade use due to the ambiguity arising from the fact that auto detailing is not specifically defined in the Zoning Ordinance.

Mr. Mulligan stated that he felt, on balance, that the essential character of the neighborhood would not be altered by the introduction of this automobile detailing facility as had been presented. As Mr. Rheume had described, there were full service stations and convenience stores on Islington Street in the same zone. There would also be no threat to the public health, safety or welfare and, for those reasons, granting the variance would not be contrary to the public interest or the spirit of

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the Ordinance. Granting the variances would result in substantial justice where the loss to the applicant is weighed against any gain to the public. He stated that the application had limitations due to the prior uses as a gas station so he felt the property owner should be allowed some flexibility. He didn't see any gain to the public in leaving this property vacant and agreed with the speaker who felt the property would be improved.

Mr. Mulligan stated that the value of surrounding properties would not be diminished. While the point was raised that the applicant had not provided what would be considered legally admissible evidence but that was not the standard to which the Board had to adhere. The Board was entitled to use common sense and he felt most people would agree that the property as it sat was an eyesore. This was an opportunity to spruce it up which, he felt, would positively affect the surrounding property values, particularly as it would be subject to site review and the Planning Board would have an opportunity to weigh in on technical issues with the property.

Regarding unnecessary hardship, Mr. Mulligan stated that the special conditions of the property were the facts that it was a relatively large lot for that part of Islington Street and located on a corner. It had a preexisting structure that couldn't be used for its original purpose. The deed and other restrictions forbid residential uses for the foreseeable future as well as gas station uses. These were all special conditions of the property distinguishing it from others in the area so that there was no fair and substantial relationship between the Table of Uses, as interpreted by the Planning Department to forbid auto detailing, and its application to this property. He felt the use was a reasonable one for the property and, with the stipulation, should be approved.

Mr. Moretti agreed and commented that Islington Street was a gateway into the City. This was another commercial business on the street and he did not see any diminution in property values by what he termed an improvement for the street.

Mr. Rheaume said he had some hesitancy, and he understood the concerns expressed by the abutters for the value of surrounding properties, but he agreed with Mr. Mulligan's comments that there were other gas stations and residential improvements in the neighborhood so he did not believe there would be a diminution of surrounding property values.

The motion passed by a vote of 7-0.

Mr. Mulligan recused himself for the following petition Mr. Johnson assumed a voting seat.

- 4) Case # 8-4
 - Petitioner: Jane A. Shannon Revocable Trust, Brian Shannon, Trustee
 - Property: 194 Wibird Street
 - Assessor Plan 148, Lot 1
 - Zoning District: General Residence A
 - Description: Create a new lot for the purpose of constructing a single-family residence.
 - 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 continuous street frontage of 57.52'± where 100' is the minimum required.

SPEAKING IN FAVOR OF THE PETITION

Attorney John Bosen appeared before the Board with the applicant, Mr. Brian Shannon, and Mr. Alex Ross, his engineer. Attorney Bosen provided copies of his narrative to the Board. He said there were three lots prior to a merger and then the property had been subdivided into two and restored to its pre-merger state since 1898.

Attorney Bosen reviewed the criteria and said the proposal would not be contrary to the public interest or contrary to the spirit and intent of the Ordinance. He said it was a non-conforming lot with less frontage, but the plans were for a modest house that would be consistent with surrounding homes. He said they were not asking for relief that would threaten the health, safety or welfare of surrounding properties. He said substantial justice would be done by granting the variance and the lot suffered from the same frontage conditions as surrounding properties. He said the values of surrounding properties would not be diminished by granting. He said the special condition of the property creating a hardship was that it was a lot of record for over 100 years that didn't meet current zoning and would require relief.

Mr. Alex Ross, engineer and surveyor said the City was re-working Wibird Street, installing catch basins and they would work with DPW to adequately take care of runoff. Chairman Witham asked if they would tie into the City's system. Mr. Ross said they already did, but the 4" line was not adequate. He said he anticipated that larger or more lines, additional catch basins and under drains would be added.

Mr. Rheume asked if they would do a site plan review. Ms. Walker said she was not sure because it was a single-family residence. Mr. Ross said they would not, but they would still work with DPW on drainage issues and improvements.

SPEAKING IN OPPOSITION TO THE PETITION

Ms. Leslie Stevens of 151 Park Street, Ms. Janet Grote of 168 Wibird Street, Ms. Mary Real of 555 Lincoln Street, Ms. Sage Clark of 582 Lincoln Avenue, Mr. Bill Townsend of 161 Wibird Street all expressed concern for excess water and flooding in the area, though many said they would have no objections if the water could be dealt with. They stated that they would like the Board to address drainage and suggested an independent review of the drainage system. Chairman Witham advised that the Board could add a stipulation to a positive motion but could not personally oversee engineering.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Bosen said they would address the water concerns through a multi-step process, first requesting a variance and then going before the Planning Board to address water issues.

Mr. Ross said the lot had been treated as low point drainage area and he was confident that they would be able to address the concerns of the abutters at the Planning Board meeting. Mr. Parrott

asked if they had done anything with test pits or an independent assessment of actual conditions. Mr. Ross said that they had surveyed and examined the site but there was no independent study.

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

DECISION OF THE BOARD

Chairman Witham noted that there were concerns about drainage raised by abutters of which the applicant was aware. While there was no definitive design plan in place, it appeared that was a step to be taken when presented to the Planning Board with overview of the Department of Public Works. Ms. Walker stated that she wanted to make it clear to the Board that, while it had been represented that drainage would be addressed if this went to the Planning Board for subdivision, it was within the Board's power to determine if this was enough of a concern to request an independent review to be done at this time. There was a discussion among Chairman Witham, Mr. LeMay, Mr. Rheume, Mr. Parrott and Ms. Walker about the best way to deal with the drainage issue and whether it was best for this Board to deal with it through an independent study or tie a positive motion to future review and action of the Planning Board through a stipulation.

*Mr. Rheume made a motion to **grant** the petition as presented and advertised with the following stipulations:*

- 1. That they submit their plan to the Planning Board for a subdivision and site review*
- 2. That any structure have a right side setback of 19' from the joint property line shown as Tax map 148, Lot 2 on the submitted plans.*

He stated that the reason for the second stipulation was the 9' width of the 0.15 acre lot plus the 10' setback (from the property line of Tax Map 14, Lot 1) just to keep the setback distance from the home by adding in that little lot. Mr. Durbin seconded the motion with the stipulations.

Mr. Rheume noted that the water and drainage issues presented by the neighbors were a concern and the stipulations would allow those to be properly addressed by another Board, which would present another opportunity for the neighbors to express their concerns. He stated that the current petition was for a large lot which would be subdivided into two smaller lots which did not meet the street frontage requirement, even with the addition of the small segment shown as Lot 3 on the plans. To allow additional distance and light and air, he had added a stipulation. He stated that granting the variance would not be contrary to the public interest as the general characteristics of the neighborhood would be maintained. About 50% of the lots had a smaller width than the proposed lot and there was a certain rhythm as you went along the street with regard to distances and separation. With the stipulation, he felt the water issues would be addressed and satisfy the public interest.

Mr. Rheume stated that the spirit of the Ordinance would be observed. While the relief was fairly substantial, the applicant was trying to add a little more width by incorporating a smaller lot so that the frontage could be as close to the Ordinance requirements as possible. In the substantial justice test, this was a lot of record and would allow the property owner to make full use of the lot, assuming that the drainage and other issues could be worked out with the Planning Board. He stated that there was no public interest that would outweigh the property owner's right to move forward and make full use of the property. He stated that the value of surrounding properties

would not be diminished by adding in a new home in rhythm with others on the street. The neighborhood feedback had been positive and the stipulation would help protect setbacks against structures encroaching too closely. The height of the proposed home was in keeping with others in the neighborhood.

In the unnecessary hardship test, Mr. Rheume stated that the special conditions included the fact that this was an existing lot of record that had a certain width and the general nature of all the remaining properties in the neighborhood. He stated that building a single-family home which met all the setbacks on the property was a reasonable use.

Mr. Durbin agreed with Mr. Rheume’s comments and added that he this had been an involuntarily merged lot that was not merged with rights according to State statute.

Chairman Witham called for a vote to grant the petition with two stipulations, the first being that the proposal would go before the Planning Board for site plan review with regard to the subdivision and their standard oversight, with an emphasis on site drainage and sourcing of the water both in regard to storm water and potential springfed. The second stipulation would be that there would be a right side yard setback of 19’ as outlined by Mr. Rheume. Mr. Rheume clarified that was along the length of the property for Tax Map #148, Lot 2, with the rear portion of the lot continuing to maintain the existing 10’ right side setback.

The motion passed by a vote of 6-1 with Vice-Chair Parrott opposing.

Mr. Mulligan returned to his seat and Chairman Witham announced that Mr. Rheume was recusing himself and Mr. Johnson would be voting in his place.

- 5) Case # 8-5
 - Petitioner: Andrew S. Martin
 - Property: 230 McDonough Street
 - Assessor Plan 144, Lot 37
 - Zoning District: General Residence C
 - Description: Add a right-side dormer within existing footprint.
 - 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 to be added to or enlarged without conforming to the requirements of the Ordinance.
 2. A Variance from Section 10.521 to allow a 5’± right side yard setback where 10’ is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Andrew Martin said his attic space was the only dry storage in his home and a too small opening created a hardship in gaining access. He said he would like to install a standard size door, which would require raising the roof by 40”.

Mr. Martin said there would be about ten more clapboards on the west side of the house and he spoke with his neighbor on that side who said she would have no problem with the proposal, and he didn't think there would be any diminution of property values or would cause any harm to the public.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

*Vice-Chair Parrott made a motion to **grant** the petition as presented and advertised which was seconded by Mr. LeMay.*

Vice-Chair Parrott reviewed the criteria, noting that granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance that encouraged people to improve their homes. He said substantial justice would be done by making the house more useful for the owner and subsequent owners. He said the values of surrounding properties would not be diminished because it was a small addition that would have a positive affect on the property values. He said the special condition that distinguished the property from others was that it was a congested house with an attic that was difficult to access and this proposal would make the home more useful.

Mr. LeMay added that it was a small increase to the property.

*The motion **passed** by a vote of 7-0.*

- 6) Case # 8-6
 - Petitioner: Thea Murphy
 - Property: 67 Mark Street
 - Assessor Plan 116, Lot 51
 - Zoning District: Mixed Residential Office
 - Description: Replace front porch and bulkhead with covered portico and storage locker.
 - 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 to be extended, reconstructed, enlarged or structurally altered without conforming to the requirements of the Ordinance.
 2. Variances from Section 10.521 to allow the following:
 - a) A front yard setback of 2'± where 5' is required;
 - b) A left side yard setback of 0.44'± where 10' is required; and
 - c) Building coverage of 42.2%± where 40% is the maximum allowed.

DECISION OF THE BOARD

*Vice-Chair Parrott moved to **postpone** the hearing to the September meeting at the applicant's request and Mr. Rheume seconded the motion.*

*The motion to **postpone** the hearing passed unanimously by a voice vote.*

Mr. Mulligan recused himself from the following petition. Mr. Johnson assuming a voting seat.

7) Case # 8-7

Petitioners: Paul E. Berton Living Trust, Paul Berton, Trustee, and Jane A. Ewell Living Trust

Property: 482 Broad Street

Assessor Plan 221, Lot 63

Zoning District: General Residence A

Description: Construct four free-standing dwelling units with an 18'± wide driveway.

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

1. A Variance from Section 10.513 to allow four free-standing dwellings on a lot where no more than one free-standing dwelling is allowed.
2. A Variance from Section 10.1114.20 to allow an 18'± maneuvering aisle where a 24' maneuvering aisle is required.

SPEAKING IN FAVOR OF THE PETITION

Mr. Paul Berton appeared before the Board and said they were requesting a variance for four units on a large lot.

Mr. Mike Sievert with MJS Engineering said they were proposing to remove the single family home and construct four new single family homes. He outlined the placement, elevations and appearance of the units and said all the setback requirements were met. They had met with someone in the Planning Department and were told they would need a second variance for the driveway width so he submitted an addendum with the criteria.

Mr. Sievert said the table of uses allowed multi-family units, in the district and the proposal would meet the intention of the district for single family. He said the proposal would maintain the character of the neighborhood and surrounding property values would not be diminished with detached units, which would produce greater value and allow greater privacy. He said the unique size and narrowness of the property was a special condition that distinguished it from other properties in the neighborhood and denying the request would cause hardship on the applicant. Substantial justice would be done by granting the variance as construction of the detached units would not have any greater impact than combined dwelling units

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Bernie Pelech appeared before the Board on behalf of abutters Mr. and Mrs. Carmichael and Mr. and Mrs. Underhill. Attorney Pelech and read their letter into the record and submitted copies to Board.

Attorney Pelech said it was an ambitious proposal, but the Ordinance required that there be no more than one single-family dwelling per lot. He said there was no hardship because other properties were also long and narrow and the applicant could have a 4-unit multi-family dwelling without a variance. He said the spirit and intent of the Ordinance would be violated because the Ordinance existed to prevent an over intensification and there would be a diminution of surrounding property values.

Mr. Peter Weeks of Weeks Real Estate, speaking on behalf of two abutters on Broad Street said the Board had to find the application met all the criteria and he did not believe it met any. Mr. Weeks said the proposal would diminish the value of surrounding properties and asked members of the public who were opposed to stand up.

Mr. Henry Mellynchuck of 458 Street, Mr. William Ehler of 153 Pinehurst Road, Ms. Michelle Richard of 479 Board Street, Ms. Nancy Andrews of 61 Sagamore Avenue, Ms. Linda Barnaby, an abutter to the property, Mr. Dana Skippington of Broad Street, and Mr. Dan Wyand of 65 Pinehurst Road all said they were concerned for the effect the proposal would have on their property values in a neighborhood of one home per lot. There wasn't adequate room for snow storage and they felt there would be water runoff. They maintained that a 24' maneuvering aisle was needed for safety reasons

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Sievert clarified that four dwelling units were allowed in one principal building and they were proposing separate buildings. He said they would reduce the amount of impervious surfaces and use landscaping buffers to improve drainage. He stated that an 18' wide maneuvering aisle was adequate for fire truck access

Mr. Berton outlined a meeting he had with someone in the Planning Department where Ms. Walker was not present. He felt it had been suggested that the units be detached, which was why they went in that direction. He felt that some of the objections were from people who were opposed to a property that mainly met all of today's standards in a neighborhood where few did.

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

DECISION OF THE BOARD

Chairman Witham said the Board was not privy to discussions in the Planning Department and Ms. Walker said she wasn't familiar with the discussions either so that couldn't factor into their decision.

Chairman Witham said the Board was often reluctant to allow two dwelling units on a lot, let alone four. He said there were patterns, but multi units on the same lot were not common in the City with the exception of the project on Marston Street near Hannaford's so he couldn't support the proposal.

*Mr. LeMay made a motion to **deny** the petition as presented and advertised and Mr. Rheaume seconded the motion.*

Mr. LeMay said the proposal had the appearance of a mini subdivision.. He said individual units would be worth more, but the look was not consistent and could diminish surrounding property values and would be contrary to the public interest. He added that there was no hardship.

Mr. Rheume echoed Mr. LeMay’s remarks and said the application fell down on the hardship criteria because the lot was far from unique. He said four separate units in a town house arrangement was a business incentive, but it was four times what was allowed and there was nothing in the neighborhood like it. He said the driveway also did not meet the spirit of the Ordinance because it was too small for fire apparatus to access the back units.

Mr. Moretti stated that he hoped the applicant had not been misled and could come forward with a proposal that would be in the character of the neighborhood.

*The motion to **deny** the petition **passed** by a vote of 7-0.*

V. OTHER BUSINESS

No other business was presented.

VI. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 11:40 p.m.

Respectfully submitted,

Jane K. Kendall
Acting Secretary