

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

**7:00 P.M.**

**CITY COUNCIL CHAMBERS**

**FEBRUARY 18, 2003**

**MEMBERS PRESENT:** Chairman Charles LeBlanc, Vice-Chairman James, Horrigan; Alain Jousse, Christopher Rogers, Nate Holloway; David Witham, Alternate Arthur Parrott and Alternate Steven Berg  
**MEMBERS EXCUSED:** Bob Marchewka  
**ALSO PRESENT:** David Holden, Planning Director (through Bratter discussion only) and Lucy Tillman, Planner

~~~~~  
**I. Approval of the Minutes**

Requested changes: Page 4, change vegetable to vegetative and Page 18, change baron to barren.

A motion was made and seconded to accept the corrected minutes from the January 21, 2003 meeting and it was approved unanimously with a 7-0 vote.

~~~~~  
**II. Old Business**

**A. Myles S. Bratter vs. City of Portsmouth**, Board to vote on whether to appeal an Order from Rockingham County Superior Court, dated January 8, 2003.

Mr. Witham made a motion to appeal the decision from the Rockingham County Superior Court to the New Hampshire Supreme Court. Mr. Rogers seconded.

Mr. Witham stated that the original decision denying the variance request was well founded. The Boards arguments were well stated but were sent back in light of the Simplex case. That did not change any of the facts or how this matter should be dealt with. Mr. Witham's strongest opposition to the request was the way the project was approached. The zone was set to help maintain neighborhoods, control growth, and keep things on a path that the city desired and the residents desired. One of the issues was to control uses in certain areas and districts. There are allowed uses and uses that are non-conforming. If the City found it desirable to control the expansion of non-conforming uses, the zoning was set accordingly. In this situation the applicant decided to construct a building, call it something that was conforming, and once it was built, wants to put something non-conforming into it. He felt that totally goes against the zoning, undermines zoning, it was not in the spirit of the ordinance and it was not in the best interest of the residents. Mr. Witham was aware that many of the residents spoke in favor of this and he was sure it was a good business but this wasn't about a good business and the neighbors supporting it as much as it was the value of having a zoning ordinance. He felt that the variance request worked against what the whole spirit of the zoning ordinance was.

Mr. Rogers agreed with Mr. Witham. Mr. Holloway stated that he supported the motion. This was based on the changes to the total character of the neighborhood. From that point on, it was single family housing so that would change the spirit of the neighborhood. Mr. Parrott noted that,

although he was not a member of the Board when this issue came before the Board, he did intend to vote as he had read all of the materials provided by the Planning Department and had some experience having sat on the Planning Board. Vice-Chairman Horrigan stated that he supported the motion. Given his original concern about the expansion of this business, he believed that it was very important for the Board to attempt to protect residential neighborhoods as best they could. The constant pressure for commercialization of arterial streets that run through the neighborhoods, in particular, Bartlett Street, faced that kind of pressure. He felt they were obliged to uphold the ordinance. It was primarily a residential neighborhood and he could not see any reason to give up on this matter. Mr. Jousse stated that he also supported the motion. He felt that granting the variance would have been a substantial injustice to the public. This particular addition was built under one pretense and once it had been built, the owner changed his mind, or maybe did not change his mind, and wanted a variance to change the nature of what the building was intended to be. Granting a variance under those circumstances would be a great injustice to the City of Portsmouth and its citizens.

Before continuing forward with a vote Chairman Le Blanc introduced the newest alternate member of the Board, Steven Berg, and indicated that Mr. Berg would not be voting on this particular issue.

The motion to appeal passed unanimously by a vote of 7-0.

~~~~~

**B. Request for One-Year Extension of Time for Richard P. Fusegni, Owner, for property located at 1574 Woodbury Avenue.** Said land is shown on Assessor Plan 238, Lots 16 & 17, and lies within the General Business District.

Mr. Horrigan indicated that he needed to know why the one-year extension was needed. Attorney Pelech spoke on behalf of Mr. Fusegni. Attorney Pelech stated that the site plan had been amended to downsize the building and it might be several more months before the final plans were done and the building permit could be pulled due to the weather. Mr. Rogers asked if Attorney Pelech felt that the one-year would be sufficient and Attorney Pelech indicated that it would be.

Mr. Rogers made a motion to grant the one-year extension. Mr. Parrott seconded. Mr. Rogers felt that there were complications and the Board was always trying to assist people when they were working in good faith. Mr. Parrott felt that the reasons set forth supported the request and felt that the request should be granted. Vice-Chairman Horrigan pointed out that the Board could only grant one extension. Any additional extension would require a variance hearing.

The motion to grant the one-year extension until March 19, 2004 passed unanimously 7-0.

~~~~~

Chairman Le Blanc advised the Board that Petition #7 of Dunya Kutchey Revocable Trust, Joan Gittlein, Trustee, Owner; Kris Rick Realty Trust, Applicant, had been **withdrawn** until next month.

~~~~~

### **III. Public Hearings**

1) Petition of **Judy Howard, owner**, for property located at **80 Burkitt Street** wherein a Variance from Article III, Section 10-302(A) and Article IV, Section 10-401(2)(c) are requested to allow the following after demolition of portions of the existing dwelling: a) a 5' x 9' porch with steps having a 9'3" front yard where 15' is the minimum required, b) an irregular shaped 355 sf 2 story addition to the left side of the existing dwelling with an 11'3" front yard where 15' is the minimum required and a 4' left side yard where 10' is the minimum required; and, c) a 10' x 11' deck with a 4' left side yard where 10' is the minimum required. Said property is shown on Assessor Plan 159 as Lot 33 and lies within the General Residence A district. Case # 2-1

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

Judy Howard, of 80 Burkitt Street addressed the Board. She distributed a letter of support from Peter Floros, of 90 Burkitt Street, who would be most effected by her project. Ms. Howard stated that the variance would not be contrary to the public interest as she proposed decreasing non-conforming setbacks by 4' on the left side, 4' in front and decrease total lot coverage by 10%. She was increasing space between her home and her nearest abutter's property. She showed her plans to 7 of her 8 direct abutters and discussed it with the other direct abutter. She showed her plans to over 20 indirect abutters and they all signed her Petition in support of her request. Ms. Howard stated that the zoning restriction interfered with her reasonable use of the property due to the small lot size. If she left the building where it was, there would not be enough space to work on it. Literal enforcement of the ordinance would leave her with a 10' wide addition, which is half of the width that she currently has. The zoning ordinance was created long after her neighborhood was built and many of the surrounding homes have similar setback issues. Her neighbors are happy with the changes that she proposed and it would be safer with more open space. The requested variance is consistent with the spirit of the ordinance as she is improving the setbacks. By granting the variance, she would have better use of her property and would increase the space to her nearest abutter. The value of her home, as well as the surrounding properties, would increase.

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

Vice-Chairman Horrigan made a motion to grant the petition as presented and advertised. Mr. Rogers seconded. Vice-Chairman Horrigan stated that the house used to have an old grocery store annexed onto it. The annex, or addition, did not fit in with the buildings in the immediate neighborhood and, as the Petitioner pointed out, it was on a very narrow, small lot. The proposal before the Board would be in the public interest because the Petition had indicated that the existing setbacks were non-conforming, with a 0' setback on the side, so they would get some improvement with the setbacks. Also, the Petition signed by abutters seemed to cover almost everyone within a 2 block radius, all in support of this renovation. As far as the hardship was concerned, he could not think of any reason why the zoning ordinance would have called for no renovation of this annex. The zoning restriction did interfere with the owner's reasonable use of the property because of the smallness of the lot and there were many other lots in the neighborhood that had a similar problem. No fair and substantial relationship existed between the general purpose of the zoning ordinance and the specific restriction on the property. In fact, this was not a unique problem. It would seem to be most unfair to insist that no renovations be done on the property. Finally, the variance would not injure the public or private rights of others, but, would be a great improvement over the appearance of this property so it would seem that everyone's public rights would be greatly improved as well as

the private rights of the immediate neighbors. This variance would be consistent with the spirit and intent of the ordinance as it would improve existing nonconforming dimensions. Substantial justice would be done by allowing her greater enjoyment of her property, with more living space and a property that would be more pleasant to look at. The variance would not diminish the value of the surrounding property. As all of the criteria had been met in this case, it should be granted.

Mr. Rogers stated that he agreed with Vice-Chairman Horrigan and also that the Simplex criteria had been met. It was an addition that would improve the evaluations of the surrounding properties. Most of the changes were going to reduce the non-conformance or keep it as it was.

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

~~~~~

2) Petition of **Gordon Sorli, owner, Paul Sorli d/b/a Portsmouth Gas Light Co., applicant**, for property located at **64 Market Street** on remand from Superior Court Order Docket No. 02-E-024 for reconsideration of all issues wherein a Variance from Article XIII, Section 10-1302(G) is requested to allow a six month extension concerning the expiration of an extension of approval granted to 30 November 01. Said property is shown on Assessor Plan 117 as Lot 35 and lies within the Central Business B and Historic A districts. Case # 2-2

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

Jonathan Flagg, Esq., spoke on behalf of the Petitioners, Gordon and Eleanor Sorli. Attorney Flagg gave a brief history of this matter. In 1999 the Board approved a Special Exception. On November 21, 2000 the Board granted a one-year extension. The Petitioners spent the year of 2000 acquiring 78 Market Street, which directly abuts 64 Market Street. 78 Market Street had within it an elevator that was on a common wall with 64 Market Street. That was a significant issue for handicapped accessibility for the plans for development of 64 Market Street. After purchasing 78 Market Street, the Petitioners then worked diligently through their architects and the City of Portsmouth Inspection Department. They went through BOCA Code analysis in February and March of 2001, with their presentation to the City Building Inspector in April and May of 2001. In June and July of 2001 the Petitioners verified their design with the consultants, including kitchen design, structural, mechanical and electrical engineers. In August and September of 2001 they submitted all of the designs for the interior. The Petitioners were working on a Phase I, which would entail interior renovations. That renovation would not have required site review or HDC approval. The Petitioners met with the City in October of 2001 about the issue of breaking the project up into two Phases, the interior vs. the exterior work. On October 22, 2001, the Petitioners received a letter from the Planning Department explaining that the application for 64 Market Street expired on November 30, 2001 and that they were not able to separate out the building permit. That left the Petitioners in a precarious situation regarding the time frame for the extension. They submitted a request for a variance from Section 1302-G, to allow them an additional 6-month extension. At a public hearing on November 27, 2001 the Motion to grant failed on a 3-3 vote. The City allowed the Petitioners to appear before the HDC at their own risk prior to the Board of Adjustment, but if the Board approved the request for re-hearing, it would be helpful to already have the HDC approval. The Petitioners were granted approval by the HDC. The Petitioners were unable to get before Site Review because they had not obtained a variance from Section 1302-G and that was the end of it. Judge McHugh, of the Rockingham County Superior Court, remanded this case in light of the Simplex decision. Attorney Flagg felt it was a critical fact that this case was different from most

cases as the underlying project itself was already approved in 1999 by this Board. This was just a question of granting a variance to allow a six-month extension. Attorney Flagg believed the Board's denial would create an unnecessary hardship because the Board had already determined that an underlying hardship existed when it approved the original request. If there was a hardship then, there would be a hardship now. There was no evidence at all that the granting of the variance would reduce the surrounding property values. This was a calendar issue rather than a substance issue. The proposal was not contrary to the spirit of the ordinance as the Petitioners had made a lot of effort to get it done. The granting would benefit the public interest and the Board had already determined that. In light of the Petitioner's efforts over the past year, the granting of the six-month extension would be substantial justice. The specific Simplex test related to the hardship issue. The Supreme Court had tried to balance the property rights vs. the needs of zoning. In this particular case, the Simplex test was met by giving the extension because it was not contrary to anything in the ordinance except 1302-G, which was to keep projects moving along. Attorney Flagg asked the Board to reconsider this request.

Vice-Chairman Horrigan indicated that he felt Attorney Flagg was required to go through the Simplex criteria as that was why the Court had remanded it back to the Board.

Attorney Flagg addressed the Simplex criteria for the Board. He indicated that the first part of the test was whether a zoning restriction, as applied to the Petitioner's property, interfered with their reasonable use of the property, considering the unique setting and its environment. The issue of the unique setting of the property in its environment was not applicable to this case. The question was whether they interfered with the property rights and the reasonable use of the property. The Board had said this project should go forward, or at least approved it. It was an interference of their property rights to go forward beyond where they had already gone and it's an unnecessary interference because they only needed a one month extension. The second part of the test was whether there was a fair and substantial relationship between the general purpose of the zoning ordinance and the specific restriction on the property. The Petitioner spent a substantial amount of time and effort with a whole variety of contractors to move this project along, including buying 78 Market Street. He did not see a relationship between the purpose of this ordinance, just to move things along, and this particular case because the Petitioners had tried to move it along. The third part of the test was that the variance would not injure the public or private rights of others. The project itself had already been determined not to injure the public or private rights of other. Therefore, how can an extension of one month in the time for getting a building permit have an impact on the public or private rights of others? Attorney Flagg indicated that the Board should focus more on the intent of the Simplex decision as opposed to the specific test, which was hard to apply to this case, then the Board should approve the extension.

Mr. Jousse indicated that Mr. Flagg indicated that they needed a one-month extension but were requesting a six month extension. Attorney Flagg indicated that at the time of the original request they still needed HDC approval, however, that has already been approved. All they need now is Site Review approval and, per discussion, it was determined that it would take at least two months to complete Site Review.

Vice-Chairman Horrigan stated that they originally gave the permit for 64 Market Street. Attorney Flagg referred to "the project", which is an element. Then 78 Market Street came into the picture, due to the handicapped access. Is 78 Market Street going to be expanded, which was part of the project. Attorney Flagg indicated that it would not and the only connection from 64 Market Street

to 78 Market Street was the elevator and staircases. The only reason that he made reference to 78 Market Street was because that was part of the delay.

Mr. Jousse asked if any other steps had been taken, other than HDC, for the finalization of this project? Attorney Flagg indicated that since the Board denied the request for re-hearing, they were unable to go forward. They did try to convince the Planning Department to allow them to go before Site Review and, if that had happened, it probably would have been January of 2002. However, the Planning Department indicated that they had to bring a lot of people together for Site Review and they did not want to take that step if they weren't going to proceed any further. Therefore, if the Board approved the variance, they would have to appear before Site Review in March and that would be it.

### **SPEAKING IN OPPOSITION OF THE PETITION**

Donald Coker addressed the Board, speaking on behalf of the Downtown Residents Neighborhood Association. Mr. Coker indicated that when this was discussed in November of 2001, they were very much opposed to the granting of the extension. A memo was sent to all of the members of the Board of Adjustment and was made part of the record. He felt that the Planning Department made a good argument for not extending the one-year extension. He reiterated the reasons for the denial. The original plans were from 1997, rather than 1999. He felt that a letter dated October 22, 2001 to the applicant from the Planning Department was a "smoking gun". The time-line that had been presented was presented in the best possible light that it could be presented by a representative of the applicant. If the Board took a look at the physical file that was on record in the Planning Department, they would see somewhat of a different timeline. The bottom line was that the applicant waited until almost the very end of that one year to present the plan to the City. They might have had activity going on in the background but everyone knew that they were working on a one-year extension. He quoted the Planning Department, "The applicant's only viable option was to apply for an extension. This was stated because in order to secure the building permit, HDC and site review approvals are required. It would appear that the process cannot be completed in the few days remaining." It was clear that the applicant waited until the last minute to submit the plans. So, if there was any hardship, it was absolutely self-inflicted. Even in light of the Simplex decision, there were three conditions. In the opinion of their organization, there was no difference one way or the other. The hardship was self-inflicted. Even if the hardship were proven, in order to obtain a variance under RSA 674:33, an applicant must satisfy each of five requirements. The Simplex decision only addressed one of those five. Nothing had changed since when they were before the Board last, opposing the granting of the extension. The association was still opposed to it for the following reasons: 1) More than adequate time had been allowed for the completion of the project. 2) There was a clear disregard for the established procedures of land use plan review that has been documented. The applicant did not meet any of those five requirements. The hardship was self-inflicted. The expansion of the business would be an over-intensification of the use of the property and would, without question, negatively effect the residents that surround the building and the area. It would effect city services and the Police Department had in the past discussed in public their feeling that the expansion of this building would increase police calls. The seeking of a variance stated clearly that no other extensions may be granted. That was not a gray area. While certainly it was a novel approach to seek a variance on that, it was clearly contrary to the spirit of the ordinance. There was no public interest in granting the variance. In fact, by granting the variance, the residents of downtown would be significantly impacted. Granting the variance served no purpose in doing substantial justice. In fact, quite the contrary was true. He urged the Board to do one of two things. Either deny the extension outright, which he felt would be the preferred choice,

or, if they had any questions about the timeline, he would urge them to table it for a month and go back and review the physical file and he believed they would see that there was no hardship. He felt that the reality was that this was a procedural question that was applied evenly to every property owner in the City of Portsmouth. You get one year, you get an extension for one year and that's it.

Chairman Le Blanc asked how this project would injure the property rights of the people who live downtown? Mr. Coker indicated that by expanding the business and increasing the number of people who partake of the business. They already suffer greatly from the outdoor deck to begin with by the noise. By extending this business and by making it even more intense of a use with a dance area and a club area leading to more alcohol, when the place lets out it was going to be like opening the flood gates. He urged them to come downtown on a warm Friday and Saturday night when the bars are all closing and he thought they would be shocked by the behavior. In all fairness he was not blaming that all on the Gaslight and never did but it was a contributing factor. As a result, their quality of life would diminish.

Mr. Rogers asked how the granting of an extension itself would have any impact on the downtown residents? Mr. Coker stated because it would allow the project to be completed. To take it to a higher level, the planning and zoning regulations are there for a purpose and it was to protect the public. He believed that by granting the extension on top of the extension set an extraordinarily bad precedent as it had never been done. Mr. Rogers indicated that the Court had been very vague since the Simplex decision, they had not said that a self-inflicted hardship should be considered. It appeared to be a gray area in that respect that they were not very specific on a self-inflicted hardship but were just talking about a hardship on the people who own the property. Mr. Rogers asked where that fit into his argument? Mr. Coker indicated that he had researched the Simplex decision and he explained that counsel for the applicant indicated, and he paraphrased, "inevitably and necessarily there is a tension between zoning ordinances and property rights as Courts balance the rights of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning regulations." It seems to Mr. Coker that it would not be unreasonable for the city to enforce calendar deadlines. Those were very clear, everyone that worked with the process knows what those deadlines are, every attorney that works with land use knows what those deadlines are, every planner, every person involved in the process knows what those deadlines are. They believe that the definition of unnecessary hardship, quoting from the Court, "has become too restrictive and in light of the constitutional protections by which it must be tempered. Henceforth, applicants for a variance may establish unnecessary hardship by proof that ....". Mr. Coker felt that the bottom line was that an unnecessary hardship, a self-inflicted hardship, was something that was avoidable. It would be unreasonable for an unavoidable hardship to penalize someone. Because the process was so clearly defined and the process was known to everyone that works in it, for the applicant to submit the plans three weeks before the expiration was very much a self imposed hardship.

Mr Witham asked Ms. Tillman to clarify the procedure on extensions. Ms. Tillman indicated that the Board could grant a one-year extension, which was done. Under that section, the applicant could not come back and ask for an additional year so they requested a variance. It was a portion of the ordinance that they were asking a variance from. So, the petition was properly before the Board requesting a variance to the time limitation. That is what has been remanded back to this Board. Ms. Tillman stated that you could request a variance on anything in the ordinance.

Ms. Tillman clarified that the next Site Review deadline that they would be able to meet would be the April 8<sup>th</sup> Technical Advisory Committee and the April 24<sup>th</sup> Planning Board meeting.

## **DECISION OF THE BOARD**

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Witham seconded. Mr. Rogers felt that deadlines sometimes change, there can be different considerations as far as purchasing property, and getting the proper planners and lawyers. He agreed that the applicants may not have been the best with their time regulation but they worked in a proper manner, making a good faith effort to move the property addition along. As far as the variance, it was not contrary to the public interest to grant the variance. As far as the Simplex decision goes, it was a little difficult to assess this particular item with that decision, except to say that not denying it would not be proper because it would deny the applicants their reasonable use of the property in continuing forward with the addition and there was no fair and substantial relationship between the general purpose of the zoning ordinance and the restrictions to the property. He did not feel that the granting of the six-month extension was going to injure the public or private rights of anyone. Mr. Rogers believed that it was the spirit of the ordinance to allow people to continue on if they had worked towards getting the project underway. They were very close to it and there were substantial problems in the process and he did not feel that there would be any diminution of value to the surrounding properties.

Mr. Witham supported the motion, simply based on the six-month request for an extension. They were only considering the extension of time. They had the criteria to look at and it was rather difficult to apply a time extension to it. The applicant had worked in good faith and it was not in the public interest to deny them the ability to pursue this project when the city had granted them permission to do it. Some of the time problems that they ran into were trying to acquire a means of getting handicapped accessibility and the stair towers. They were working in good faith and it wasn't in the interest of the City or the spirit of the ordinance to simply say that their time was up and they had to quit. Another six months to overcome some obstacles that they ran into, whether self-inflicted or not, seemed reasonable. He did not see where the six-month extension would hurt the property values or hurt the rights of the public or private citizens.

A motion to grant as presented and advertised passed by a 6-1 vote.

~~~~~

3) Petition of **DSM Realty, owner**, for property located at **1500 Lafayette Road** wherein a Variance from Article IX, Section 10-907 is requested to allow 14.4 sf of additional attached signage for an aggregate of 841.8 sf of attached signage where 745.3 sf is the maximum aggregate attached signage allowed. Said property is shown on Assessor Plan 252 as Lot 2 and lies within the Office Research district. Case # 2-3

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

Don Reed, of Barlo Signs, spoke on behalf of Brooks Pharmacy. Mr. Reed indicated that they were requesting a minor addition to an existing sign. He gave the Board a history of this case. In March of 2002, Barlo Signs went throughout New England and changed a lot of Osco Drug signs to Brooks Pharmacy and one of the locations was 1500 Lafayette Road. At that time, they were advised by Brooks Pharmacy that they just wanted "Brooks Pharmacy" on the new sign. He has

since been told that there was an oversight and they were really interested in advertising their one hour photo service. The relief that they were requesting was the addition of the 'One Hour Photo' letters. Mr. Reed felt that they were presenting an appropriate sign for the area. He pointed out to the Board that the DeMoulas Plaza had many signs of similar type and they felt that what they would be allowed was overshadowed by what was going on in the rest of the plaza. They felt that they were requesting minimal relief that was appropriate for the business. Brooks Pharmacy depends upon the one hour photo function. They felt it would be in the public interest for people coming into the plaza to see that Brooks Pharmacy had the one hour photo capability. They felt substantial justice would be served by the Board allowing them to advertise the one hour photo. They felt the zoning restriction would deprive Brooks of a substantial amount of business that would be derived from being able to advertise. They believed it would be in the spirit of the ordinance where the ordinance allowed for this type of sign and to deny it based upon the signs that are in the rest of the plaza would clearly be an injustice. By granting the petition it would not diminish any of the surrounding area and it certainly would not be harmful. It would be in the public interest.

Chairman Le Blanc asked what the current signage square footage was? Mr. Reed indicated that Brooks Pharmacy currently has 62.3 square feet and they were asking for an additional 14 square feet.

Mr. Rogers asked if they were taking up any more space or were they just moving the letters around? Mr. Reed indicated that the exterior band was laid out for each individual tenant and they would be within that space. Mr. Rogers clarified that they were changing the text but would keep it within the same exterior band? Mr. Reed indicated that was correct.

Vice-Chairman Horrigan indicated that he visited the site and could not identify the picture in their plan. Mr. Reed indicated that it was a computer graphics picture rather than an actual picture of the current sign. Vice Chairman Horrigan also asked whether the new sign would cover more of the storefront, thereby covering more open space. Mr. Reed indicated that the sign would not extend any further than the existing sign.

Mr. Parrott asked about the calculations used for the square footage of the signage, which would include the lighted sign in the window that advertised their one hour photo service. Mr. Reed indicated that the sign in the window was intended for pedestrian traffic as opposed to having a sign that sat up over the wall for the vehicular traffic. However, the window sign was not calculated in the total square footage and he was not sure that had to be done. Mr. Parrott asked if the window sign would come down if the new one were approved? Mr. Reed indicated that he did not believe they would do that. He did not feel that it was an either/or situation as he felt the signs addressed different situations. Mr. Parrott asked if the total square footage of the large lighted sign remained the same as it was right now? Mr. Reed indicated that they would be adding the lettering for One Hour Photo so they would be adding 14 square feet. He indicated that the sign consisted of individual channel letters, consistent with the rest of the plaza.

Chairman Le Blanc asked how much of the pharmacy's business is in one hour photo finishing? Mr. Reed indicated that he could not give the volume or percentage but the important thing about the one hour photo was that it welcomed people into the store. It was a way of attracting new business into the store. Once they came in, they used some of the other services and products of the pharmacy. Chairman Le Blanc asked if they were not getting the business because they were not advertising? Mr. Reed said that was absolutely correct. In a sense, it was a self-imposed hardship

because of the omission of the one hour photo on the original sign. The one hour photo was a very important part of the Brooks Pharmacy package.

Mr. Rogers asked Ms. Tillman about window signage. Ms. Tillman indicated that she would defer to the Building Inspectors but to her knowledge they always counted window signage as part of the over all signage of the property. She did not believe they made an exception when it was hanging inside a window as opposed to one attached to the building.

Mr. Witham confirmed that the Building Inspector did a site inspection and did his own calculations so Mr. Witham was going to stay with those figures.

## **DECISION OF THE BOARD**

Mr. Rogers made a motion to grant the petition as presented and advertised. Vice-Chairman Horrigan seconded. Mr. Rogers indicated that this was a 14.4 square foot addition which was included in their own band above their store, so it was not increasing the size much other than changing the letters and moving them around a little bit in the same amount of space. There was a lot of space between some of the other words so they were not adding much more. Mr. Rogers did not feel this was contrary to public interest to grant them the Variance as the particular building was a commercial property. It was not a stand-alone unit, but was attached to all of the other businesses in that plaza. He felt that not granting the petition would interfere with the reasonable use of the property. They should be able to advertise what they sell. He felt there was no fair or substantial relationship between the purpose of the zoning and this particular signage. Increasing it 14.4 square feet was very minimal. It would not decrease the value of the property in the area because it was a commercial building. He felt that there would be substantial justice in granting the variance.

Vice-Chairman Horrigan indicated that the building was currently almost covered with signage. Any business located at the site would definitely have a need for some signs to attract the public to their particular business. Aesthetically he did not feel the increase would have any impact on the public at large. There was some public interest served as the proposed sign had more information. One hour photo developing was important to some people and it was also important to the applicant because it had become a standard feature of drug store operations. It did not appear to be contrary to public interest. The specific property called for some sort of signage and there are at least 6 more businesses at the site and each business had a right to their own signage. Addressing whether there was an unfair or insubstantial relationship between the general purpose of the zoning ordinance and the specific restriction on the property, in this particular case, the answer was no. An additional 14 square feet could not be defended on any fair or substantial grounds. It would be difficult to perceive how the public or private rights of others would be effected. Getting into aesthetics, the building was already covered with similar signage so substantial justice would be done by granting the variance. He did not see how a message regarding one hour photo would diminish the value of any surrounding properties.

Mr. Jousse indicated that he would not support the motion. He failed to see where there was a hardship. Osco had changed to Brooks Drugs and seemed to have survived without the one hour photo processing. Personally, when he needed one hour photo he let his fingers do the walking to find out where he could accomplish his need. Another sign on the building was a safety hazard. It was intended for drivers, not pedestrians, and there was already enough signage to distract a driver without adding another sign.

Chairman Le Blanc also indicated that he would not support the motion. He felt that, with this 14 square foot addition, they would have 841.8 square feet of attached signage where 745 square feet aggregate was allowed. He felt that was more than sufficient. The company had been doing business over the years and they didn't seem to be dying from it. He felt the zoning restriction as applied to this particular property was not unreasonable. If they want, they can put the signage in smaller letters and accomplish the same thing. The ordinance was meant to be applied and it was not interfering with the use of the property and that was sufficient for denying it.

A motion to grant as presented and advertised failed with a 3-4 vote, therefore the Petition was denied.

~~~~~

4) Petition of Chittenden Bank, owner, for property located at 1555 Lafayette Road wherein a Variance from Article IX, Section 10-908 is requested to allow: a) two free standing signs of 71.15 sf and 58.62 sf in a district where free standing signs are not allowed, b) 199.17 sf of aggregate signage including 57.4 sf of attached signage where 75 sf of aggregate signage is the maximum allowed, and c) four 3 sf directional signs where directional signs greater than 1.5 sf are not exempt. Said property is shown on Assessor Plan 251 as Lot 125 and lies within the Mixed Residential Business district. Case # 2-4

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

Don Reed, of Barlo Signs, spoke on behalf of Chittenden Bank, also known as Ocean National Bank. Mr. Reed stated that this site was on the corner of two very busy streets, Elwyn Road and Lafayette Road, requiring the site to have two entrances. Ocean National Bank has invested a lot of capitol to completely redevelop the site to provide state of the art banking services. They were trying to achieve a consistent identifying package that related to all of the other Ocean National Banks in New England. In the banking business, consistency and identity is a vital means of marketing. They were proposing two free standing signs. The one on Lafayette Road would contain the Ocean National logo and also a time and temperature unit which they felt would be a benefit to the public. This would be a good location for it as people are sitting at the light. They were proposing a sign that was a bit larger than what was currently there because of the nature of the area. Although the site was in a mixed area, this was clearly a commercial site. There were a lot of businesses up and down the street that had substantial signage and they proposed what they felt was a very tasteful, well designed sign proposal that would be an asset visually to the area. The signs that would be installed would not be a brilliant kind of sign but a rather sedate layout. The colors were not garish in any way and they would be an asset to the area. For the bank to be competitive and provide sufficient identification in the area, they were requesting additional square footage, for both signs. The sign on Elwyn Road would be a tenant supporting sign so that the upper portion would be Ocean National Bank and the bottom portion will be a tenant panel because they plan to construct an additional building.

The request for additional square footage for the directional signs was a reasonable request. The 1.5 square feet that was allowed was fine for accessory "No Parking" or "Turn Here" signs but the ones that say "Enter" and "Exit" are really in an area that control a lot of traffic and they felt the size was appropriate. It was always a challenge to make sure the signs are legible. There is nothing worse than a sign that was made too small causing a person to have to look around and try to understand what it says. They tried to design a clearly identifiable directional package.

Vice-Chairman Horrigan asked whether the location of the new signs would be in the same location as the old signs? Mr. Reed indicated that the sign on Lafayette Road would be moved into a large island area. Mr. Reed distributed their site plan showing the location of the new signs. He further explained that the existing free standing sign was next to the entrance but the proposed sign was actually in an island. Vice-Chairman Horrigan asked about the time/temperature sign and whether that was allowed? Mr. Reed indicated that the time and temperature changed every 3 seconds.

Mr. Witham asked how the temporary sign location on Elwyn Road differed from the proposed sign location? Mr. Reed indicated that the proposed sign would be a little bigger but in the same location.

Chairman Le Blanc requested the square footage of the current signs. Mr. Reed indicated that those signs were approximately 35 square feet each. Chairman LeBlanc indicated that in the ordinance, Section 10-903-B, "Temperature and time shall be permitted in all business, industrial and airport districts, provided that ....". Therefore, time and temperature are allowed.

Mr. Reed also pointed out that a lot of the signs in the area were much larger than what they were proposing. He had a picture of the Exxon sign down the street, which was a bright blue and red type of sign that was certainly a lot bigger than what they were proposing. He also indicated that the new signs that they were proposing had an opaque background so they were illuminated at night, just the letters were illuminated and it would not have a big flashy background.

Chairman Le Blanc asked if the signs that they were proposing on Lafayette Road would be roughly twice the size of what they have now, if they currently had 35 square feet and the one that they were proposing was 71 square feet. Mr. Reed indicated that was correct. Chairman Le Blanc indicated that the one on Elwyn Road would be 10 square feet larger.

Mr. Rogers asked Ms. Tillman about aggregate signage and whether it included the four 3 square foot directional signs, because they are not exempt. Ms. Tillman indicated that was correct, plus attached signage. The applicant had already been issued a permit for the allowable amount of attached signage. Mr. Rogers asked, if they were to grant the variance on the directional signage, wouldn't it be subtracted from the aggregate signage because it would be exempt? Ms. Tillman indicated that it would not make it exempt. She indicated they could have directional signs on site as long as they were not greater than 1.5 square feet. They had chosen to place four of them that are 3 square feet each, so they counted towards signage, as well as any other free standing signs they were asking for and in addition to the attached signage which they had already been granted a permit for. So, all of those added up to the aggregate. What was not in the aggregate was the two 1.5 square foot directional signs. Free standing signs were not allowed and the signs were greater than what was allowed.

Mr. Reed indicated that it was their understanding that the code specified that the directional signs could not be over 1.5 so they were appearing for a variance to ask for relief to ask for a larger sign. They could have had six more directional signs that were 1.5 and they would have been exempt. Ms. Tillman confirmed this.

Mr. Parrott asked how the size of the signs were chosen? He indicated that 15 feet was pretty tall and they had indicated that it was a mixed use area but the immediate abutters to this property on the side and on the back were both long established residential areas. He also indicated that it was

at a busy traffic light. He assumed that most people were going to the bank for a purpose and already knew where they were going. He asked if a smaller sign could do the same job and be less obtrusive. Mr. Reed indicated that they did a very thorough site survey and looked at the traffic pattern in the area, which was substantial. They looked at the conditions of a four-lane road going into two lanes. One of the developments over the past few years was ATM's and banks today rely on the ATM's as part of their service package. People are out at all hours of the night looking for ATM's. If someone is driving along in a big traffic pattern during rush hour and they need to get to a bank, they are better off having a sign that they can see quickly. They have seen situations where signs have been made too small and have created a public hazard. They have done studies to determine how large a sign should be to allow people to make a decision about where they want to go. They designed their package to be very modest, simple and straightforward.

Mr. Parrott asked what type of traffic studies had they come up with? Mr. Reed indicated that the number they came up with was 25,000 cars per day. This was a study they received from the NH DOT. Mr. Parrott asked what that figure led them to conclude? Mr. Reed indicated that they were looking at a mixed area and because of the residential area he did not feel that a business should be penalized. The street was consistently lined with larger signs. Their proposed sign was far under the Shell station next door. They were requesting relief that was not out of line for the area and it was not detrimental to the area. The whole Ocean National project was a plus for the neighborhood. The signs were well designed. Mr. Parrott asked how they came up with the size for the larger sign? Mr. Reed indicated that the proportion of the sign were dictated by all other Ocean National signs. The size is an issue of the proportion. They look at the size of the letters as each size is visible from a certain distance. They are trying to get the letters large enough so that people can see them in time to make a lane change or come into the entrance.

Bill Bernard of Barlo Signs addressed the Board. He was an account representative who worked with Ocean National. He stated that one of the reasons that they came up with the sizes was based on letter height for safety. Ocean National Bank respects the mixed use district but it was a very large lot and would have tenants off of Elwyn Road. In the general business zone 200' is allowed so they used that as their base. The signs were not allowed in the zone but they were obviously needed there so they had to go somewhere.

Chairman Le Blanc asked what the distance was from the property line on the Elwyn Road to the sign as well as the sign on Lafayette Road? Mr. Bernard indicated that the setback on the Lafayette Road sign was 20' from the property line. Elwyn Road was also 20'.

### **SPEAKING IN OPPOSITION OF THE PETITION**

Steve McGinnis, of 14 Elwyn Road, spoke in opposition of the petition. He stated that he lived 3 houses down from the Chittenden Bank property. He was glad to hear Vice-Chairman Horrigan's comments about protecting their neighborhoods. That reinforced why he strongly opposed the petition for two reasons. The first reason was because the large illuminated sign shown at E-2 on the site map was an eyesore for the neighborhood. They felt it would decrease the values of their homes when their assessments have almost doubled. The second reason, which was the most important reason for them, the sign located on Elwyn Road is some 58 square feet. That makes it a residential neighborhood being transformed into a commercial neighborhood. He feels that the banks' hardship did not override the risk of lowering neighborhood property values. He also brought up the fact that he was confused about how they put up their present signs and where they got their temporary sign permit.

Ms. Tillman stated that she believed the frame for the two 35 square foot signs had been existing. Barlo did not install the original signs, another sign company did that back in the 90's when it was Citizens Bank. Barlo was under the impression that they did not need a sign permit to do that however have since been told that they do need a sign permit to change the face of the sign from one company to another. They have replaced the faces of existing signs but did not have a sign permit to do so.

Mr. McGinnis had pictures of the existing signs that he shared with the Board and he felt that it looked like a new sign frame as well and that concerned him.

Mr. Reed stated that they only change the lower panel to "ATM:" where it previously said "entrance".

### **DECISION OF THE BOARD**

Mr. Rogers made a motion to grant Section C of the petition as presented and advertised. Vice-Chairman Horrigan seconded. Mr. Rogers stated that, because of the safety factor on Lafayette Road and Elwyn Road where it is a very hazard location, it would be necessary to have larger directional signs so that people can have a little more time to get into the site. It is not a form of advertising. He did not feel that there was anything contrary to the public interest but, rather, the public would be served by the larger signage. He felt that the signs did not interfere with the property use in any way, there was no relationship between the purpose of the zoning ordinance of 1.5 s.f., He did not feel that it was injuring the public or private rights of other people in the area because it was a safety aspect. The variance did apply the spirit of the ordinance as the ordinance was set for 1.5 for directional signage and he felt they needed a little bit more in that area. He did not feel it would diminish the value of any of the surrounding property. Vice Chairman Horrigan stated that he agreed with Mr. Rogers and felt that the public interest would be served by larger directional signs, given the nature of the two thoroughfares. That was a very busy and confusing intersection and it would seem in the public interest to have where the entrances and exits to the property were. From personal experience, he had seen fast cars do left turns into that property and he felt the directional signs would cure that particular problem. Regarding the hardship, he felt a reasonable use of the property dictated that the directional signs be large enough to be seen by motorists. Restricting them to 1.5 square feet seemed to interfere with the reasonable use of the property. The spirit of the ordinance dictated that traffic safety was one important criteria so a fair and substantial relationship did exist between the petitioner's request for larger directional signs for this particular site. Regarding injuring the public or private rights of others, a major concern would be the abutting residential properties and these particular signs, given the stipulations that have been placed on this property for vegetation and fences, would essentially make the signs invisible to adjoining properties. He did not see an issue of diminution of values.

Mr. Parrott asked that for purposes of clarity that the motion identify the signs by number and the quantity of each.

Vice Chairman Horrigan indicated that there were 4 signs, labeled F3, F4, F5, and E (Multi directional sign).

Chairman Le Blanc stated that he could not support the motion. He did not believe the arguments held water. He felt the ordinance allowed 1.5 square feet and he felt that was sufficient to give

direction. By the time the signs were seen, they would be on the property and there shouldn't be any particular high rate of speed. He felt it failed the second hardship test, he felt there was a proper restriction as applied to this property and it would not interfere with the owner's reasonable use of the property.

Mr. Parrott stated that he endorsed what Chairman Le Blanc stated. He felt that the maneuvering area and the driving area on the lot is very small so a car would have to be going very, very slowly at the onset and he also felt that the sign ordinance, as the city has written it, was adequate.

A motion to grant Section C as presented and advertised passed with a 4-3 vote.

Vice-Chairman Horrigan made a motion to deny Section A & B as advertised and presented. Mr. Parrott seconded. Vice-Chairman Horrigan stated that a lot of time and effort had been expended on the site and one of their major concerns had been that it was a mixed residential business area and the site very closely abuts a large residential neighborhood, referred to generally as Elwyn Park. Anything they do at this site, they had to be very sensitive to those concerns. Large free standing signs would be a significant visual intrusion on the very nice residential neighborhood, no matter how well designed the signs might be. As far as a hardship is concerned, the zoning restriction as it applied to the specific property interfered with the reasonable use of the property, the setting essentially was in a residential district and it was difficult to see why this specific property demanded large free standing signs to be seen. As far as the fair and substantial relationship issue was concerned, the zoning ordinance for very good reason did not allow free standing signs. The reason for that was to allow the adjoining neighbors private, enjoyable use of their property. Reference to other businesses in the area was not relevant. The variance would injure the public or private rights of others, by forcing the residential abutters to look at commercial signs as part of their scenery. The variance was not consistent with the spirit of the ordinance. The ordinance was very clear that free standing signs were not allowed. Substantial justice would not be done by granting the variance. Again, a major concern are the residential neighbors. It struck him that the Board would do them an injustice by allowing commercial signs. The granting of the variance would certainly effect at least the immediate abutters if the signs were allowed. He did not hear any argument that the signs would preserve or increase their values.

Mr. Parrott agreed with Vice Chairman Horrigan. It speaks to the test that they have to apply when considering a variance for approval. He would add that the variance would be contrary to the public interest. The housing which was adjacent to the bank long predated the present owners and the housing which was adjacent to it also predates the owners. The housing and adjacent property have co-existed peacefully for a long period of time without these large obtrusive signs. With respect to the hardship, Mr. Parrott noted that a branch bank existed on this very property for many, many years and operated successfully with a small, unobtrusive sign. He did not see how anything had changed in that regard. Regarding the test dealing with whether the requested variance was consistent with the ordinance, he felt it was directly contrary to the ordinance, i.e. the ordinance said you shall not have free standing signs in this zone. The owners were fully aware of that ordinance when they purchased the property. He did not believe that substantial justice would be done by the granting of the variance as it would be a major change in the property and the adjacent properties had been their in their present configuration for a long period of time. He believed a very attractive, reasonably sized sign can be designed and placed on the property and be very successful.

A motion to deny Sections A & B of the petition as presented and advertised passed unanimously with a 7-0 vote.

~~~~~  
A five minute break was taken.  
~~~~~

5) Petition of **Alan J. Watson, owner, David R. Lemeux, applicant**, for property located at **43 Cornwall Street** wherein a Variance from Article III, Section 10-302(A) is requested to allow the construction of a 32' x 80' 3 1/2 story building for 4 dwelling units after the demolition of the existing building with 2,102.5 sf of lot area per dwelling unit where 3,500 sf of lot area per dwelling unit is required. Said property is shown on Assessor Plan 138 as Lot 42 and lies within the Apartment district. Case # 2-5

Vice-Chairman Horrigan moved to table the petition. Mr. Rogers seconded. Vice-Chairman Horrigan stated that as was indicated to them by the Planning Department, this petition would only be reviewed by the Board of Adjustment because it only had 4 units and did not require site review. The Board members received two items about the petition tonight, one about drainage and some drawings of the proposed building. He felt the need to look at this petition more closely. This was a neighborhood that the Board knows from past petitions has parking problems and there may be some other concerns and he felt they need more time to digest this petition and study it. He did not feel it was adequate to come in with information the evening of the hearing and allow the Board to give it the proper attention. Mr. Rogers indicated that he just seconded it for discussion.

A vote to table the petition was granted by a vote of 6-1.

Chairman Le Blanc stated that the application had been tabled until next month.  
~~~~~

6) Petition of **Brora, LLC, owner**, for property located at **off Portsmouth Boulevard** wherein a Variance from Article II, Section 10-209(33) is requested to allow a proposed 108 room 4 story hotel (including a meeting room with an occupancy of 35 people) on a 10 acre parcel and having a 100' front yard setback where a 175' front yard setback is the minimum required. Said property is shown on Assessor Plan 213 as Lot 2 (to be subdivided) and lies within the Office Research/Mariner's Village Overlay District. Case # 2-6

Attorney Malcolm McNeill spoke on behalf of Brora, LLC. Also present were Marc Stebbins, the contractor, and Karen Whitman, of Hilton Hotel. Attorney McNeill felt it was important to mention at the onset that the only relief they were requesting was one dimensional variance to permit a 100' setback where 175' was required in this rather interesting zone. This was a zone where multiple uses were permitted but some uses had higher dimensional requirements than others. What was very unusual within the zone and, for reasons that were unclear and unanswerable at the Planning Department, was that a hotel had a higher lot size requirement of 10 acres as opposed to the usual 3 acres and had higher setback requirements in the front and the back of 175' rather than the 100' for office-type uses. What was clear was that the use was permitted in the zone without question. Offices, a hospital with only a 100' setback, medical offices and even a secondary school would be permitted uses on the site. In Attorney McNeill's opinion, all of those uses had lesser dimensional requirements but had the probability of having a greater impact than the proposed hotel. He stated

that this was clearly a Simplex variance case, where the zoning ordinance interfered with the reasonable use of the property in its unique environment as a permitted use as a hotel. Attorney McNeill showed the Board an aerial photograph of the site. He pointed out the Commerce Center Office Park, Demoulos Shopping Center, Market Street, and Portsmouth Boulevard, which had been substantially upgraded by the applicant. By an agreement with the City, it was agreed that 240,000 square feet of uses would be permitted, of which this would be the first, without any other traffic modification. Attorney McNeill felt the building was important to the Board's consideration of the mixed use zone. On one side, across the street, were large office buildings that could be 60' tall. The proposed hotel was proposed to be 45' tall. To the rear of the property are residential uses that are multi-family uses. On the side of the property are 2 single-family dwellings. With regard to all of the setbacks that effect residential properties, they were in complete compliance. The only dimension that they didn't comply with was the front yard setback. The property across the street was property that was owned by the applicant. The hotel would not fit across the street because there wasn't sufficient depth. With regard to the property that was most effected by the setback, it was the small lodge use in the front of the building that was primarily impacted by the compliance with the 175' setback. The vast majority of the hotel was in complete compliance with the front yard setback. The lodge facility was within 175'. The lodge, which was the receiving area to the hotel, was a lesser structure than any of the office buildings and the multi-family dwellings.

Attorney McNeill indicated that this was not like the Ramsey Hotel that was recently heard by the Board, where there were four different variances requested. They were only requesting one variance and it only impacted similarly zoned uses. Nor was this property judicially re-zoned, such as Ramsey. Nor was this an Extended America case which was recently considered with regard to the property up close to the turnpike, where the Planning Department spoke of "shoehorning in the use". In the Planning Department's memo regarding this property, it noted complete compliance with the regulations but for the one setback issue as it related to the hotel. Prior to Simplex, they would not be before the Board, but with Simplex, it was entirely appropriate as to a permitted use that was adversely effected by the dimension controls where the result was a lack of ability to use this property for this permitted use, Simplex clearly applied.

The hotel was an extended use hotel. The average period of occupancy was 3-7 days, very similar to the Residence Inn at Pease. Attorney McNeill felt this use was very compatible in terms of the similar type of uses that were contemplated. It was close to an office park facility and training would occur in the facility. Every one of the hotel units had a small kitchen in it. The hotel would not have a bar, a restaurant, or function rooms. It had a small meeting room for some training that seats about 35 people and it had a breakfast nook. This particular use would fit in with the area, with other single family properties who knew that they purchased into and are located in a mixed use zone with regard to anticipated impacts on their properties.

Attorney McNeill indicated that they were proposing a hotel that was 4 stories, or 45' high, as opposed to the 60' that was allowed. In the area of greatest probable differential in quality or arguably in the types of units that exist, they were in complete compliance with the setbacks. The property would go through site review with regard to the buffering issues and, as such, the proposed building completely complied with that standard. The side setbacks were completely in compliance. It was just the front setback that was not in compliance.

Attorney McNeill indicated that they did have the option of building an office building that was 6 stories high, which would double the parking on the site, significantly expand the lot coverage and not be required to come before the Board. The question became, under the Simplex standard,

whether a reasonable use, i.e. a permitted hotel, was unreasonably effected by 1 setback. It was not enough for an opponent of this project to come in and say they could use the property for a permitted use. The issue was whether the existing ordinance unreasonably interfered with a reasonable permitted use. The standard of 10 acres was higher than other standards but their argument was that their particular, unique hotel would be less than other uses that would afford lesser protections in the neighborhood.

Addressing the specific criteria for granting the variance, they provided a report from Mr. Bergeron, MAI appraiser, who formed a conclusion that the hotel would not result in a diminution of property values. There were many other allowed uses for the property which would have a greater impact than what they were proposing. The expert appraiser, through examples, showed that other city properties had been sold close to other hotels and there had not been any diminution in property values. Attorney McNeill indicated that there would be an appreciation of property values because the use would be a desirable amenity to the office park that is next door and the use would cause a lesser impact than a hospital that would operate around the clock or a 6 story office building that could operate on shifts, as opposed to an extended stay facility. This would not be a tourist hotel.

Attorney McNeill then addressed the Simplex test. He stated that there were enhanced setbacks that only related to hotels with regard to the use. It was not apparent from the zoning ordinance why the 175' and 10 acres should apply to a hotel and 100' and 3 acres should apply to an office building that could be 15' higher and contain more parking. It makes no sense at all. The question then became, if the use is reasonable and they were only dealing with a dimensional issue, was there something unique about the site? The property was narrow, it would not be justifiable to move the hotel further back to impact residential properties which would require some sort of variance to the rear. They attempted to focus the lack of compliance in the area where it would hurt the least in a one story building that looked like a large house, across from property that the applicant owns, with a similar 100' setback for the most probable use, namely offices. The residential abutters could not say that there would be increased traffic as the applicant and the city entered into an Agreement where there could be 240,000 square feet of permitted uses in this area and this was the first one to come along without any further traffic modifications.

The applicant did not believe that any fair and substantial relationship existed between the general purpose of the zoning ordinance and the specific restriction on the property. Why should the front setback be 175' for a hotel but only 100' for an office building? Does it make sense that they could develop the site more intensely for office use?

Addressing the last part of the Simplex test, it would not injure the public or private rights of others. The residential properties were not being adversely effected. The infrastructure is in place. The adjoining office park would not be adversely effected and, in fact, would be benefited. It would be conducive to the environment in terms of limiting, rather than maximizing, the use of the site. The proposed use was consistent with the spirit and intent of the ordinance. The OR/MV zone was a multi-use zone. This was the only use within the zone that required 175' front setback. The general spirit and intent of the ordinance was to encourage diverse type uses, to provide for reasonable movement and also to have reasonable setbacks. They believed that existed in every part of the site except the front where they were seeking relief. Substantial justice would be done by the granting of the variance. In terms of this particular use, it was the only one that suffered from this expansive designing requirement. Attorney McNeill called David Holden and asked how did this come about? And his answer was that he didn't know. Why should they need a larger requirement for a permitted use with a lesser impact? Substantial justice would be done because the infrastructure

could handle it. The office park would be enhanced and there would be another facility in town to supply hotel needs for people, similar to the Residence Inn. This would not be contrary to the public interest. The use was permitted and it desirably fit into the neighborhood. Homewood Suites was a Hilton brand that was very similar to the Residence Inn that had been very successful in accommodating similar uses in a very unobtrusive way at Pease without adversely effecting other properties at that site. The site would be adequately buffered and the site review process would clearly provide for that.

Mr. Witham asked if the one story building was built first, would they need a variance for that? Attorney McNeill indicated that the building was the check-in and meeting-type area and he believed that as long as it was connected to the hotel it was considered part of the hotel. If it was detached from the hotel, they would not require a variance.

Chairman Le Blanc asked why the meeting room was only for 35 people? Karen Whitman, the Director of Development for the Hilton Hotels indicated that they were geared towards guests who were staying 5+ nights. They were not geared towards catering and did not have extensive restaurants and lounges. The meeting area was essentially there to help them sell guest rooms. They didn't have a big kitchen and the only food that they served was a complimentary breakfast.

Mr. Holloway clarified that they were only infringing on the rights of their own property across the street and Attorney McNeill confirmed that. Mr. Holloway then asked if the street was finished to accommodate another building across from the hotel? Attorney McNeill confirmed that it was. He indicated it was very much a boulevard and would easily accommodate the use.

Vice-Chairman Horrigan asked if they were expecting any problems when the signage issue was addressed? Attorney McNeill responded that the plans show a sign on the building and they would expect to have a conforming sign on the street. Also, Commerce Center was in the process of establishing a sign on Market Street Extension that would include their facility. They did not anticipate requesting any sign variances. Ms. Whitman added that Homewood Suites, being an extended Suite facility, did not depend on the roadside traffic.

John Madden, the owner of Osprey Landing apartment complex, spoke in support of the granting of the variance. He believed that the granting of the variance would result in an improved situation from their perspective relative to the alternatives that could be pursued by Brora in the absence of this variance. He believed the way the building was sited was a more substantial buffer that sits between the hotel property and his apartments. They had chosen not to place parking in the buffer. He thought the hotel was a logical use for the site, that it would require less parking than a comparable office building and, all things considered, he believed they would be a compatible neighbor.

David Kempton, of Dunlin Way, spoke in support of the granting of the variance. Mr. Kempton indicated that when he bought his property he knew it was a mixed used area. One of their fears was that it would be a giant office building. The extended stay hotel would have less of a traffic impact than an office building. Also, if the hotel had to be moved back for the 175' variance, some of the nice, tall pines would be impacted by the hotel and that would not be a good thing for the neighborhood.

Art Nicholson, of Dunlin Way, spoke in support of the granting of the variance. He was in complete agreement that the hotel was a good use of the property and did not feel that it would have any negative impact.

Terry Jenkins, of 13 Dunlin Way, stated that he was in support of the granting of the variance.

### **SPEAKING IN OPPOSITION OF THE PETITION**

Attorney Thomas Keane spoke on behalf of 1000 Market Street Corporation. He submitted a letter to the Board members that outlined their opposition to the request for a variance. He noted that there was no direct access to an arterial street as required by the zoning ordinance. Attorney Keane believed that Attorney McNeill made an argument against the granting of the variance. He told the Board that the applicant could make reasonable use of the property without the granting of a variance. Under the Simplex decision, the applicant must demonstrate the zoning ordinance interfered with the applicants' reasonable use. In this case, the construction of an office building fell within the zoning ordinance, without the need for any variances. Furthermore, the applicant stated that there would be greater impact on the neighborhood however the hotel is a 24 hour a day, 7 day a week use as opposed to an office building which would be 8:00 a.m. – 6:00 p.m., 5 days a week. He submitted that the use of a hotel would have a greater adverse impact on the neighborhood and he requested that the Board deny the application.

Vice-Chairman Horrigan asked who 1000 Market Street Corporation was? Attorney Keane indicated that they were a series of office buildings on Market Street, ½ mile closer to I-95. Mr. Jousse asked for the names of the businesses. Attorney Keane indicated that 1000 Market Street owns an office building, the old Congolium building and the Marriott Courtyard.

Chairman Le Blanc indicated that the Board had received a letter from Martin Torres in opposition to the variance and a letter from Linda Panori, expressing concerns regarding the proposed site plan.

Attorney McNeill responded to Ms. Panori's letter. He believed her concerns were related to site review issues with regard to lighting, which they will be complying with. Mr. Torres property is significantly buffered from the hotel site and has been buffered from the site for an extended period of time. He felt that the Board's questioning of Mr. Keane regarding 1000 Market Street was appropriate. The substance of his testimony was an anti-competitive issue as opposed to a variance issue.

### **DECISION OF THE BOARD**

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Parrott seconded. Mr. Rogers felt the criteria had been met for a variance. It was only a small variance, abutting their own property, which made a difference as well as the fact that most of the abutters came forward in support of the variance. By denying the variance, the Board would not allow them to use the property in a reasonable use, creating a hardship. Most of the property was within the proper requirements except the one-story entrance building. If it had been an office building, 100' would have been all that they would have needed. Addressing the fair and substantial relationship between the general purposes of the zoning and the specific restrictions on the property, he did not understand why a hotel should have more restrictions than an office building, which would be a much more intense use. The abutters all spoke in favor of the variance and felt it was a much better use of the property, so there was no injury to the public or private rights of others. It appeared to be

a much better use of the property and the applicants came a long way in making the rear and sides of the property beneficial to those around them. The variance was consistent with the spirit of the ordinance. Substantial justice would be done by granting the variance and there would not be any diminution of property and surrounding property values would probably rise due to the substantial investment in landscaping and highways. He felt the Board could grant the variance.

Mr. Parrott agreed with Mr. Rogers' analysis. He added that it was an attractive design and the parking in particular was arranged away from the adjacent residential area which was also a desirable feature. The dimensions all satisfy the requirements with the exception of the one on the front which was the one that would be least likely to effect the neighbors, in particular the residential areas. For all of those reasons, he felt the Board should support it.

Mr. Witham stated that he supported the motion. He could not figure out why a hotel was required to have a 175' setback, other than to keep the parking in the front, rather than in back of the building. In this proposal, the property did have the parking in front. The unique circumstance of this property was its unique shape. When you have a property that has a pie or triangular shape and you put the setbacks on, you would be greatly limited to the use of the property. He could not find any fair or substantial relationship between the purpose and the zoning ordinance.

Mr. Jousse indicated that he believed the zoning restriction was the hardship in this case. It didn't seem logical that a hotel would be required to have a 175' setback when the rest of the allowed uses on the property would only be required to have a 100' setback. Also, he felt it was the least impacted use of the property. Assuming the hotel was full and they had 2 occupants per room, they would only be talking about 218 occupants on the property while an office building could have as many as 500. Also, an office building would be entering and exiting the area pretty much at the same time but the hotel traffic more than likely would be over an extended period of time. He believed the hotel would be a very good use of the property.

Vice-Chairman Horrigan mentioned that the applicant provided a very careful market analysis by Bergeron Commerical Appraisal, which made a convincing case that the value of surrounding properties would be enhanced and there would not be any diminution of values.

Chairman Le Blanc addressed the criteria dealing with the variance being consistent with the spirit of the ordinance. The spirit of the ordinance is meant to keep light in an open area and minimize interference between the various zones that are in the area. He felt this project goes a long way to meet all of those needs of the ordinance. He felt it should be granted.

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

~~~~~

A motion was made to continue past the 10:00 p.m. rule and it was unanimously granted.

~~~~~

8) Petition of **Deb Campbell, owner**, for property located at **295 Maplewood Avenue** wherein Variances from Article III, Section 10-303(A) and Section 10-401(A)(2)(c) are requested to allow a 2<sup>nd</sup> floor irregular shaped deck approximately 10' x 36' with: a) 0' left and right side yards where 10' is the minimum required, b) 0% open space where 25% is the minimum required; and c) 79.8%

± building coverage where 40% is the maximum allowed. Said property is shown on Assessor Plan 141 as Lot 35 and lies within the Mixed Residential Office district. Case # 2-8

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

Ms. Tillman brought to the attention of the Board that some figures were corrected and the applicant would be giving some more refined figures than those in the legal notice and the owner would be looking for less relief.

Brian Rodonets, of Coastal Architects, spoke on behalf of Deb Campbell. The redefined calculations were the open space was changed from 0% to 15%, after the proposed deck/step addition was added. They also reduced the building coverage from 79.8% to 64%. It was an old, historic building that had been kept in very good shape. On the rear of the building was a deck that had deteriorated to the point of being a hazard. The steps were punky and soft and they also did not meet any code. They proposed extending the deck to the south side of the building and put stairs down from the deck. The proposed stairs would be protected from the elements as they planned to have a slight overhang roof above the doorway and over the stairs and then the stairs turned and went underneath the deck so that would be protected from the elements. The proposed stairs would not project out into the two grandfathered parking spaces. For safety reasons, to add the roughly 10' x 11" deck and change of stairs would be very beneficial.

Mr. Rogers asked if they had spoken to the abutter regarding his thoughts on the matter? Deb Campbell indicated that she had not spoken to the abutter. Mr. Rodonets indicated that the house was vacant.

Mr. Witham asked if the current stairs were code compliant? Mr. Rodonets indicated that the stairs were not code compliant, the rails were not but the deck itself was.

Mr. Parrott asked how high the deck was off the ground? The proposed deck would be the same height that it was, which was approximately 9'. Mr. Parrott asked if this was part of an emergency exit from the building? Mr. Rodonets stated that he believed it was an egress out of the building. There was a front stair that went down. Mr. Parrott asked about covering the deck and Mr. Rodonets indicated that they did plan to cover it. They plan to put an overhang over the doors which would cover some of the stairs and then the stairs would go under the deck.

Mr. Parrott asked who owned the adjacent property that this deck was right on the property line? Ms. Campbell indicated that she didn't know her name and did not try to get in touch with her. She had been coming and going to visit the premises to review the construction that was being done on her property but she never dropped in to see Ms. Campbell and she has never spoken with her. Ms. Campbell indicated that they planned to address the side wall aesthetically so that she has more privacy than she presently had. The main purpose of the deck was to make it more functional for her and more aesthetically pleasing to the neighborhood.

Chairman Le Blanc asked about the space between the property line and the proposed deck. Mr. Rodonets indicated that it would not extend any further than the existing building and would not extend past the property line.

**DECISION OF THE BOARD**

Vice-Chairman Horrigan made a motion to grant the petition as presented and advertised with a stipulation that appropriate screening be placed on the left side of the deck from the ground to the upper level. Mr. Rogers seconded. Vice-Chairman Horrigan stated that the existing deck was in bad shape and was a safety issue. He felt the more external access available for a second floor there was, the better it was. This would give one additional window on the rear of the building that would have external access by extending the deck. The zoning restrictions as applied to this particular property interferes with the owner's reasonable use. A deck was definitely a reasonable use and was almost a standard component of residential property today. This was a very small lot with a strange angle on the property line along Jackson Hill Street so the existing deck was really quite small. Restricting a new deck to the same area as the existing deck would not allow the owner the full use and enjoyment that she would get from a full size deck. There was no fair and substantial relationship between the purpose of the zoning ordinance and the specific restriction on the property. While they would be allowing the deck to go up against the left hand property line, in a sense they were not extending the variance as the current building was also on the property line. The variance would not injure the public or private rights of others. Vice-Chairman Horrigan could not see any public issues but the private issue would be the immediate abutter but he felt they covered that with the stipulation. The abutting property owner would be looking at a much nicer deck. The spirit of the ordinance was that residential property owners should be able to enjoy their property outside as well as inside. Substantial justice would be done by granting the variance because the owner would have a fuller use of her property and be able to enjoy the outside as well as the inside. Finally, granting the variance would not diminish the value of surrounding properties but clearly would enhance the applicant's building as well as the abutter's property.

Mr. Rogers agreed with Vice-Chairman Horrigan and added that, if this egress location were repaired or replaced as it were, it would not need a variance. They were basically looking at a 10' x 10' addition for the safety of the deck and it would improve the appearance of the deck.

A motion to grant as presented and advertised, with the amended figures that were given to the Board, with the stipulation that appropriate screening be placed on the left side of the deck from the ground to the upper level, passed unanimously with a 7-0 vote.

~~~~~

**IV. Adjournment**

There being no further business to come before the Board, the Board acted unanimously to adjourn at 11:00 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