

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
EILEEN DONDERO FOLEY COUNCIL CHAMBERS
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE
PORTSMOUTH, NEW HAMPSHIRE**

7:00 P.M.

**November 17, 2015
And to be Reconvened
On November 24, 2015**

MEMBERS PRESENT: Chairman David Witham, Vice-Chairman Arthur Parrott, David Rheume, Charles LeMay, Patrick Moretti, Jeremiah Johnson

MEMBERS EXCUSED: Derek Durbin

ALSO PRESENT: Planning Department: Juliet Walker

Mr. Durbin was excused, and Mr. Johnson assumed a voting seat for the meeting.

I. APPROVAL OF MINUTES

A) October 20, 2015

*The October 20, 2015 minutes were **approved** with one minor correction by unanimous vote.*

II. OLD BUSINESS

A) Request for Rehearing for property located at Deer Street, Russell Street & Maplewood Avenue.

Mr. Mulligan recused himself from the petition.

Chairman Witham stated that the Board had a thick packet presented to them from the appellants' attorney, and it boiled down to whether or not the Board erred in their judgment or new information was presented. He felt that there was no new information submitted and said the Board had put in countless hours on the petition and heard everything. Mr. Johnson said he was confused about the 12 major points because six of them referred to previous HDC hearings, while other items were referred to as a *de novo* hearing, so he wondered how the appellant could go back and forth.

Chairman Witham said he thought the appellant wanted to have it both ways by asking the Board not to consider what the Historic District Commission (HDC) did, yet constantly referring to it. He believed the Board had given the case due diligence. He denied the claim that the Board said the Master Plan was irrelevant. He could not support the appeal because he felt the Board's decision was well-rounded. Mr. LeMay agreed, noting that sometimes people did not like what the Board decided, but the Board had a thorough record on that application and he had seen nothing new.

Vice-Chair Parrott said he thought anyone who made a fair assessment of what the Board did would agree that the hearing was thorough. With respect to the quality of the discussion, he said that, given the amount of publicity the issue generated before going before the Board, there wasn't a lot that was new. The package the Board received was complete, and they spent plenty of time studying it. Vice-Chair Parrott also noted the appellants' statements of saying the Board erred were erroneous because the Board's decisions were judgment calls based on their criteria. He felt that the appeal was without merit. Mr. Moretti agreed, saying he came to the meetings to judge what was presented and never with a prerequisite to vote for or against.

Chairman Witham said that the appellants' claim of the decision on Point #10 being drafted by the Planning Department and almost echoing the HDC's decision was a fallacy and an error on the appellant's part. Regarding the claim about Point #11 saying that the Board erred by imposing a 45-minute presentation limitation, he said the Board had the power to impose guidelines and to design a format so that appeals had a 3-hour minimum and reasonable limitations.

DECISION OF THE BOARD

*Mr. LeMay made a motion to **deny** the Request for Rehearing. Mr. Johnson seconded the motion.*

Mr. LeMay stated that the Board had discussed the situation well enough at that point.

*The motion to deny **passed** with all in favor, 7-0.*

B) Request for Rehearing for property located at 482 Broad Street.

Mr. Mulligan recused himself from the petition.

Mr. Rheume stated that the appeal related to the size of the buildings and the surrounding neighborhood and that the Board had discussed it in length and had decided that the appellant's project was larger than the other large neighboring buildings and didn't meet all the criteria. Mr. Johnson said the new information didn't present anything he already wasn't aware of. Mr. LeMay said he went through the neighborhood and thoroughly reviewed the packet, which convinced him that the Board was right in their decision. Relating to the appellant's 24-ft wide driveway, the Board had said that a variance could be requested for the width of the driveway.

DECISION OF THE BOARD

*Mr. Rheume made a motion to **deny** the Request for Rehearing, and Vice-Chair Parrott seconded the motion.*

Mr. Rheume said the information the appellant provided was nothing that the Board didn't consider when they made their decision. He thought the appellant had many positive aspects but failed to meet the criteria, and he saw nothing new that would change the original vote. Vice-Chair Parrott stated that after his walk through the neighborhood, he was convinced that the Board made the right decision. Mr. Moretti said he would support the motion because there was no new information that would overturn the Board's decision.

*The motion to deny **passed** with all in favor, 6-0.*

III. OLD BUSINESS – PUBLIC HEARINGS

3) Case #10-3

Petitioner: Wayne Semprini

Property: 1 Fairview Drive

Assessor Plan 219, Lot 26

Zoning District: Single Residence B

Description: Subdivide single lot into two lots.

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 Lot 1 to have 79.97± s.f. of continuous street frontage where 100' is required.
2. A Variance from Section 10.521 to allow Lot 2 to have 14,052± s.f. of lot area where 15,000 s.f. of lot area is required.

Mr. Mulligan resumed his voting seat and Mr. Johnson recused himself from the petition.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech was present on behalf of Bluebird Holdings and the owner Mr. Wayne Semprini. He reviewed the petition and noted that it had been reviewed by the Technical Advisory Committee (TAC), who recommended approval. He said the City asked the applicant to give them the 20-ft easement to install sewer and drain lines, and in return they would allow a storm water runoff into the drainage pipe. Mr. Pelech discussed bringing the driveway on Fairview Drive instead of Woodbury Avenue and pointed out that the applicant's lots were much bigger than the adjacent ones. Attorney Pelech went through the criteria and explained how they were met.

In answer to Mr. Mulligan's questions, Attorney Pelech confirmed that one lot had 57 feet of frontage on Fairview Drive and the other had less than 80 feet, and that no access was proposed to Woodbury Avenue. Mr. Mulligan noted that the house across the street was close to the road and would be impacted by the proposed driveway on Lot #2. Attorney Pelech said he assumed that the location would not interfere with the house's driveway. Mr. Mulligan asked if there was information on the pool and playground, and Attorney Pelech said he recalled from his youth that the pool was in the same location. Mr. Mulligan asked if there was an intention to reserve property within the subdivision for a playground and pool. Attorney Pelech replied that he didn't know if the playground ever existed but knew that the pool was never public.

Mr. Rheume said he had a concern with the frontage on Woodbury Avenue and the address on Fairview Drive because the intent of the Ordinance was to allow any street to meet the frontage requirement, and he thought it would be the property's address. Ms. Walker explained that the Planning Department did not define frontage as the side of the property that would be in the address, but they did in the Ordinance. They further discussed it.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Fred Lewis of 1238 Maplewood Avenue stated that his backyard abutted the property and he was concerned about whether the structure would fit into the neighborhood. He was especially concerned about the location of the spring-fed pool because construction material had been thrown in as fill, and he wondered what would happen when the foundation was built over the pool. He asked the Board to stipulate a hydraulic study for the pool.

Ms. Kelly Twohig of 999 Woodbury Avenue stated that she was against the subdivision because it would alter the characteristics of the neighborhood. She said several people were concerned about the sharp corner, and she had heard that the pool and playground were set aside as green space for the subdivision and also didn't see the necessity of dividing the lot and building two large homes.

Ms. Emily Lahut of 4 Fairview Drives said she was concerned about the bend in the road and adding a driveway in that location.

Ms. Susan Lewis of 1238 Maplewood Avenue said she was against the petition because of the thicket on the property that was home to the New England Cottontail. She asked that the applicant contact NH Fish and Game to relocate the rabbits if the subdivision was approved.

Mr. Steven Entenmann of 14 Fairview Drive said he was concerned about the curve because it was especially dangerous when people parked on the road. He thought the additional driveway and houses would cause more people to park on the narrow road.

Ms. Gina Patch of 16 Fairview Drive said she was concerned about the traffic and the overflow parking on Fairview Drive from an apartment building on Maplewood Avenue. She thought another driveway would cause more problems.

SPEAKING TO, FOR OR AGAINST THE PETITION

Ms. Zoe Lambert of 8 Fairview Drive said she objected to the application and felt that the hardship criteria should not be considered because the property had been owned a long time. She was concerned about the dangerous corner and also concerned about cut trees as well as two large homes that might reduce the value of other homes in the neighborhood.

Attorney Pelech told the Board that there was no proposed tree cutting. He didn't think the driveway would be more unsafe than the existing driveways and said that parking was an enforcement issue. He said that the owner did not propose to demolish the cottage. He doubted that green space was dedicated back in 1942 because the property was sold to someone who built a house on it. The pool could be drained off into the City's drainage system. He thought there was a hardship because an individual had the right to subdivide his property consistent with other lots in the neighborhood. He stated that the five criteria were met, the requested relief was minimal, and all the concerns would be dealt with.

Mr. Rheume asked Attorney Pelech to elaborate on the frontage, and Attorney Pelech replied that the size and shape of the lot were a special condition that rendered the lot unique, noting that the lot was three times bigger than the other lots, so it had special conditions and was unique because it had frontage on two streets. Putting the driveway on Woodbury Avenue would not be any safer than putting it on Fairview Drive, so there was no fair and substantial relationship between the purpose of the Ordinance as it related to the two lots.

Mr. Rheume further discussed the argument that the structure on Lot 1 was built after the subdivision, even though the report indicated that it was built in 1930. Ms. Walker said it was assessor information and thought the lot could have been moved from another location. Attorney Pelech said it wasn't shown on the 1942 plan. Mr. LeMay asked whether the structure on Lot 1 would remain. The lot would be subdivided and a house would be added on Lot 2.

The abutters Mr. Steven Entenmann of 14 Fairview Drive, Mr. Fred Lewis of 1238 Maplewood Avenue, Ms. Kelly Twohig of 999 Woodbury Avenue, Ms. Susan Lewis of 1238 Maplewood Avenue, and Ms. Zoe Lambert of 8 Fairview Drive reiterated their concerns.

Mr. Kevin Drohan, owner of Bluebird Holdings, said he was also an abutter and wanted to invest in his neighborhood so that a developer couldn't do any clear cutting or devalue his home. Regarding the cottage, he said that some of the original plans involved using the footprint as garage space and that it wasn't set in stone, but he knew the plan was not to knock down the existing structure.

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

DECISION OF THE BOARD

Chairman Witham said he was familiar with the area and understood the concerns of the abutters. He didn't think the driveway would make the street one of the most dangerous areas in town. He believed that the requests were minimal, and he pointed out that some of the other homes didn't meet the 30-ft setbacks, which made their driveways shorter and their garages closer, and he thought that might cause the blind spots. The proposed house would have to follow the setbacks and there would be long driveways that could handle cars. He said it was difficult to ask the Board to control the design of the house, noting that every house on the street had significant additions controlled by setbacks. There would be a good faith effort to save the trees. He said it boiled down to adding another driveway onto Fairview Drive, but he thought the street could handle it.

Mr. LeMay said they had to consider the Board's responsibility, which was the compliance of the lot sizes, and he thought the requested relief was small. The issues were not extreme and would be discussed at the site plan review. Ms. Walker agreed, saying that there had already been a meeting with TAC but thought the Board could reiterate the issues in a stipulation or a comment because it would weigh in on the Planning Board's deliberations.

After some discussion, Mr. Rheume said he thought the frontage on Fairview Drive was small but agreed that the relief requested was minimal. He thought the applicant would follow through with building a modest structure. He also thought the issues of the abutters, like the hydraulic study, should be forwarded to the Planning Board. Ms. Walker noted that the application would only go to the Planning Board for subdivision.

*Mr. Rheume made a motion to **grant** the variances as presented and advertised, and Mr. LeMay seconded the motion.*

Mr. Rheume stated the key factor was that the request was minimal enough that the Board could grant it based on what they were responsible for. Granting the variance would not be contrary to the public interest due to the specific aspects of the street frontage and total square footage and the fact that the overall lot was much larger than surrounding ones. One of the two lots fully met the Board's requirements, and the other lot fell short but not by such an amount that it was against the general characteristics of the neighborhood. Granting the variance would observe the spirit of the Ordinance because there would be sufficient frontage to align homes and driveways appropriately. The lot was off by 20% and was within what the Board would consider. It was even less for the second lot in square footage and much larger than most of the other lots in the neighborhood. Granting the variance would do substantial justice because it was a weighing test between the owner's rights versus the rights of the surrounding neighbors, and he believed it tipped toward the owner to make full use of his property. As presented to the Board, the existing cottage would remain intact and a single family home would be built with the size dictated by the neighborhood, and it would not diminish the value of surrounding properties and would be in keeping with the neighborhood. The most important special condition was the large size of the lot and the fact that it was originally planned as a common space because of the pool, but at some point it changed to private ownership and the pool was filled in, leaving the property as a large buildable lot. The

property couldn't be used in strict conformance with the Ordinance, so it was necessary to get the variance, and with such a large lot, it was reasonable.

Mr. LeMay said he concurred with Mr. Rheaume, adding that the lot complied with the vast majority of restrictions put upon it from a zoning standpoint. He thought the small amount of relief provided resulted in a just decision. Chairman Witham said that the Board always listened to abutters and put a lot of weight in what they said, but the Ordinance was specific on how big the size of the house could be. He thought the traffic would increase by perhaps 7-8%.

The motion passed with all in favor, 6-0.

IV. NEW BUSINESS – PUBLIC HEARINGS

- 1) Case # 11-1
Petitioners: Aaron K. & Stephanie A. Caswell
Property: 65 Mendum Avenue
Assessor Plan 148, Lot 11
Zoning District: General Residence A
Description: Appeal.
Requests: Appeal by the owners of an abutting property of the action taken by the Portsmouth City Council to restore involuntarily merged lots for this property under RSA 674:39.

Mr. Johnson resumed his voting seat and Mr. Mulligan recused himself from the petition.

SPEAKING IN FAVOR OF THE PETITION

Attorney Charles Griffin representing the applicants introduced the group of direct abutters who were present, stating that they would be impacted by the appeal against granting the request to restore involuntarily merged lots. Attorney Griffin went through all his exhibits with the Board, reviewing all the deeds from various years and emphasized his points for appealing the petition.

Mr. Rheaume noted the 1958 deed and subsequent ones that had a separate description of two small parcels, and he asked Attorney Griffin if he thought they were involuntarily merged. Attorney Griffin replied that they might have been.

Ms. Stephanie Cassel stated that she was a direct abutter and thought it would help to know how all the previous owners of 65 Mendum Avenue had regarded the property as a single lot, so she read a letter from the 1913 owner that described the apple orchard.

Ms. Diane Schaefer of 620 Lincoln Avenue said she had been a direct abutter for 24 years and shared the back lot. She referred to two deeds in 1913 for Lots 33 and 34.

Mr. Michael Chubrich stated that he had owned his property for five years and considered it as one lot and found it hard to believe that there could be two lots.

Ms. Mimi Clark stated that she purchased her home at 65 Mendum Avenue in 1981 as one lot and then sold it later as one lot. A elderly neighbor told her that it had always been one lot.

Mr. Steve Sanger of 52 Mendum Avenue stated that he and his wife were in support of the appeal and that one of the owners, Mrs. Russell, discussed plans for a garage with them and never mentioned anything other than one lot.

Mr. Bill Lyons of 62 Mendum Avenue stated that street parking was a problem because the houses had small driveways. He noted that there were no sidewalks and children had to walk in the street.

Mr. Aaron Caswell of 83 Mendum Avenue felt that the unmerging was unlawful. He said the goal was to find out whether 65 Mendum Avenue was voluntarily or involuntarily merged by a single owner, and if so, then all subsequent owners would be stopped from requesting that it be unmerged.

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Bernie Pelech stated that he was present on behalf of Mr. and Mrs. Russell and wanted to clear up the statement made by Attorney Griffin about the City Council not having known about the deeds and the perimeter description. He referenced the memo to Mr. Bohenko that said the deeds from 1958, 1976, 1981 and 2012 described three separate parcels. The City Council had the memo and knew that the deeds from those years described Lots 43 and 44 with a perimeter description. He said that it was not a popularity contest, and the Supreme Court had said that describing the parcels as one track was not a voluntary merger. He referenced the Roberts vs. the Town of Windham case. He also referred to the apple orchard, discussing whether an overt act had taken place or not. He knew of no other allegations of overt acts and thought the only thing cited by the appellants was the 1958, 1976, 1982 and 2012 deeds describing the lots as one. He also noted that building the house so that it faced a vacant lot was not an overt act to merge the two lots. He said that the City Council got it right when they voted to unmerge the lots, and he pointed out that Mr. Taintor could find no evidence of voluntary merger and that the deeds after 1958 described the parcels as one tract of land. Attorney Pelech concluded that nothing had been done that made the use of a lot with the house on it dependent on the vacant lot.

Mr. LeMay asked Attorney Pelech when he believed the lots were involuntarily merged, and Attorney Pelech replied that it was when the City starting showing them as one lot on the tax map in the 1960s. Mr. LeMay asked for an example of an overt action from the owner. Attorney Pelech stated that the cottage Mr. Roberts built in Windham across the boundary line on one lot, and on the two lots in question, he built the garage two inches from the boundary line between the two lots, and the garage faced the lot in the driveway. On the vacant lot, he had a woodshed, a privy, a doghouse, and another multiuse building, which the Supreme Court thought was an overt act.

In answer to Mr. Rheume's question, Attorney Pelech stated that his client did not indicate what his intent would be if the lots remained unmerged. He noted that the City Council unmerged all four lots and the Russells merged a small lot with a big front lot and the other small lot with a big front lot, resulting in two lots. Mr. Rheume discussed how the second lots would face the burden of coming before the Board for variances to build a house and how the property currently fell short on street frontage and total lot area.

SPEAKING TO, FOR OR AGAINST THE PETITION

Attorney Griffin read the Statute's definition of an overt act and then referenced the 1913 letter and the information from the Clarks and others who regarded the parcel as their front yard, saying it was an action consistent with abandoning a lot line. The memo from Mr. Painter said the lots were merged between 1958 and 1976, so the 1958 deed clearly predated any action taken by the City. Mr. Taintor pointed out in his memo to the City Council that if the lots had been involuntary merged by the City for assessment purposes, it would have been an involuntary merger, but they knew there

was a voluntary merger by the 1958 deed, and the way the various owners treated the property indicated that it was an abandonment of a property line. Attorney Griffin said the Supreme Court decision addressed the fact that one needed to look at the property's characteristics and how it was treated from 1913 on, and it was clear that the owners regarded it as one lot.

No one else rose to speak, and the public hearing was closed.

DECISION OF THE BOARD

Chairman Witham said that it boiled down to the 1958 deed, which clearly described Lots 43 and 44 as one lot and then the two smaller lots, noting that if it was involuntarily merged, all four lots would have been mentioned. He said the City didn't write the 1958 deed, so there was no action from the municipality to involuntarily merge the two lots, and he strongly felt that they were voluntarily merged. He could agree to unmerge the three lots, the two smaller ones out back with the larger one out front, but it seemed clear that Lots 43 and 44 were voluntarily merged and there was no action by the City to merge those lots.

Mr. Rheaume said the timing was the key point. Had the deed showed up later on referencing the two properties being merged, he'd say that Attorney Pelech's argument held more weight, but it seemed something was done as an act by the owners to recognize it as one property. He didn't fully buy into some of the other arguments, like the positioning of the house, because many Portsmouth houses had that odd orientation. He thought the 1913 letter was interesting but didn't lend much information. He believed that the 1958 deed was the crux of it, and the fact that it was done before the involuntary merging of the property was a key factor.

Mr. LeMay said he agreed with everything the Board said but thought the house orientation was significant, saying that one didn't build a house on two lots, thinking they might sell one lot later, nor aim the house at the side of the house next door, which to him constituted an overt action. He agreed that the most dramatic overt action was the deed because of the fact that it happened before any municipal pressure to go through the effort, when it clearly would have been easier just to describe all four lots. Despite the testimony of the owners in between, Mr. LeMay said he didn't think it was of much consequence because they did no overt acts. LeMay said that the 1958 deed was the silver bullet.

*Mr. Lemay made a motion to **grant** the appeal, and Vice-Chair Parrott seconded the motion.*

Mr. LeMay stated that he would incorporate his prior comments. The 1958 deed results from a voluntary merging since there was no municipal pressure to acquiesce to prior to that time, so there was no other reason that they would have written it the way they did.

Vice-Chair Parrott concurred with Mr. LeMay, saying it was significant that the property had changed hands several times. Title and insurance companies and attorneys had looked at descriptions and found that it was one lot, which he thought was significant. He also agreed that the house orientation was significant because, given the size of the small lot, to put a house sideways to have a view of someone's house in the front yard didn't make sense.

Mr. Rheaume said that he would support the decision but believed it was important to clarify that the City Council would be within their rights to break the lots into three lots, but to break it into four pieces was unacceptable based on the Board's interpretation. He asked the maker of the motion Mr. LeMay whether he agreed, and Mr. LeMay said that he did.

*The motion **passed** with all in favor, 6-0.*

2) Case # 11-2

Petitioners: Justin P. & Melissa L. Perry

Property: 243 Wibird Street

Assessor Plan 133, Lot 32

Zoning District: General Residence A

Description: Replace an open deck with 11'± x 14'± enclosed porch.

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

1. A Variance from Section 10.321 to allow a lawful nonconforming building or structure to be reconstructed and enlarged except in conformance with the Ordinance.
2. A Variance from Section 10.521 to allow 28.4%± building coverage where 25% is the maximum allowed.

Mr. Mulligan resumed his seat.

SPEAKING IN FAVOR OF THE PETITION

The owner Mr. Justin Perry was present and described his petition. Chairman Witham said it looked like a 1-1/2% increase over what existed and that the other requirements would be met. He asked Mr. Perry to explain the reasons why the variance should be granted, which Mr. Perry did, noting that the project would be behind a privacy fence and almost invisible.

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

No one rose to speak, so the public hearing was closed.

DECISION OF THE BOARD

*Mr. Mulligan made a motion to **grant** the variances as presented and advertised, and Mr. Moretti seconded the motion.*

Mr. Mulligan stated that granting the variances would not be contrary to the public interest or the spirit of the Ordinance because what was proposed was a replacement of an open porch with a slightly larger enclosed 4-season porch but in the same location. It would not change the essential characteristics of the neighborhood nor threaten the public's health, safety, or welfare, and would do substantial justice because the loss to the applicant if the relief was denied would outweigh any benefit to the public by holding the line on the lot coverage requirement. Granting the variance would not diminish the value of surrounding properties because the improvements wouldn't be visible to the public and most likely not detract from surrounding property values. Literal enforcement would result in unnecessary hardship due to the special conditions of the property. It was a corner lot and already slightly exceeded the lot coverage requirement, the purpose of which was to prevent substantial overcrowding of the lots, and he believed that was unlikely. There was no fair and substantial relationship between the purpose of the Ordinance and the lot coverage.

Mr. Moretti agreed with Mr. Mulligan, adding that the applicant said that he would decrease the overall impervious surface, which would be excellent for the property. He assumed that the height of the porch would be similar to the existing gazebo.

*The motion **passed** with all in favor, 7-0.*

3) Case # 11-3

Petitioner: Douglas F. Fabbriatore

Property: 536 Marcy Street

Assessor Plan 101, Lot 56

Zoning District: General Residence B

Description: Construct second story addition.

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

1. A Variance from Section 10.321 to allow a lawful nonconforming building or structure to be extended, enlarged or structurally altered except in conformance with the Ordinance.
2. A Variance from Section 10.521 to allow a 0'± left side yard setback where 10' is required.

DECISION OF THE BOARD

Chairman Witham stated that the applicant requested that the petition be postponed.

*Vice-Chair Parrott made a motion to **postpone** the petition, and Mr. LeMay seconded it.*

*The motion **passed** with all in favor, 7-0.*

4) Case # 11-4

Petitioner: Deborah E. Zimmerman

Property: 50 Sewall Road

Assessor Plan 166, Lot 27

Zoning District: Single Residence B

Description: Construct a 12'± x 20'± addition.

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

1. A Variance from Section 10.321 to allow a lawful nonconforming building or structure to be extended or enlarged except in conformance with the Ordinance.
2. A Variance from Section 10.521 to allow an 8'± right side yard setback where 10' is required.

SPEAKING IN FAVOR OF THE PETITION

The owners Mr. Mark Dube and his wife Ms. Deborah Zimmerman were present to speak to the petition. Mr. Dube stated that they were requesting a variance for a modest addition. They had found a style that would match nearby residences and also had a property survey done. He said the project would not impact their neighbors' quality of light and air. They were also planning to add a 6-ft fence and shrubbery. Mr. Dube went through the criteria, saying the project met all of them.

Chairman Witham asked Mr. Dube to confirm that the triangle was 27'' on one side and 28'' on the other. Mr. Dube agreed, noting that it was less than three square feet in total.

Minutes Approved 12-15-15

**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 variances as presented and advertised, and Mr. Rheaume seconded the motion.*

Vice-Chair Parrott said that what was striking about the proposal was the small size and odd shape of the property. He stated that granting the variances would not be contrary to the public interest because it was in their interest and, combined with the spirit of the Ordinance, there was no advantage to anyone else by denying it. It would do substantial justice because it was a balancing test, and he couldn't see any public interest in it. There was nothing to outweigh the advantage to the owners of having an addition. Granting the variances would not diminish the values of surrounding properties but would most likely improve them. The special conditions consisted of the unusual triangular shape. The house was situated as well as it could be, and the owners had few options for orienting an addition.

Mr. Rheaume concurred with Vice-Chair Parrott, adding that normally the Board's concern with setback variances was the neighbors' light and air, but he felt it was a very small intrusion and should be approved.

*The motion **passed** with all in favor, 7-0.*

- 5) Case # 11-5
 Petitioners: Lewis Family Rev. Trust of 2013, Stephen M. & Randy B. Lewis, Trustees
 Property: 360 Wibird Street
 Assessor Plan 132, Lot 7
 Zoning District: General Residence A
 Description: Construct a 12'± x 28'± garage.
 Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:
1. A Variance from Section 10.573.20 to allow an 8'± left side yard setback where 10' is required.
 2. A Variance from Section 10.521 to allow 30.36%± building coverage where 25% is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

The owner Mr. Steve Lewis stated that he wanted to build a single car garage that would be compliant with others in the neighborhood. He went through the criteria and said they were met.

In response to Mr. Rheaume's questions, Mr. Lewis said he would not be replacing an existing structure, the 28-ft garage would be a single-car garage with storage, and the reason he had to be 8 feet off the property line was because there wasn't enough space between the deck and the garage and he would have no place to put snow in the winter.

SPEAKING IN OPPOSITION TO THE PETITION OR

Minutes Approved 12-15-15

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 variances as presented and advertised, and Mr. Johnson seconded the motion.*

Mr. Mulligan noted that the applicant was proposing to site a modest garage in the rear of his property. The setback relief was not enormous at 8 feet where 10 feet was required, and it was important to save some usable space in the backyard. He said that the lot coverage was more extreme but not out of character with the neighborhood.

Mr. Mulligan said that granting the variance would not be contrary to the public interest or to the spirit of the Ordinance because putting a garage where the applicant was proposing to would not alter the essential characteristics of the neighborhood nor threaten its health, safety and welfare. It would result in substantial justice because the loss to the applicant if denied, preventing the construction of the garage, would outweigh the corresponding gain to the public by maintaining the lot coverage and setback requirements. Granting the variance would not diminish the value of surrounding properties because the addition of a modest garage in the backyard would not change the essential characteristics of the neighborhood nor have an effect on surrounding property values. Literal enforcement of the Ordinance would result in an unnecessary hardship because there was a preexisting nonconforming lot already with setback violations. Those were special conditions and there was no fair and substantial relationship purpose of the setback variance to prevent overcrowding and over-intensification of the use to the lot. It was a modest relief and granting it was necessary for the reasonable use of the property.

Mr. Johnson concurred with Mr. Mulligan, saying that two feet of relief on a setback was minor. He thought it could be moved over an additional two feet, but he didn't have a problem with it because no abutters were against it and the garage was sited behind the house. Mr. Rheume said he agreed with Mr. Johnson and noted that the Board had a letter of support from an abutter.

*The motion **passed** with all in favor, 7-0.*

6) Case # 11-6

Petitioners: Frank W. Jr. & Ingrid C. Getman

Property: 606 Union Street

Assessor Plan 132, Lot 20-1A

Zoning District: General Residence A

Description: Construct single family home.

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

1. A Variance from Section 10.513 to allow a second free-standing dwelling unit on a lot where only one free-standing dwelling unit is allowed.

SPEAKING IN FAVOR OF THE PETITION

The owners Mr. Frank Getman and Ms. Ingrid Getman and Attorney Peter Loughlin were present to speak to the petition. Mr. Getman stated that his house was originally a carriage house to the larger mansion next to it, which now housed condominiums. The house was too small for his family and

was on a lot big enough to support modification without variance relief, but doing so would destroy the uniqueness of the carriage house. There was enough space to build a second structure, and he had the support of the neighbors.

Attorney Loughlin stated that the variance request related to the lot's history. When the existing structure was built, it didn't have to be related to the street because it was a carriage house, so it was set way back in the lot as an accessory to the mansion. He felt that the lot lent itself to allowing another home to be built and not affect the neighborhood.

Mr. Rheaume noted that the Board previously had a similar request that they denied, and he asked Attorney Loughlin to provide detail that would make the Board feel more comfortable. Attorney Loughlin replied that the lot was narrow and the proposed structure would fit in and would be a single family home with the same setbacks as the neighboring homes. It was the largest lot in the block with a single family home and was 836 feet short of having three buildings on the property.

Chairman Witham said it was a tough request but thought Attorney Loughlin wrote a convincing argument. Because the existing house was out back and the applicant wanted permission to build one in the front, he felt that he could support it but was still on the fence. He respected that Mr. Getman wanted to save the small carriage house, but he also noted that Mr. Getman bought the house knowing that it was small. Mr. Getman replied that their neighbors were in favor because the existing house was in an odd location and they felt that the neighborhood would be improved because the house would be more consistent with other homes. He said the direct abutter was pleased to learn that there wouldn't be an addition to the carriage house itself.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Todd Deluca, President and resident of the Victorian Estate Condominium Association, stated that he received notification of the application only a few days before the hearing and had just enough time to do basic research. He also noted that Mr. Getman had not spoken to him or other members of the condo association. He said that the spirit of the Ordinance called for only one dwelling on the lot and that he was requesting that the Board follow the Ordinance. He said the applicant knew the size when he bought the house, so there was no hardship, and he thought a new building on the lot would reduce the carriage house's historic value.

Chairman Witham asked Mr. Deluca whether he was opposed in general or because he didn't know what the proposed structure would be. Mr. Deluca said the structure would be kitty-corner and have a back dwelling, and the applicant had mentioned that they wanted bathroom connections, so he didn't know where it would end.

Mr. Michael Coppola stated that he lived in the mansion and had received the notice that day. He was concerned that adding a building would destroy the uniqueness of the mansion's property. He agreed with Mr. Deluca that the applicant bought the house knowing its size, and he also wondered whether someone would have to buy two homes if the property was sold.

SPEAKING TO, FOR OR AGAINST THE PETITION

Attorney Loughlin said that he had no control over the notices but knew that there could be two dwellings on a property as a right and that the proposed home could have a connector if the owner wished. He didn't see the proposal as an attempt to maximize the use of the property but rather as a reasonable use, given the unique piece of property topographically and the way the building was developed. He also noted that the mansion next door had six condominiums and the applicant's property was down the hill from it, so he didn't see any impact on the mansion.

DECISION OF THE BOARD

The Board discussed the application. Mr. Johnson said he saw the application differently from the previous one because of the modest size, noting that the previous application maxed out the site but the applicant's site, size and location could handle the structure. He said he was also frustrated with the late notification process due to his recent experience as an abutter. Ms. Walker said she would verify the notification procedures.

Chairman Witham said he was still on the fence because the property could not be reasonably used in strict conformance but had a current reasonable use. He understood the carriage house history and appreciated that they could do the connector approach but wouldn't. He also thought a lot was happening on the lot, with the site plan, driveway configuration, turnaround and pavement of the garage. Mr. Rheume thought the Board had more flexibility because two separate buildings were possible, but he was concerned that the driveway configuration would make the property feel compacted. He would be more in favor of a larger house in the front and an alternate use for the carriage house, which would create less need for the proposed driveway space.

*Mr. Mulligan made a motion to **grant** the variances as presented and advertised.*

Mr. Mulligan stated that there was a lot of discussion, but it came down to the fact that the applicant could demolish the historic structure and build something much larger or could jerry-rig a breezeway and still be in compliance. It was a situation where the Ordinance could work against itself. Mr. Mulligan said the applicant's intent was to preserve a carriage house, and he was pushing the envelope for the right reason.

He went through the criteria, stating that granting the variance would not be contrary to the public interest or to the spirit of the Ordinance because the lot has sufficient space and square footage for multiple households. It would not alter the essential character of the neighborhood. It would result in substantial justice because the loss to the applicant if forced to comply with the prohibition against two free-standing dwellings was outweighed significantly by any gain to the public. The applicant would be faced with the choice of tearing down the historic structure or compromising it. Granting the variance would not diminish surrounding properties because the new construction would be tastefully done, and the most affected abutter was fully in favor. Literal enforcement of the Ordinance would result in an unnecessary hardship because the special conditions of the lot included that it was an unusually large lot and had an existing historic carriage house that was in Portsmouth's best interests to preserve. The use was a reasonable one because there was enough square footage for three separate dwellings on the lot and the applicant would not be maximizing the property. Mr. Mulligan said he thought it was pushing the envelope for the right reasons.

Mr. Johnson seconded the motion. He said he concurred with Mr. Mulligan and thought substantial justice would be done because adding a building would not affect the essential character of the neighborhood and would not harm the general public. Granting the variance would save a historic structure that had value. The hardship was the siting of the existing structure in relation to the oversized lot, but new construction could be built in a modest way and be adjacent to an existing dwelling and enhance it.

Mr. Rheume stated that he would support the motion, noting that the Board was placing a lot of trust in the applicant based on the fact that the applicant said he would be tasteful and mindful of the overall nature of the property as well as the concerns of the neighbors.

Chairman Witham said he could not support the motion because he thought there was a fair and substantial relationship between the purpose or the Ordinance and the specific application as well as a reasonable use for the property as it currently existed. He noted that the property might be the only one in the neighborhood with two separate free-standing dwelling structures on the lot.

*The motion **passed**, with 5 in favor and Chairman Witham and Mr. Moretti voting against the petition.*

7) Case # 11-7

Petitioner: Kevin Drohan

Property: 201 Echo Avenue

Assessor Plan 237, Lot 57

Zoning District: General Business

Description: Convert existing commercial unit to residential use.

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 a multi-family dwelling with 4 residential dwelling units where this use is not allowed.
2. A Variance from Section 10.331 to allow a lawful nonconforming use to be extended or enlarged without conforming to the Ordinance.
3. A Variance from Section 10.333 to allow a nonconforming use located in a portion of a building to be extended throughout other parts of the building.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech representing the applicant stated that he had three letters of support from abutters. The unique lot was in the General Business District but part of it was in the SRB District. It had three approved dwelling units and at one time also had a salon, which the applicant wanted to convert into a fourth dwelling unit. Attorney Pelech reviewed the criteria, noting that the project wouldn't alter the essential characteristics of the neighborhood because the photos of the house showed it as a multi-family residential home. It would not threaten public health, safety or welfare and there would be adequate parking on site. Less traffic would be generated by a fourth residential unit instead of a business. The hardship was the special conditions of the lot and its location.

Mr. Mulligan asked how big the proposed unit was, and Attorney Pelech said it was 900 square feet. Mr. Mulligan asked him to elaborate regarding allowing residential in the General Business District. Attorney Pelech said that the 1960s house had been in that district since it was built, with three residential units allowed, so that made it more residential than commercial. Compared to nearby buildings like Home Depot, it was a use that was out of character in a location much different from everything that surrounded it, which created the hardship and made the fourth residential unit more appropriate than a commercial one.

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. Moretti made a motion to **grant** the variances as presented and advertised, and Vice-Chair Parrott seconded the motion.*

Minutes Approved 12-15-15

Mr. Moretti stated that granting the variance would not be contrary to the public interest because no one from the public was there to speak against it. It was a building on a highway at the end of a road in a district that was unusual for the property, but it looked like a residential property. Granting the variance would observe the spirit of the Ordinance because it was a house in the Business District that had a residential feel with three units in the house. Adding a fourth unit where a salon used to be would make good use of the property. It would do substantial justice because the owner could use it as another business, but it didn't make sense in that location unless the whole building was made into an office building. Granting the variance would not diminish the value of surrounding properties because the commercial properties would not be affected and the residences up the road would not be impacted. The traffic would be less than when the salon was there. The unnecessary hardship was its location.

Vice-Chair Parrott concurred with Mr. Moretti and said he had nothing to add.

*The motion **passed** with all in favor, 7-0.*

VI. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 11:00 p.m.

Respectfully submitted,

Joann Breault
Recording Secretary