

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

7:00 P.M.

CITY COUNCIL CHAMBERS

DECEMBER 17, 2002

MEMBERS PRESENT: Vice-Chairman Charles LeBlanc, James, Horrigan; Christopher Rogers; Bob Marchewka, Alain Jousse, Nate Holloway; David Witham and, alternate, Arthur Parrott

MEMBERS EXCUSED: n/a

ALSO PRESENT: David Holden, Planning Director & Peter Britz, Environmental Planner

Vice-Chairman LeBlanc read the notice at the bottom of the Agenda concerning the process for filing a Motion to Re-consider and/or an Appeal with the Rockingham County Superior Court.

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**I. APPROVAL OF MINUTES**

Requested change, on page 2: "Mr. Holloway arrived, bringing the Board members to a quorum of 7" was changed to "Mr. Holloway arrived, bringing the Board members to 7".

A motion was made and seconded to accept the corrected minutes from the meeting of November 19, 2002 and it was approved unanimously with a 7-0 vote.

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I. OLD BUSINESS

917 Greenland Road - Site changes from Site Review Approval.

David Holden clarified that at a prior Board of Adjustment meeting, the Board approved a site plan. It then went to Technical Advisory Review by the Planning Board and minor modifications were made to the plan. The issue is whether the Board deems those modifications to be significant enough to schedule a public hearing. The Planning Department recommended that no further action was necessary as the changes were largely administrative and were designed to make less of an impact on abutting properties. Sean Correll briefly described the changes and confirmed that the plan was the same as what the Board of Adjustment approved with just a few things moved around a little bit.

There being no further speakers, the Public Hearing was closed.

DECISION OF THE BOARD

Mr. Rogers made a motion that no further action to be taken and Mr. Jousse seconded. Mr. Rogers stated that as the alterations were more of a technical nature and not a zoning problem and had been approved by the Planning Board, no further action should be taken. Mr. Jousse agreed with Mr. Rogers and had nothing further to add.

The Motion to not take any further action by the Board on this Petition passed unanimously with a 7-0 vote.

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A Motion was made and seconded to take Petition #2 off of the table. Said motion passed unanimously with a 7-0 vote.

**A.** Re-hearing per Order of the Rockingham County Superior Court in the matter of Michael Boccia, et al. v. City of Portsmouth and Raymond A. Ramsey, Intervenor 01-E-552 dated 26 September 02 for the petition of **Raymond A. Ramsey, owner**, for property located off **Kearsarge Way** wherein the following are requested for the construction of a 100 unit four story hotel: 1) a Variance from Article III, Section 10-304(A) Table 10 to allow the 63' x 231' four story building with a: a) 51' front yard where 70' is the minimum required, b) a 16' left side yard where 30' is the minimum required; and 3) a 30' rear yard where 50' is the minimum required, 2) a Variance from Article III, Section 10-304(c)(2) to allow the building to be located 83' from property zoned residentially where 100' is the minimum required, 3) a Variance from Article XII, Section 10-1201(A)(3)(e)(1) to allow off-street parking to be located 15' from property zoned residentially where 100' is the minimum required; and, 4) a Variance from Article XII, Section 10-1201(A)(3)(e)(2) to allow off-street parking, maneuvering space and traffic aisles 15' from the front property line where said use is required to be at least 40' from the front property line. Said property is shown on Assessor Plan 218 as Lot 22 and lies within the General Business district. Case # 11-2

It was brought to the attention of the Board that Thomas Keane, Esq., had handed out correspondence to the Board that raised the issue of whether the Board should hear this action. The Board reviewed the documentation prior to discussion.

David Holden reviewed the past history of this matter. When the Board of Adjustment acted to grant the approval for the construction of the hotel, that action was appealed to the Superior Court. The Superior Court then directed it back down for consideration under Simplex. As is often the case, the applicant also sought to preserve their rights by appealing it to the Supreme Court. It is not unusual to have actions pending in Court while this Board is also looking at material. Attorney Keane's letter proposed that all actions should be stayed pending the Supreme Court appeal.

Attorney Charles Griffin addressed Attorney Keane's letter. He indicated that he had not been notified of this until 3:30 that day. It was his opinion that the Appeal to the Supreme Court did not stay any further proceeding. Also, the Superior Court order made reference to comments made by several Board Members. The Supreme Court appeal process will take approximately 15 months to complete and at that time some Board Members may no longer be on the Board. Attorney Griffin felt that it is was appropriate to go forward with this matter.

Attorney Thomas Keane stated that he raised the issue because he felt that Attorney Griffin was not asking the Supreme Court to send this matter back to the Board for a re-hearing. He felt it was contradictory to file an appeal and at the same time ask the Board to re-hear the matter.

Attorney Keane felt it should be up to the Supreme Court to determine whether this case would be re-heard by the Board and until that decision was made it did not seem logical to go forward and hear the entire presentation.

Vice-chairman LeBlanc asked if there was a Court order saying that they should not hear the case? Attorney Keane indicated that there was in fact a court order saying that they should hear the case.

Mr. Rogers asked for clarification on if the Board was to hear the case and deny the variance requests and the appeal went through, where would that place the order from the December meeting? Attorney Griffin indicated that if the Board denied the request for the variances, it would be appealed to the Superior Court. Either way, the case may come back to the Board because they are the factfinding body. The Superior Court does not re-try the case from square one. Rather, it is a review of what the Board has done.

Attorney Keane indicated that if the Board were to deny the variances, Attorney Griffin would go forward with his appeal and have the Supreme Court say the Board shouldn't have heard it at all. Attorney Keane felt that it may seem confusing and maybe the Board would like to take some time and get a decision from the City Attorney.

Mr. Witham felt that the Court sent it back to them for a re-hearing and until he is told otherwise they should go forward with that hearing. Vice-Chairman LeBlanc indicated that one of the factors that they must remember is that the Supreme Court had not yet accepted the appeal so there is no other standing in front of the Court except what the Board had in front of them.

Mr. Horrigan mentioned that the order from the Superior Court stated that various members of the Board did not consider the five points of the Simplex case and he understands why the Judge felt that they did not consider it properly. Therefore, he feels that they are obliged to re-consider this case. They made a major set of procedural errors and are obliged to correct those and re-hear it.

A motion was made and seconded to move forward with the re-hearing and the motion passed unanimously by a 7-0 vote.

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

Attorney Griffin spoke on behalf of Raymond Ramsey. Attorney Griffin felt that the case was unique because it was the only case that he has been involved with where the permitted use of the property was determined by a Court order as opposed to the zoning ordinance. Although the property is located in a particular zone, it can only be used for one purpose. This came about because in November of 1998, the Rockingham County Superior Court granted Mr. Ramsey's request to re-zone his property from Single Residence B to General Business for the sole purpose of allowing him to construct a hotel on the site. This was done because of changes that had been done in the Market Street Extension area and also because the City had amended its zoning ordinance to permit the Marriott to be located across the street as well as possibly allowing hotels to go into Mariner's Village. The Court found that there were 5 other motels in the City, all of

which were located in a general business zone and all of which abutted residential properties. The Court concluded that there would be no adverse traffic impact and the Court concluded that Mr. Ramsey could not make any reasonable use of this land unless he constructed a hotel. The property was unique and should be considered as such. On page 17, the Court order said "Simply stated, the allowance by the City of the Marriott Motel mandates the Plaintiff's right to construct a motel on his property."

Attorney Griffin stated that the City of Portsmouth was concerned that by re-zoning Mr. Ramsey's property, he would be able to put any business he wanted on that property. Therefore, the Court restricted Mr. Ramsey's use to building a hotel.

Mr. Griffin reminded the Board that this hearing was only to address some requests for setback variances in connection with the only permitted use of the property, a hotel.

After the 1998 Court decision several meetings were held between the City, Mr. Ramsey and Attorney Griffin. The City wanted to make sure that the impact on the surrounding residents of the hotel was minimal. As a result, it was agreed that the most desirable place for the hotel would be as close as possible to Market Street and as far away as possible to the abutters. The first thing that happened was that the City agreed to deed to Mr. Ramsey the abandoned portion of old Kearsarge Way. In exchange, Mr. Ramsey gave the city a conservation easement comprised of 2.13 acres on the rear of his property, which serves as a buffer. In addition, in March of 2001, Mr. Ramsey acquired title to a small triangular piece of property along the rear that squared off the rear property line and made it more conforming. This property reduced Mr. Ramsey's rear setback variance from a 0' setback to a 30' setback. In February of 2002, during the Site Review process before the Planning Board, a conditional use permit was granted to allow storm water runoff to discharge from the parking lot into a wetland and a buffer area, creating a detention pond. The NH Wetlands Bureau reviewed this request and it concluded that the area impacted by the Conditional Use Permit also needed to be the subject of a conservation easement. This required that Mr. Ramsey put this area into a conservation easement. As a result, over half of the land is encumbered by conservation easements and cannot be developed. This limitation is far greater than any other land in the City on which a hotel is located. This buffer also addresses the concerns of the Atlantic Heights Neighborhood Association with whom they have had several meetings over the last year and one half.

In April of 2002, after reviewing the conservation concerns, traffic concerns, etc., the Planning Board granted a final site review to construct this hotel.

Attorney Griffin then went on to discuss the five elements needed to grant the variances. He first addressed the front, side and rear setback variances, as well as variances of the buffer requirements between properties that are zoned general business and properties that are zoned residential. Attorney Griffin felt that there would be no diminution of property values as a result of the granting of these variances. Attorney Griffin reviewed a report prepared by Vern J. Gardner of Horizon Associates. Mr. Gardner studied homes that were near or adjacent to existing hotels in Portsmouth. He evaluated homes on Coakley Road in relation to the Meadowbrook Inn, homes on Boyd Road in relation to the Wynwood Inn (formerly Howard Johnson's) and homes on Woodbury Avenue in relation to the Holiday Inn. He concluded that

the proximity of the homes to the different hotels did not effect their re-sale value. Mr. Gardner also stated that the City Assessor's Office did not recognize potential adverse influence to residential properties that adjoin hotels or motels. Mr. Gardner concluded that all of this information demonstrated that the proposed hotel would have no adverse effect on the value of the surrounding properties. Mr. Gardner also did an analysis of two properties on Kearsarge Way to determine whether the presence of a hotel would adversely effect the value of either properties and Mr. Gardner determined that it did not.

Attorney Griffin stated that this land is vacant and has become a dumping ground. Mr. Ramsey plans to build a 100-room hotel, catering to business clientele. There would be no restaurant, no function room and no bar. No other hotel in the city has these types of limitations but Mr. Ramsey agreed to them to accommodate the neighborhood. Other stipulations were agreed upon between Mr. Ramsey and the Planning Board in July of 2001. Mr. Ramsey did not have a franchise agreement in place yet and is still negotiating but it is fair to say that the basic design of the hotel is similar in nature with other hotels in the city. Mr. Ramsey would employ between 20-25 individuals. He has 20 – 25 years of experience in the hotel field and currently owns 2 hotels.

Mr. Ramsey also submitted a report from Resort Realty Advisors which states that this site is suitable for hotel development because of its access and visibility from I-95 as well as it's proximity to the Marriott Hotel which is directly across the street. Because of projected growth in the local economy, there continues to be a demand for hotels in Portsmouth. At the same time, there is a shortage of sites near major highways suitably zoned for development.

Also submitted by Attorney Griffin was a letter from Matthew Senior, a direct abutter and the closest abutter, dated December 14, 2002, indicating that he does not oppose the variances.

Attorney Griffin stated that the granting of the variances would be consistent with the spirit and intent of the ordinance. There would be no danger to the health, safety and general welfare of the community as a result of granting the variances. Mr. Ramsey has granted the City two conservation easements that total 3.9 acres, thereby turning over 50% of the property into land that will not be developed and will turn into a buffer between the hotel and the residents on Kearsarge Way.

The property met the area, frontage, depth, height and actual construction requirements of the ordinance. It would provide 126 parking spaces where 120 are required. Based upon the Traffic Impact and Access studies prepared by Dermot J. Kelly Associates, the traffic impact of the hotel would not change the level of service at the intersection of Kearsarge Way and Market Street and would have minimal impact on morning and evening peak hour traffic. Mr. Kelly recommended some mitigation including interconnecting and coordinating the traffic signals on Market Street at the intersection of Kearsarge Way. In March the Traffic and Safety Committee approved the project with the following conditions: That Kearsarge Way be widened to accommodate a separate left and right-hand turn lanes as well as safe truck turning for a WB50 truck movement and that Kearsarge Way and I-95 traffic signals be physically interconnected and coordinated at a cost to Mr. Ramsey not to exceed \$100,000. These recommendations were made by Mr. Burke, the City traffic engineer after extensive review.

Next, Attorney Griffin stated that none of the variances would result in unnecessary hardship. There are three elements of the hardship test. The zoning restriction interferes with the reasonable use of the property, considering the unique setting of the property. As was previously noted, the only permitted use of the property is a hotel. This property has been re-zoned general business for the sole purpose of allowing a hotel to be built on the property. The Superior Court did conclude that the property was unique and Mr. Ramsey cannot make a reasonable use of this property unless he is allowed to construct his hotel. The setback buffer requirements interfere not only with the reasonable use of the property but also with the permitted use of the property, thus rendering the property in its setting truly unique. The size and configuration of the property was also irregular. The property was narrow at the Market Street end and there were wetlands cutting through the middle of the property, making it impossible to locate the hotel farther back. Per agreement with Mr. Ramsey and the City, the hotel was being located to maximum the buffers.

Attorney Griffin stated that no fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific use of the property. The right of way land will not be developed by the City so there is an even greater setback between the edge of Kearsarge Way and Mr. Ramsey's property. That established that the spirit and intent of the ordinance could still be accomplished and adhered to by the granting of the variances.

The granting of the variances will not injure the public or private rights of others. This property lies in an area of mixed uses. There are many zones – Single Residence B, General Business, Office Research, Waterfront Industrial. This was not an area of single family residences. As Mr. Gardner's report indicated, surrounding property values would not be affected by the hotel. Another hotel lies directly across the street and also abuts the residential area. With the cooperation between the City and the applicant to relinquish the abandoned portion of Kearsarge Way in exchange for a conservation easement at the rear of the property, a balance was designed to protect public and private property rights.

The granting of the variances will result in substantial justice. There are a number of hotels in the City of Portsmouth that lie in general business zones that abut a residential zone – The Holiday Inn, the Anchorage Inn, the Marriott Hotel. The Marriott, although it lies in an office research zone, also abuts residential properties. Not only is there an established pattern of allowing hotels in general business zones that abut residential properties, there is also a record of granting variances similar in nature to the one being requested by Mr. Ramsey to hotels that needed to come closer to residential property lines. Those variances were received by the Holiday Inn, the Anchorage and Howard Johnson's. In fact, the Marriott itself was granted a special exception in 1997 to add 24 additional rooms. While each application has to rise and fall on its own merits, this information shows that it is not unusual to grant hotels variances similar to those that Mr. Ramsey is seeking.

In conclusion, Attorney Griffin felt that the evidence presented to the Board met the five requirements and he asked that the Board approve the variances. Attorney Griffin indicated that Raymond Ramsey was present, along with Vern Gardner of Horizon Associates, Skip Bagdoyan of Ambit Engineering and Dermott Kelly of Dermott J. Kelly Associates.

Mr. Marchewka asked why Mr. Ramsey couldn't build a smaller hotel that wouldn't require any variances? Attorney Griffin responded that that was not the plan that they presented and there were franchise requirements that become financially and economically viable and it reaches a point where it simply wouldn't be profitable to have less than 100 rooms.

Mr. Horrigan wanted clarification that other general business uses could not be used on this site. Attorney Griffin indicated that Mr. Ramsey's property was re-zoned to allow him to build a hotel. That was the sole purpose why this property was zoned general business. Mr. Ramsey could not sell the property and have someone else build a department store or a restaurant. The Court stated that the property was re-zoned for the purpose of building a hotel. Just as an applicant appears before the Board making a representation as to what they would do with the property is they were granted a variance, Mr. Ramsey has made representations to the City and to Superior Court that if his property is rezoned, he will build a hotel. If the hotel fails and Mr. Ramsey sells the property, there would be a situation similar to the Marriott, where they would have to come back to the City and, in Attorney Griffin's opinion, receive permission to make use of that property other than a hotel.

Mr. Rogers stated that when this matter was brought to the Superior Court to get the zoning changed, Mr. Ramsey was aware of the restrictions that were going to be placed on it so it appears that he created his own problem. Attorney Griffin indicated that he went to the Superior Court knowing that he wanted to build a hotel on the property. He bought the property in the mid 1980's, anticipating that someday Market Street would be expanded. He has been in the hotel business and it was an entrepreneurial situation for him and he decided that someday that would be a good place to build a hotel.

Vice-Chairman LeBlanc inquired about whether the restrictions that were originally placed on the property were still acceptable and amenable to the applicant? Attorney Griffin indicated that they were.

### **SPEAKING IN OPPOSITION**

Attorney Thomas Keane, representing several abutters, spoke in opposition. Attorney Keane asked the Board where the hardship was? Everyone recognized that this case was remanded by the Superior Court for a re-hearing in light of the Simplex decision. The issue was whether the variance request satisfied the Simplex test. Did the zoning restriction as applied to the Ramsey property interfere with the reasonable use of the property? Under the current circumstances, Attorney Keane asked what could Mr. Ramsey build on that property as a matter of right? He can build a hotel. Attorney Keane provided the Board with two plans of a hotel that did not require any setback relief from the zoning ordinance. It did not require any variances. Attorney Keane did not feel that Mr. Ramsey is satisfying the Simplex test because he can make use of the property with a hotel. Mr. Ramsey only asked that the property be rezoned for use as a hotel. He did not ask that it be rezoned for a 100-room hotel. For Attorney Griffin to suggest that you could not have a financially viable hotel with less than 100 rooms might fly in the face of many hotel operators in the city such as the Sise Inn. Attorney Keane would ask the Board, and suggest to the Board, that there was no way that Mr. Ramsey could satisfy the test of hardship.

Attorney Griffin directed the Board to Exhibit 1, Page 2 of his packet, which was a copy of the Court decision, which does refer to the hotel as a "100-room hotel". That was a specific reference to the fact that what the Court had before it was a request for a 100-unit hotel for the property and the Court, when it says he has permission to build a hotel on his property, can only mean he has permission to build a 100-unit hotel. In court, he was quite specific as to how many units he wanted and the Court granted that petition, saying he may build a 100-unit hotel.

Attorney Keane responded by referring to the most recent court order by Judge Abramson, and he indicated that there was never any reference to a 100 room hotel. It was never submitted that it could only be a 100-room hotel. The only thing Mr. Ramsay ever asked for was to have the property rezoned for commercial use for a hotel.

There being no further speakers, the Public Hearing was closed.

### **DECISION OF THE BOARD**

A motion to vote on the four variance requests separately was made and seconded and passed with a 6-1 vote, with Mr. Holloway voting in the negative.

Mr. Marchewka asked Mr. Holden about the 100-room issue. Mr. Marcheska felt it was clear to everyone that Mr. Ramsey intended to build a 100-room hotel. What were Mr. Holden's thoughts on the Court ruling? Mr. Holden recommended that the Board should review the Court case and they would discover that it was remanded back to them not because there were errors in their consideration on the traditional rules for a variance but it recommended that they consider additional criteria which is contained within the Planning Department Memo regarding Simplex. His recommendation to the Board was that they take a global look at the project, consider whether any new evidence had been presented that may sway their thinking one way or the other on the original grants, and also to concentrate on Simplex as that is what the Court is directing them to do.

Mr. Witham asked if the 100-room hotel was based on his wording or was it based on a site plan? Mr. Holden indicated that it had always been a 100-unit hotel. In general, the footprint of the building hasn't changed over the years but, what had changed as it had gone through the process was that the focus had sharpened so that now the Board was being called upon to balance the rights of everyone based on very certain criteria.

Mr. Rogers made a motion to grant as presented and advertised **Article III, Section 10-304(A) Table 10**, with the original 11 stipulations. Mr. Witham seconded. Mr. Rogers stated that he went through the criteria and felt that it was not contrary to public interest. This property was encumbered by a great number of problems. Although many of these problems were brought on by the owner himself when he applied for the zoning change, things snowballed after that so he didn't have much choice but to accept all of the conditions that had been agreed to. The setbacks are the only way he is going to be able to build the hotel. Mr. Witham indicated that he is looking at this in a different light than he was a couple of months ago. In terms of the first



motion for 3 setbacks, Mr. Witham feels that these requests met all of the criteria for a variance. With the limitations of the land, they were very reasonable.

Mr. Horrigan stated that the peculiar shape of the property itself entered into their thinking and he was unsure that the Simplex case had to be voted as it was a case of classic hardship. Any business would be faced with the same problems. There were not any unreasonable requests.

Mr. Holden asked for clarification from Mr. Horrigan, in light of the Court order remanding the case back for Simplex, did he mean that Simplex doesn't apply? Mr. Horrigan indicated that he didn't mean that Simplex didn't apply. He thought that the hardship was almost obvious in a very direct way.

Mr. Jousse indicated that he would support the Motion due to the unique location and shape of the parcel of land with Route 95 on one side and Kearsarge Way on the other side. In the vicinity of that piece of property, the only thing on Market Street Extension are businesses and to satisfy the Court ruling, putting the business on this piece of property was in direct compliance with the Simplex case. There was another hotel across from this property that helped to support this Motion.

Vice-Chairman LeBlanc indicated that he felt that the Board had covered the Simplex criteria. There was a special relationship between the property and the zoning ordinance and they had to be granted in order to product this particular outcome. In granting this variance, there was a substantial relationship between the two purposes of the zoning ordinance and the specific restrictions on this property and that was what they were granting relief to and the variance was not going to injure the public or private rights of others. He felt that they had to focus in on those three conditions when thinking about this particular case because it was part of the reasoning that they had to go through to grant this variance. It was not an optional portion of what they had to look at. It was part of the five criteria and they had to be looked at and answered. Otherwise, anything that the Board said or did could be called invalid.

Mr. Marchewka indicated that he supported the motion as he felt it was a reasonable request. The Simplex case did apply in terms of the hotel use. However, he would caution the Board that, even if they determined that the hotel use was a proper use due to Simplex, it didn't mean that they just ignore every set back that was in that zone.

Mr. Horrigan added to his original remarks that he was not suggesting that they ignore the Simplex criteria. His only point was that the three Simplex hardship criteria were there because of the shape of the lot. The Court also asked that they consider the impact on the value of surrounding properties and he could not see where there would be any impact in this case.

Vice-Chairman Leblanc read the previous 11 Stipulations that became part of the Motion:

**Stipulations:**

- That there be no more than 100 rooms maximum;
- That there be no restaurant, bar, tavern or the sale of alcoholic beverages allowed;
- That a conference center not be allowed;

- That there be sidewalks constructed;
- That the utilities be placed underground;
- That bus and truck parking be designated away from the residential area;
- That refrigeration trucks do not run all night;
- That 6'-8' high evergreen screening be placed around the parking area where needed;
- That dumpsters be screened and enclosed to the rear of the property;
- That lighting be downward or shielded so that it does not shine into the residential neighborhood; and,
- That snow storage will not be located in the northern most part of the lot away from where residential homes are located.

The motion to grant, with the 11 stipulations, passed unanimously with a 7-0 vote.

Mr. Rogers made a motion to grant as presented and advertised **Article III, Section 10-304(c)(2)**, with the original 11 stipulations. Mr. Jousse seconded. Mr. Rogers stated that he believed that by allowing a 100-room hotel, there was no way the building could be allocated anywhere else without being closer than the 83' being requested. It met the Simplex requirement because it was not contrary to public interest and it didn't interfere with the other people in the area. Many of the hotels abutting residential properties are much closer. It did interfere with the owner's reasonable use of the property. Mr. Jousse felt that, because of the unique shape and size of the building, it was just about the only place that the hotel could be located, the granting of the variance was not contrary to the public interest, the zoning restriction as applied would interfere with the proper use of this particular piece of property, it would not diminish the property values and the variance would not injure the public or private rights of others. Substantial justice would be done by granting this variance.

The motion to grant, with the 11 stipulations (see stipulations above), passed unanimously with a 7-0 vote.

Mr. Rogers made a motion to grant as presented and advertised **Article XII, Section 10-1201(A)(3)(e)(1)**, with the original 11 stipulations. Mr. Witham seconded. Mr. Rogers stated that he is ambivalent about the distance from the property line to the residential neighborhood because it was going from 100' to 15' and, although the abutters are divided on whether they want it to occur or not, it's disheartening that it couldn't be placed some other way. But, as the plans reflect, there wasn't any other place to put the hotel. It was very restrictive with the easements. There was a shrubbery buffer that was supposed to be 6-8' tall to protect the residential neighborhood from the noise and the lights. It met the criteria of the Simplex ruling for the same reasons already quoted previously. Mr. Witham stated that he asked that the variances be treated separately because this was the one variance request that he could not support. The Court did send this back, telling them that it had been rezoned and that the hotel could be there. He did not feel that this was sent back by the Court under the premise that he would get the variances required to fit a 100-room hotel and the necessary parking. There were some variances that Mr. Witham supported but this situation was 85% relief of what the zoning required. Looking at past variance requests granted to other hotels, most were given approximately 50% relief. Putting a parking lot in residential back yards does not meet any of the criteria. He understood that there were issues with wetlands and conservation areas but he

did not feel that that protects the people who live in that area. He felt that this was far too much relief. There was a specific reason to give 100' and that was to give a buffer to the residential area. In terms of diminution of property values, he was not sure how that would effect their property values. He understood that the city had worked hard but there was always the option of putting some parking under the building.

Mr. Marchewka agreed with Mr. Witham. He felt that this certainly did push the envelop. He believed that 100' is probably reasonable and 15' is less than the length of a parking space. A parking lot like that shouldn't be in someone's back yard because of lights and fumes. He believed that 100' is reasonable and 15' was not.

Mr. Horrigan asked Mr. Holden if the Board was to deny this particular Article, would that sink the whole project? Mr. Holden indicated that there were two ways to proceed. The Board could put a figure in or they may also leave it as it was written in which case there may be a subsequent request coming back to the Board with a different figure. Mr. Holden encouraged the Board to act on what was requested unless they wanted to change it to a different figure. Mr. Holden indicated that the applicant would have to address whether the denial of this article would be fatal to the project.

Mr. Horrigan indicated that the closest abutter had indicated that he had no problem with the 15' buffer. The other property that is most effected by this is 260 Kearsarge Way and their buffer is about 50'. Board is looking at the impact to one adjoining property. Although he shares the concerns of the other Board members, the abutter has said that it was fine with him and he apparently feels that it would not affect his property values. He was not sure that it made any sense to deny the Article because they are not going to like anything that they do.

Vice-chairman LeBlanc indicated that they are requiring a vegetative buffer as well.

Mr. Jousse indicated that he wanted to point out what Mr. Horrigan mentioned, that the direct abutter has sent two different letters saying that he did not object and the Board should keep that in mind.

The motion to grant, with the 11 stipulations(see stipulations above), passed with a 5-2 vote, with Mr. Witham and Mr. Marchewka voting in the negative.

Mr. Rogers made a motion to grant as presented and advertised **Article XI, Section 10-1201(A)(3)(e)(2)**, with the original 11 stipulations. Mr. Holloway seconded. Mr. Rogers indicated that they had already covered the Simplex criteria in the previous Motions. No one is directly effected by this variance. There is no where else that the hotel can go because of the unique profile of this building. Mr. Holloway agreed with Mr. Rogers that the relief requested in this Article is the least of all of the variance requests..

The motion to grant, with the 11 stipulations (see stipulations above), passed unanimously with a 7-0 vote.

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II. PUBLIC HEARINGS

1) Petition of **Jeffrey M. Ouellette, owner**, for property located at **550 Cutts Avenue** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 24 foot x 24 foot one story garage creating 23.3% building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 210 as Lot 23 and lies within the Single Residence B district. Case # 12-1

SPEAKING IN FAVOR OF THE PETITION

Jeffrey Ouellette indicated that he had a letter from the only residential abutter, indicating that they do not object. Mr. Ouellette indicated that it is a small lot and he is looking for a 3.3% variance.

Mr. Horrigan asked what the garage would be used for? Mr. Ouellette indicated it would be a 2 car garage instead of a 1 car garage.

DECISION OF THE BOARD

Mr. Rogers made a motion to grant the motion as presented and advertised as it met all of the requirements of the Simplex decision. Mr. Horrigan seconded. Mr. Rogers felt that it was such a minimal request that it almost didn't require any thought. However, it did meet the Simplex requirements, it was not contrary to public interest, it was a minimal request and the zoning restrictions for building coverage created a hardship. The ordinance also said that there was no substantial relationship between the zoning and the very small coverage that the applicant was requesting. In that light, it did not injure the public or private rights of others and could be granted. Mr. Horrigan agreed with Mr. Rogers. It was a small lot and building a garage large enough to accommodate 2 vehicles was certainly a very reasonable request. There was no fair and substantial relationship between this zoning ordinance and this restriction on the property. It certainly wouldn't injure anyone else's private or public rights as the property was on a part of Cutts Avenue that he didn't even know existed. It was backed by the Interstate Bridge and is very close to the Piscataqua River and he couldn't imagine that a garage would diminish the value of the surrounding property in any way whatsoever.

The motion to grant as presented and advertised passed unanimously by a vote of 7-0.

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2) Petition of **Shannon Realty Trust, owner**, for property located at **85 Heritage Avenue** wherein a Special Exception is allowed in from Article II, Section 10-209 Table 5 (13) to allow the sale of used cars. Said property is shown on Assessor Plan 285 as Lot 5 and lies within the Industrial district. Case # 12-2

Mr. Holden indicated that this petition needed to be re-advertised and requested that it be tabled until the next regular meeting.

**DECISION OF THE BOARD**

A vote to table until the next regularly scheduled meeting passed unanimously by a vote of 7-0.

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The Board took a five minute break.
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3) Petition of **Tyroch Realty Management Incorporated, owner**, for property located at **480 State Street** to build a four unit residential structure wherein the following are requested: 1) a Variance from Article III, Section 10-303(A), Table 9, is requested to allow four (4) residential dwelling units on a lot containing 7,477 square feet, where 7,500 square feet of lot area per dwelling unit is required, 2) a Variance from Article III Section 10-303 (A), Table 9, to allow a 3.3 foot front yard setback, where 5 feet is required, 3) a Variance from Article III Section 10-303 (A), Table 9, to allow a 4 foot left side yard and 8.2 foot right side yard setback, where 10 foot side yard is required, 4) a Variance from Article III, Section 10-303 (A), Table 9, to allow a 5.7 foot rear yard setback where 15 feet is required, 5) a Variance from Article XII, Section 10-1201 (A)(2) to allow a 22 foot maneuvering isle where 24 feet is required, 6) a Variance from Article XII, Section 10-1201 (A)(3)(c)(2) to allow a 1 foot front yard buffer with no landscaping where 10 feet with landscaping is the minimum required, and, 7) a Variance from Article XII, Section 10-1204 Table 15 to allow 5 parking spaces, where 6 parking spaces are required. Said property is shown on Assessor Plan 127 as Lot 14 and lies within the Mixed Residential Office district. Case # 12-3

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

Attorney Bernard Pelech spoke on behalf of Tyrock Realty Management, Inc., the owner and the applicant of the property. Louis Dow, the principal of Tyrock Realty and Bob Iafolla were also present. This property was the Dow/Gulf site located on State Street. It was the last downtown gas station in the city and it was a unique piece of property. The site was currently 100% impervious surface with no storm water mitigation and no canopies. It would not be allowed to be built today. It was not an allowed use in the present district, nor was it an allowed use in the previous district. It couldn't be brought up to today's standards for a gas station primarily because it was in the historic district. It was also unique because of its shape and size. They were requesting side yard relief as they really don't have any side yard. It is surrounded on three sides by Middle and State Streets and it had a backyard which was the McMaster property. It was also uniquely situated in a district. It is surrounded by the Mixed Residential Office District, the Central Business District and the Municipal District. If this matter were in the Central Business District, which is right next door, they would only be there for 2 very insignificant variances. Although it looks like they were requesting a lot of relief, they really weren't asking for much more than what is already out there.

They were proposing four residential dwelling units in a two-story building. The Board had architectural drawings. It appeared that they were seeking a lot of setback variances. They were requesting a 3' front yard setback where 5' is required. At the present, the pump islands were within 1' or 2' of the front yard so they were not seeking any more relief than what was already on the site. They were requesting a 4' left side yard setback where 10' is required. On one pump island they had about 1' and on the other pump island they had about 2'. They were requesting a 5.7' rear setback which backed up to the McMaster property. There was an existing 1 1/2' setback with the existing service station. Those three setback variances were necessary because of the rectangular-circular shape of the property. The other variance was for the square foot per dwelling that was 7,500 square feet per dwelling unit. This was not consistent with the rest of the area. Most of the lots were substantially smaller than 7,500 square feet. Across the street, Charlie Griffin's lot was one of the biggest lots of 10,000 and the lots going down State Street were 2,700 square feet, 4,000 square feet, 4,200 square feet, 5,700 square feet, 6,100 square feet. Then you get to the monster AT&T lot. All of those lots were multi-use offices on the first floor with multi residential units on the second floor. Likewise, down Middle Street the same thing occurs. The Board should also be aware that most the properties in the area have their front steps come right up to the sidewalks. They were proposing 3' and 5' on their lot with landscaping between the sidewalk and the proposed structure. Therefore, the 7,500 square feet per dwelling unit was inconsistent with the area and they had a hardship in that regard. The four dwelling units were allowed in this district. The use was allowed, contrary to what was there now which

was not an allowed use. Therefore, the property would be going from a non-conforming use to a conforming use.

The last two variances dealt with parking spaces and the size of the travel lane. There currently was no curbing, no structured entrance and exit. The on-going use was a very intense use because Louis Dow ran a good business. There were a lot of cars coming and going. What they were requesting was to curb all of the property lines except for the single point of ingress and egress into the Courtyard behind the proposed building off State Street. One of the variances they were seeking was to allow a traffic lane of 22' where 24' was required. This would be a courtyard driveway for four residential units. The cars would be entering and exiting very slowly.

Attorney Pelech then addressed the five criteria. The first was whether the granting of the variances was going to result in diminution of value of surrounding properties. Mr. Dow had spoken with the only direct abutter, John McMaster, and he had no problem with any of the variances being granted. The townhouses would be a much less intense use and the aesthetics would be greatly improved. There would be landscaping and there would be green space. There would be buffers that would enhance the site. It would be much more consistent with the surrounding properties. There was no question that there would not be any diminution of property values.

Secondly, they had to demonstrate, under Simplex that there was a hardship which was a 3-part test. The first was whether or not there was a hardship due to the uniqueness of the property that interfered with the reasonable use of the property. As previously stated, should this property be across the street on State Street or Middle Street, they wouldn't have setbacks. They wouldn't have minimum requirements for lot area for the dwellings. They believe that the hardship was a result of several factors. The existing size and shape of the lot and the fact that the lot was surrounded on three sides by pavement. A triangular lot was not easy to work with, especially when the lot was very small. If the setbacks were added to the lot, it would substantially reduce the buildable area.

The second part of the test was whether there was a fair and substantial relationship between the general purpose of the zoning ordinance as it applied to this particular property. This property had been in its configuration for probably 100 years. It was originally part of one of the churches across the street. Therefore, it preceded the imposition of setback requirements. There was no fair and substantial relationship between the zoning ordinance as applied to this substandard and uniquely shaped lot. Front, rear and side yard setbacks would work very well on rectangular lots but not on a lot such as this. First you would have to determine what was the front and rear, which was difficult. Right now, the structures on the lot violate the zoning ordinance front, rear and side yard setbacks.

Attorney Pelech indicated that they felt that the granting of the variance would be more in keeping with the purpose of the zoning ordinance than what existed there now. It would be going from a non-conforming use to a conforming use, a zero green space lot to a lot that had green space, which had regulated curb cuts, which had a much more environmentally acceptable use. The general purpose of the ordinance was to protect the health and welfare of the general public and this use would be more in keeping with the ordinance.

The third part of the hardship was whether any private or public rights of others would be affected. There are none on the site as far as private rights of others, easements, any type of license or public rights.

The third criteria for the granting of the requested variance would be contrary to the public interest. This was going to benefit the public interest. It was not going to be contrary. It was

going to take an environmentally safer use in place of the gas station that does meet any of the current ordinances. It was going to provide four housing units in an area that was certainly lacking in housing. The public interest was going to be benefited by the enhanced tax basis on the lot. Most importantly, the public was going to be benefited by a much safer lot. It's a less intense use, the site would be safer for pedestrians and vehicles, and the public would benefit by a building that was architecturally consistent with the surrounding properties.

The fourth criteria was whether substantial justice would be done by the granting of the variances. Would the hardship on the owner if the Board denies the variances be outweighed by the benefit to the citizens. Attorney Pelech stated that he wasn't aware of a benefit to the citizens of Portsmouth by denying the variance however he certainly knew of a hardship on the applicant. The balancing test would show that the hardship on Mr. Dow and his company was certainly going to be greater than any perceived benefit to the general public.

Finally, the fifth criteria, the granting of the variance would not be contrary to the spirit and intent of the ordinance. The ordinance and the Master Plan encouraged the use and adaptation of downtown properties to add dwelling units. The spirit and intent of the ordinance, as set forth in 101, which was to promote the general health and welfare of the citizens to prevent and provide safety from fire, explosion, etc. Allowing this property to be used for residential purpose was going to be more in keeping with the spirit and intent than a non-conforming use on a non-conforming lot which was environmentally challenged. The granting of the variance would not be contrary to the spirit and intent of the ordinance.

In conclusion, Attorney Pelech indicated that they were dealing with a peculiar and unique lot. Although 7 variances seemed like a large number, this Board had granted more. The totality of the circumstances showed that what they are asking for was not unreasonable. It was better than what exists now. They could have requested to spot zone this particular piece of property into the central business district but that would have been a six month process and they believed that the Board could recognize that this was an appropriate case for the granting of the variance.

Mr. Rogers indicated that they did not have a good plot plan and he had questions about the sidewalks. Attorney Pelech indicated that they would be going through site review but he believed the lot line went directly up to the sidewalk. The lot line on State Street would allow for a curb and sidewalk and there would also be a sidewalk along Middle Street that was going to be 5'. And there would still be additional room between the sidewalk and the building for plantings that were shown on the plan.

Mr. Horrigan asked about the first variance concerning the size of the lot. If it were strictly enforced, they would only be allowed one residential dwelling. What was the rationale for 4 units? Attorney Pelech indicated that they arrived at 4 units by taking the required parking, still allowed some green space, and worked backwards. They looked at various proposals from 2 units up to multi units and anything more than 4 would have required even greater relief. The 6-unit plan resulted in the site being too crowded. The 4-unit plan allowed them to have the courtyard in the back and have parking spaces that were accessible from State street. The intent was to provide as many dwelling units as reasonably possible without over-intensifying the use.

Vice-Chairman LeBlanc indicated that none of the plans had a surveyor's stamp on them. Did Attorney Pelech know where the property lines were? Attorney Pelech indicated that he was surprised that the Ambit Engineering plan did not reflect that. Attorney Pelech provided a plan that did have the surveyor's stamp on it, entitled Existing Conditions.

Mr. Witham asked if this would come back to them if the HDC got involved and requested changes? Vice-Chairman LeBlanc indicated that the only thing the BOA would be concerned with was a change in the dimensional requirements.

**DECISION OF THE BOARD**

Mr. Rogers made a motion to grant the petition as presented and advertised as it met all of the requirements of the Simplex decision. Mr. Marchewka seconded. Mr. Rogers stated that the site was a very important position in the city. Most of the variance applications were for minimal requests and because of the size and shape of the lot there was a hardship. It was not contrary to the public interest because anything was better than an empty gas station and anything that was put there would be some sort of relief. The zoning was different and less restrictive across the street and being a very unique shaped lot, it needed some sort of relief to put any sort of building on it. Mr. Rogers was glad to see it was a 2 story building rather than a 4-story building. It was not injuring the public or private rights of others. The only abutter was McMaster behind the property and he had no objections. A substantial justice could be done in granting this variance and the surrounding properties would not be effected.

Mr. Marchewka agreed with Mr. Rogers. He stated that these requests would not be contrary to public interest and would, in fact, benefit the public concerning the safety issues, environmental issues and traffic issues. Literal enforcement of the zoning ordinance would result in a hardship to a reasonable plan, which he felt this was. It was not an over-intensification or over-development of the property. No private rights would be injured and substantial justice would be done by granting the variance. It would not diminish any of the surrounding property values and would, in fact, increase them. Therefore, he believed the variances could be granted.

Mr. Witham stated that there were times when zoning worked against itself. This project worked with the character of the downtown. Buildings need to be up to the sidewalk to maintain the character of the downtown and the zoning requirements work against that. The only disagreement that Mr. Witham had with Mr. Rogers was that he believed the building was somewhat out of scale and should be larger. It was a very important cornerstone and Mr. Witham wouldn't mind seeing some more height on it.

Mr. Horrigan stated that he was sorry to see the gas station go but this was a very nice replacement.

Vice-Chairman LeBlanc stated that he felt they had a unique lot in both its siting and in its size. It's right on the edge of a zoning area. Across the street it was a different zone and the requirements were different. It was the duty of the Board to look at these particular circumstances and make decisions on them so that they don't have a pressure cooker with the various construction projects that go on within the city. All of the variances, except for the first one dealing with the square footage, were quite minimal which was something that the Board had to consider. It met all of the criteria that they had to use for their analysis.

The motion to grant as presented and advertised passed unanimously by a vote of 7-0.



- 4) Petition of **Kenneth Smith and Deborah Bouchard-Smith, owners**, for property located at **298 Myrtle Avenue** wherein the following correction is requested from a previous approval: a Variance from Article III, Section 10-302(A) Table 8, is requested to allow a 13.6 foot front yard setback where 30 feet is required. Said property is shown on Assessor Plan 220 as Lot 101 and lies within the Single Residence B district. Case # 12-4.



**SPEAKING IN FAVOR OF THE PETITION**

Kenneth Smith, owner, indicated that while working on the property they found out that one of the walls of the foundation had been measured wrong and it happened to be the same wall that they had previously received a variance for. They were off by 8” – 9”. Basically, they measured from the inside wall rather than the outside wall. As soon as he found out about this issue, he contacted the Planning Department and was advised that he needed to reapply for a variance. It was not his intent to mislead anyone.

**DECISION OF THE BOARD**

Mr. Horrigan made a motion to grant the motion as presented and advertised as it met all of the requirements of the Simplex decision. Mr. Jousse seconded. Mr. Horrigan stated that this petition was essentially correcting a prior petition that had been presented at the July 2002 meeting. At that time the Board considered the various Simplex criteria and one of those considerations was the front yard. He reminded the Board that this was a house sitting on a very quiet dead end street. It did not extend the previous non-conformance. If the Board had known about the additional 10” they would have granted it at that time. He did not believe that they would have made a different decision. Mr. Jousse stated that denying the variance would be contrary to the public interest and also very cost prohibitive to the applicant. There was no intent to deceive either the Board or the public but rather an error in construction was made, it would not diminish the surrounding property values and is consistent with the spirit of the ordinance.

The motion to grant as presented and advertised passed unanimously by a vote of 7-0.

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5) Petition of **James G. Bolduc and Joanne M. Stella, owners**, for property located at **25 Ridges Court** wherein the following are requested to construct a deck: 1) A Variance from Article III, Section 10-302 (A) is requested to allow a structure coverage of 24.6% on a lot where 20% is the maximum allowed, 2) A Variance from Article III, Section 10-302 (A) is requested to allow a left side yard setback of 8 feet and right side yard setback of 9 feet where 10 feet is the minimum side yard requirement. Said property is shown on Assessor Plan 207 as Lot 57 and lies within the Single Residence B district. Case # 12-5

After discussion it was determined that this Petition was not advertised properly and therefore the Board could not hear the Petition that evening. It was determined that the Petition needed to be re-advertised.

A Motion was made and seconded to table this matter until the next regular meeting and said motion passed unanimously by a vote of 7-0.

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6) Petition of **Guthrie Swartz, owner**, for property located at **33 Johnson Court** wherein a Variance from Article III , Section 10-302(A) Table 8 is requested for a proposed addition to a residential home to allow a rear yard setback of 23 feet where 25 feet is required. Said property is shown on Assessor Plan 110 as Lot 12 and lies within the General Residence B district. Case # 12-6

After discussion it was determined that this Petition was not advertised properly and therefore the Board could not hear the Petition that evening. It was determined that the Petition needed to be re-advertised.

A Motion was made and seconded to table this matter until the next regular meeting and said motion passed unanimously by a vote of 7-0.

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III. NEW BUSINESS

Election of Officers for 2003:

A Motion was made and seconded to nominate Charles LeBlanc as Chairman and said motion passed unanimously by a vote of 7-0.

A Motion was made and seconded to nominate James Horrigan as Vice-Chairman and said motion passed unanimously by a vote of 7-0.

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**IV. ADJOURNMENT**

There being no further business to come before the Board, the Board acted unanimously to adjourn at 10:00 p.m. and meet at the next scheduled meeting on January 21, 2003 at 7:00 p.m. in the City Council Chambers.

Respectfully submitted,

Jane M. Shouse  
Secretary

/jms