

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE
CITY COUNCIL CHAMBERS**

7:00 P.M.

May 20, 2003

MEMBERS PRESENT: Vice-Chairman James Horrigan; Alain Jousse, Christopher Rogers, Nate Holloway; David Witham, Alternate Arthur Parrott and Alternate Steven Berg
MEMBERS EXCUSED: Chairman Charles Le Blanc, Bob Marchewka,
ALSO PRESENT: Lucy Tillman, Planner

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**I. Approval of the Minutes**

A motion was made and seconded to accept the minutes from the April 15, 2003 and April 22, 2003 meetings and it was approved unanimously with a 7-0 vote.

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II. Old business

A. Request for One Year Extension of Time for Portsmouth Casey Home Association for property located at **1950 Lafayette Road**. Said land is shown on Assessor Plan 267, Lot 007 and lies within the Office Research zone.

A motion was made and seconded to approve the request and it was unanimously approved with a 7-0 vote.

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**B) Petition of Susan B. Parnham, owner** for property located at **1220 Islington Street** on remand from Superior Court Order Docket No. 01-E-0568 for reconsideration of all factors to be addressed in a variance request under *Simplex Technologies v Town of Newington*, 145 NH 727 (2001) wherein a Variance from Article III, Section 10-302(A) is requested to allow an existing 10,280± sf non-conforming lot with a single family residence to be subdivided into two non-conforming lots with: a) one lot having 5,000± sf of area and the other lot having 5,280± sf of area where 15,000 sf of lot area is required for each lot, b) continuous street frontage of 50' for each lot where 100' for each lot is the minimum required, c) to allow a 2' rear yard for the existing 10' x 16' garage where 10' is the minimum required; and d) to allow 23% building coverage for the existing dwelling and accessory building where 20% is the maximum allowed. Said property is shown on Assessor Plan 233 as Lot 6 and lies within the Single Residence B district. Case #4-4

**SPEAKING IN FAVOR OF THE PETITION:**

Attorney Bernie Pelech spoke on behalf Susan Parnham. He indicated that this application was denied by the Board in August of 2001, it was appealed to the Rockingham County Superior Court and by agreement with the Portsmouth City Attorney this matter was remanded back to the Board of Adjustment. They presented the same case with additional information. This property came from one of the first sub-divisions recorded in Rockingham County back in 1895. The sub-division consisted of approximately 60 lots off of Islington Street and three new streets were built for this sub-division – Essex Street, Melbourne Street and Rutland Street. Most of the lots were 50' by 100'. The Parnham lots #12 & #15 have 50' of frontage on Islington Street and 50' of frontage on Melbourne Street. In 1951 the area was zoned General Residence and the requirement was 2,500 square feet of lot area per

family, a front yard of 15' and a side yard of 7'. Sometime between 1951 and 1982 these lots were moved from the General Residence zone to the Single Residence II zone. The minimum lot size was increased from 2,500 square feet to 7,500 square feet, then to 20,000 square feet. The zone was then changed to Single Residence B and the minimum lot size was reduced to 15,000 square feet. Also in 1982, a new section was added to the zoning ordinance, Section 10-301-A(4), and that was to resolve the ambiguities that existed in 10-301-A(3). That said that, if someone owned two adjoining lots that were sub-standard in size or didn't comply with the requirements of the ordinance, then they were automatically merged. Therefore, unbeknownst to the Parnhams, their two lots were merged into one lot.

Attorney Pelech stated that there was a hardship resulting from the application of the ordinance on this particular parcel of land. This was a hardship argument from Simplex. The application of the ordinance interfered with the reasonable use of the property by the applicant as she believed she was purchasing 2 lots as the deed showed and up until the 1980's she received two separate tax bills. It was not until she applied for a building permit for the second lot that she learned that the lots had been merged. The second lot was no longer buildable because of the application of the ordinance and therefore it interferes with a reasonable use. They believe that the use was reasonable as there were many houses in the area and within that sub-division with a 5,000 square foot lot. The lot in question is surrounded by approximately 127 lots, including the original 60. Of those 127 lots, only 14 of them are 15,000 square feet in size. 89% of the other 113 don't meet the requirements of the zoning ordinance as they are less than 15,000 square feet. 89% are non-conforming and 11% are conforming. This is the result of the ordinance being continuously amended from 1951 until the present. In 1951, 127 out of 127 of those lots would have complied. As has been stated in Simplex, municipalities must coordinate their zoning ordinance to reflect the current character of the neighborhoods. This area has a zoning designation of SRB, calling for 15,000 square feet of lot area, which basically does not reflect the current character of the neighborhood. The Simplex case went on to cite Belanger v. Town of Nashua in which the Supreme Court stated, "Zoning ordinances must be consistent with the character of the neighborhoods they regulate." The Supreme Court further stated in Belanger that, "While we recognize the desired inter-relationship between the establishment of a plan for community development and zoning, we believe municipalities must also have their zoning ordinances reflect the character of the neighborhood." The Supreme Court also stated "Towns may not refuse to confront the future by building a mote around themselves and pulling up the drawbridge." Attorney Pelech felt that to deny Mrs. Parnham's request for a variance would be contrary to vested rights that she had received. The Supreme Court has held that when a developer of a sub-division substantially completes the project in accordance with the original sub-division plans, the developer as well as his successors require vested rights to complete the project in accordance with the original sub-division plan, despite the subsequent adoption of a contrary zoning ordinance. The Supreme Court, in the case of Henry and Murphy v. the Town of Allenstown, basically said that this right would run to the developers successors. The sub-division plan for this property was recorded in the Registry of Deeds in 1895 and showed 60 of these 50' x 100' lots.

Attorney Pelech went on to discuss the second part of the test. He submitted that there was not a fair and substantial relationship between the purpose of the ordinance and this particular lot. Mrs. Parnham could construct a home on the lot that meets all other zoning requirements. Attorney Pelech directed the Board members to the tax map that he distributed, showing that many of the lots were exactly what Mrs. Parnham was seeking. He did not believe there was any fair and substantial relationship between the general purpose of the ordinance as it applied to this lot.

Attorney Pelech addressed the third part of the hardship test, whether the public or private rights of others would be injured. He indicated that the proposed home would completely comply with the

zoning ordinance and there were not any private rights of others upon the lot that would be interfered with. Nor would any public rights be interfered with.

He did not believe that the granting of the variance would result in any diminution of values of surrounding properties. Because Mrs. Parnham is able to construct a home that meets the setback requirements and lot coverage requirement, they did not believe that it would result in any diminution of property values. He felt the neighbors would say that they would like to see it remain a vacant lot but that it was not something that they have a right to see. As long as she complied with the zoning ordinance, he did not see any diminution in value of surrounding properties.

Attorney Pelech felt that granting the requested variance would result in substantial justice being done. If the variance was not granted, there would be a substantial hardship upon the applicant. It has to be balanced by the benefit to the general public in granting the variance. This was Mrs. Parnham's retirement – she was planning to build a small house on the rear property and sell the much larger house that fronts on Islington Street. It wasn't until she applied for her building permit that she found out that she couldn't do that. The denial of the variance would result in a substantial hardship to the applicant that is not outweighed by any benefit to the general public. They believe there would be a benefit to the general public by providing additional housing.

Attorney Pelech addressed the fourth criteria, whether granting the requested variance would be contrary to the spirit and intent of the ordinance. He indicated that he didn't know what the spirit and intent of the ordinance was when the 15,000 s.f. was arrived at as the minimum lot size in the SRB district or what the thinking was of this neighborhood where 89% of the lots don't comply. They believed the spirit and intent of the ordinance in establishing minimum lot sizes was to prevent the over crowding of land, to provide for adequate light and air and access by emergency vehicles. If a structure could be constructed on the lot and comply with all of the setback requirements and lot coverage requirements, then it seemed to Attorney Pelech that the spirit and intent of the ordinance to prevent this overcrowding had been complied with. If someone were to drive through the neighborhood, they would see that there are many, many houses built on lots of a similar size. He believed that the granting of the variance would benefit the public interest. An additional building lot would be created. It is well known that the City of Portsmouth has a shortage of housing and a shortage of developable land in the city. By allowing the creation of a lot similar in size with many of those surrounding lots, not only would the housing shortage in part be alleviated but the tax base for the city would be enhanced. One additional building lot would not overburden municipal services nor would there be an adverse financial effect upon water, sewer, or trash pickup.

In conclusion, Attorney Pelech indicated that the variance met all of the criteria for granting the variance. The applicant further requested that the Board vote on each variance request separately as the applicant would be willing to remove or relocate the existing garage, or demolish it and put up a smaller garage, if the rear yard setback was a problem or if the 23% lot coverage was a problem.

Mr. Jousse asked when the property was purchased? Attorney Pelech indicated it was purchased in 1979.

Mr. Jousse referred to Attorney Pelech's statement that 89% of the lots in that particular development were less than 15,000 s.f. but he wanted to compare apples to apples and oranges to oranges. In Attorney Pelech's definition, a lot of 14,000 falls within that 89%? Attorney Pelech confirmed this. Mr. Jousse indicated that they were being asked to create two lots of 5,000 s.f.. He asked how many lots in the area were around 5,000 s.f.? Attorney Pelech indicated that 30% to 40% of the lots but he couldn't be sure as he hadn't actually done the calculations.

Mr. Rogers was under the assumption that there were no zoning regulations at the time of the original subdivision so it didn't have to meet any zoning requirements. Attorney Pelech confirmed that. Mr. Rogers asked about the tax bills. He asked when Mrs. Parnham stopped receiving two tax bills and started receiving one bill for the property. Attorney Pelech indicated that in 1982 or 1983 she started receiving one tax bill. This was a result of the 1982 ordinance.

Vice-Chairman Horrigan addressed the applicant's request for separate consideration of each variance. As there were four variances, he suggested that the Board consider Variances A & B together and Variances C & D together, if the Board so wishes.

### **SPEAKING IN OPPOSITION TO THE PETITION:**

Kent LaPage, of 45 Melbourne Street, spoke in opposition. He distributed a handout to the Board members. He stated that this was the fourth time that he had addressed this property. He read a letter from Mark Louthier of 64 Melbourne Street, that was submitted to the Board Members.

Mr. LaPage referred to a Planning Board meeting on November 22, 2002 regarding a similar request for property at 135 Thaxter Road. On page 3 of the minutes, Attorney Pelech addressed the Planning Board as an abutter and stated that he sympathized with the applicant and that he had one case pending in Superior Court that was very similar to the one before the Board. He suggested that the applicant apply for a variance from the Board of Adjustment for a mother-in-law apartment. It was his concern that the approval of the request would set a precedent for double lots in the area that would have a domino effect. The minutes went on to say that one of the reasons that the Motion to Deny was granted was "That the Board does not condone the practice of creating two non-conforming lots from an existing non-conforming lot."

Mr. LaPage did a diagram of the proposed building abiding by the required setbacks. In 1967 the City of Portsmouth started to give quality of life and quality of homes in the City of Portsmouth. A driveway would be necessary for the proposed lot. Also, houses on both abutting lots were very close to the property line so they would be affected. The proposed house could only be 30' x 40'. The original plans were for a 50' x 35' home.

Mr. LaPage was concerned that if this was granted and the domino effect was set into motion, it could allow 9 dwellings on the street. They would be conforming to the same standard that would be set tonight.

Mr. LaPage went through the five criteria for granting or denying the variances. He did not feel that any of the criteria had been met.

Mr. Rogers stated that he did not agree with Attorney Pelech's previous discussion concerning the decision of the Board and he stated that the Board of Adjustment did not set precedents. Each petition that comes before them is individually decided upon so there is no domino effect.

Mr. Rogers asked about his comment concerning Lot #11. Mr. LaPage indicated that there needs to be 10' between the property lines however the house on this lot sits right on the property line. Mr. Rogers indicated that the non-conformance would be a result of Lot #11 and would not apply to the lot in question.

Mr. Parrott asked about the zoning map and indicated that he counted 12 lots on the block in question. He asked Mr. LaPage how far the neighborhood should extend for consideration and comparison of lot size? Mr. LaPage would go from Islington Street to Middle Street, including the Hampshire Circle area, Essex Street, to Rutland Street. However, there is a drastic difference in the zoning on Islington Street.

Mr. Berg asked about limiting speakers to 10 minutes. Vice-Chairman felt the Board should waive the 10 minute rule for this particular hearing because it had been remanded back from the Superior Court. For the remainder of the evening it was asked that speakers try to limit themselves to ten minutes.

Tim Diep, of 44 Melbourne Street (Lot #20), spoke in opposition. He disagreed with the Attorney's statement that it won't change the appearance or have any effect on the neighborhood. By looking at the city tax map and looking at the distance between the homes, a normal person driving by the neighborhood would see a difference. Putting a building on that lot will make it look crowded.

George Pendleton, of 64 Melbourne Street (Lot #1), spoke in opposition. When he bought his house in 1995 he looked at the neighborhood and felt there was ample room for people to live and felt it was a very nice residential setting. If a house was built 10' from his home it would overcrowd the neighborhood.

Gina LaPage, of 45 Melbourne Street, spoke in opposition. She agreed with everything that her husband, Kent Lapage, said.

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

Mr. Witham made a motion to grant Variance requests C & D as presented and advertised. Mr. Holloway seconded for discussion. Mr. Witham felt that by looking at the character and set up of the neighborhood, he doesn't feel that a garage 2' from the property line is out of line when looking at the site map and where a lot of other out buildings are located. Also, the 23% building coverage where 20% is allowed was only a 3% request for relief that he felt was minimal. He felt that the requests were not contrary to the public interest since the neighborhood exists rather successfully with the same type standards. There were special conditions with the neighborhood that exist with relationship to these requests. Most of the buildings were built before zoning so there were obviously going to be some buildings that didn't meet the setbacks. He didn't feel the request would hinder the public or private rights of others and for that reason he also thought it was consistent with the spirit of the ordinance. Substantial justice would be done by granting the variance because they would be allowing a garage to exist for the same needs as all of the other homes in the neighborhood. He did not feel it would diminish any surrounding property values.

Mr. Berg made a motion to set aside Mr. Witham's motion to grant variance requests C & D until variance requests A & B were voted on. Mr. Rogers seconded. Motion was granted by an anonymous vote of 7-0.

Mr. Rogers made a motion to deny variance requests A & B as presented and advertised. Mr. Berg seconded. Mr. Rogers felt that was a diminution of value based on the fact that it was one of the smallest lots in that area and if it was subdivided, there were only four lots in the area that meet the same requirements as that one. The other lots have increased in size and not decreased. The values of surrounding properties, especially Lot #11, would be diminished. It was contrary to the public interest as zoning is to allow people to enjoy their properties, to have air and green space. The restrictions to this specific property interfere with the owner's reasonable use of the property but it also interferes with the reasonable use of the people who own the adjacent lots. There was a relationship between the purpose of the zoning and the restrictions on this property because in 1982 the property was merged as 15,000 s.f. was the minimum lot and the two separate lots were non-conforming. If the variance was granted it would injure the private rights of individuals in that particular area.

Mr. Berg agreed with Mr. Rogers and added he did feel that if someone came in with a virtually identical request, such as the owner of another property who has 2 contiguous non-conforming lots that were merged by virtue of the ordinance, they would certainly have a reasonable request that they also

be able to separate the lots. Therefore it would not be consistent with the spirit of the ordinance. This could set up a whole set of dominos.

Mr. Jousse indicated that he would be supporting the motion. He felt that the creation of two non-conforming lots from an already non-conforming lot was not in the public interest. The applicant had reasonable use of the property since 1979. Those are two valid reasons for not granting the variance.

Mr. Witham added that part of the argument that the value of properties would be diminished is because there would be a structure there and they would lose light and air. As they are allowed to build a garage there, he doesn't feel that the property values would diminish because of the structure but rather that the property values would diminish because of the use of the structure. Living next to a garage and living next to a house are two completely different experiences. Although the Board often grants variances for properties that are non-conforming, they try to move towards greater conformity and this request is towards a far greater non-conformity. He did not feel it was in the interest of the public. It was suggested that this small lot reflected the character of the neighborhood but Mr. Witham disagreed. He felt neither the zoning nor the request to make these two lots reflects the current character. Although it was argued that 89% of the lots were non-conforming out of 127, it was noted that the two lots that are being proposed would be two of the smallest 7. That dispels the theory that the unique setting of the property and its environment was an aspect of granting the variance.

Mr. Parrott felt that the argument relative to the character of the neighborhood was very relevant. He felt that the block of 12 lots reflected that most of the lots were 10,000 s.f., a few were 7,500 s.f. and the smallest was 5,300 s.f. and the lots being requested would both be smaller than that. The argument that the whole neighborhood was nothing but small lots was a stretch. Secondly, there was a problem with the orientation of the house on Lot #11, which was immediately adjacent to the proposed new lot. That house was right on the property line and as the owner pointed out, the proposed new house would be 10' from the side wall of his house and that just wasn't good planning in this day and age. Mr. Parrott also felt that this would result in a reduction in value. No one has presented any expert testimony as to the likely effect upon the value of the existing properties were this house to be built. Therefore, they had to rely upon their own judgment and his judgment felt it would diminish the value of at least the property located on Lot #11 and most likely Lot #12 on the other side as well.

The motion to Deny variance requests A & B passed unanimously with a 7-0 vote

The motion to take the motion to grant variance requests C & D off the table passed unanimously. Mr. Holloway withdrew his second.

Mr. Parrott made a motion to deny variance requests C & D. Mr. Holloway seconded. Mr. Parrott indicated that they couldn't grant a variance from a line that doesn't exist.

The motion to deny variance requests C & D was unanimously passed by a 7-0 vote.

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C) Petition of **B. J.'s Wholesale Club, owner, Munro Muffler Brake Inc., applicant**, for property located at **1801 Woodbury Avenue** wherein a Special Exception as allowed in Article II, Section 10-208(36) is requested to allow a motor vehicle repair garage where such use is allowed by a Special Exception. Said property is shown on Assessor Plan 215 as Lot 14 and lies within the General Business district. Case # 4-9

SPEAKING IN FAVOR OF THE PETITION:

George W. Jarrett, Director of Development for Munro Muffler Brake, Inc., which is based out of Rochester, New York, addressed the Board. He was asking for a Special Exception to allow Munro

Muffler to operate a service bay at the existing B.J.'s location. Monro and B.J.'s have had a working relationship for 5 years. They are looking to expand into Portsmouth. They would be adding additional services such as wheel alignment, oil changes, shocks, and brakes, to the business and would continue to replace the tires for B.J. members. The days and hours of operation would be Monday thru Saturday, 7:30 a.m. – 9:00 p.m. and Sunday, 9:00 a.m. – 5:30 p.m. They would propose to have 4-6 employees and would try to retain as many of the existing B.J. employees as possible. Those not wishing to convert to Munro would be guaranteed jobs within any of the existing B.J. organizations. The anticipated number of customers per day would be existing and they do not intend any modifications to the building or the site. They would be changing the signage and will make that application later. The existing square footage would not be modified or changed. For the oil change business they would have 2 above ground storage tanks that would be contained within the structure. One would contain virgin oil and one would contain waste oil. Those tanks would be double walled in nature. There would be no tanks outside the existing business. Most of the waste was recycled.

Mr. Jarrett spoke to the Special Exception requirements. He felt that they met all of the standards under the guidelines for a Special Exception. He indicated that they would address those individually if there were concerns from the Board.

Mr. Jousse asked where they planned to store the waste metal? Mr. Jarrett indicated that they would be stored in a container inside the building. There would be a 3' dumpster which would be used for typical household waste and office supply waste. Cardboard goes back to their headquarters.

Mr. Parrott asked about the liquid wastes. Mr. Jarrett indicated that most automotive fluids have gone to recycling. They are put through machines and re-invigorated on site. Therefore, there wasn't a large amount of fluid waste. The largest waste storage tank would be for waste oil that was a 240 gallon tank. There were no floor drains existing. The State regulations would dictate whether they will have to put any floor drains in.

Vice-Chairman Horrigan asked if cars would be parked overnight? Mr. Jarrett indicated that it was company policy to bring vehicles inside overnight if they couldn't be picked up by the customer by the end of the business day. Occasionally someone will make arrangements to drop off a car very early in the morning before they open. Vice-Chairman Horrigan asked how they would control the noise they were making, considering there was a large retail store attached? Mr. Jarrett indicated that there would not be any more noise than what was already there. The worse offender is the air tools.

DECISION OF THE BOARD:

Mr. Berg made a motion to grant the Special Exception as presented and advertised, with the stipulation that no inoperable vehicles or parts thereof shall be stored outside. Mr. Parrott seconded. Mr. Berg indicated that all of the criteria had been met. This was basically a modification of what was already there. The only changes are that they are offering more services. The only hazards that are generated are chemicals and by-products which have been dealt with. All other requirements are the same as what was there. Mr. Parrott agreed with Mr. Berg.

The motion to grant with the stipulation passed unanimously with a 7-0 vote.

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D) **Request for Re-Hearing**, concerning the Board's Stipulation, for **Robert Byrnes and Patricia Tobey, owners**, requested by Charles Allard and Joan S. Davis, for property located at **41 Salter Street**. Said land is shown on Assessor Plan 102 as Lot 30 and lies within the Waterfront Business and Historic A. Districts.

**DECISION OF THE BOARD:**

Mr. Rogers made a motion to deny the Request for Re-Hearing. Mr. Witham seconded. A request for rehearing is based on the fact that there was information that wasn't available at the original hearing or that the Board made an inappropriate decision based on the law. Mr. Rogers did not see that the Board made any errors in their decision, it appeared from the request that this information was all available at the time of the original hearing and there did not appear to be anything new regarding this matter.

Mr. Witham indicated that when this matter came before the Board, they were being asked to delineate either side of the driveway and he felt that the Board accomplished that. This request said that there should be a bigger fence, a more private fence and it talks about aesthetics, but those reasons were not why the matter was brought before the Board. If the applicant was concerned about privacy, there was nothing preventing him from putting up a fence on his side of the property.

The motion to deny passed unanimously with a 7-0 vote.

### III. Public Hearings

1) Petition of **Stamatia S. Miminis, owner**, for property located at **17-19 Elm Court** wherein the following are requested: 1) a Variance from Article II, Section 10-208(45) and Article IV, Section 10-401(A)(1)(b) to allow an existing building with two grandfathered dwelling units to be converted into three dwelling units where such use is not allowed, 2) a Variance from Article XII, Section 10-1204 to allow 3 parking spaces to be provided where 5 parking spaces are required, 3) a Variance from Article XII, Section 10-1201(A)(2) to allow an 8' travel way where 24' is the minimum required; and, 4) a Variance from Article III, Section 10-304(A) to allow 0% open space where 15% is the minimum required. Said property is shown on Assessor Plan 164 as Lot 10 and lies within the Business district. Case # 5-1

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

Attorney Bernard Pelech addressed the Board on behalf of Mrs. Miminis. A similar application was before the Board several months ago when Mrs. Miminis had applied for a variance to allow 4 dwelling units in the building. Those variances were denied. Mrs. Miminis was now attempting to create parking on the lot and to put 3 dwelling units in the building. There currently was no parking whatsoever on the lot. Many of the residents in that area have very limited parking. If the variances were granted, she would like to create a parking lot to the rear of the building to allow parking for 3 vehicles, leaving her a deficit of 2 vehicles. There presently is a deficit of 3 parking spaces. Attorney Pelech felt that there was a hardship inherent of the land as the building was large for the lot. The building sits right on the front property line. As such, the request to put an 8' travel lane to get vehicles to the back of the building was a reasonable request. The variance request with respect to open space was an attempt to convert some of the open space into parking. It was a very small lot, 2500 s.f., and the building is 36' x 26'. It occupies the majority of the lot. There was not a fair and substantial relationship between the purpose of the ordinance and this particular request in that what the applicant was trying to do was make a bad situation better by creating some parking in the rear of the property.

Attorney Pelech did not believe this would result in any diminution of property values. There was not going to be any exterior changes to the structure. The structure itself was going to be improved considerably. It was in poor shape now and it would be improved aesthetically and be a more welcome addition to the neighborhood. The creation of the 3 parking spaces in the back would alleviate some of the parking problems that presently exist. Substantial justice would be done by granting the variance. The hardship upon the owner if the variance were denied was not outweighed by any benefit to the general public. The general public would actually be benefited by the creation of

one additional housing unit. This would not be contrary to the spirit and intent of the ordinance. Mrs. Miminias was attempting to create some additional parking in the rear where there was no parking now. This would make her more in compliance with the parking ordinance than she is at the present time, even though she has a grandfathered use.

Attorney Pelech felt that the 5 criteria necessary to grant the variance had been met by the applicant. He felt that the addition of the 3 parking spaces would benefit the neighborhood, that the 8' travel lane was reasonable given the fact that there was only a 10' difference between the frontage of the lot and the size of the building, and the 0% open space was a sacrifice but certainly was understandable given the fact that she was creating 3 parking spaces.

Mr. Rogers asked Attorney Pelech about the abutter's claim that a portion of the existing driveway was actually on his property. Attorney Pelech indicated that they had not surveyed the property. They were going by the tax map that they were assuming was accurate.

### **SPEAKING IN OPPOSITION TO THE PETITION:**

Joe Gobbi, of 27 Elm Court, spoke in opposition. Mr. Gobbi felt it was great that Mrs. Miminias was going to create some parking for the property but he felt it should be for the duplex. Her tenants park all over the neighborhood. The building was grandfathered for two units and he felt she should consider herself lucky that it was because there was absolutely no parking. On average, there were about 6 cars for the 2 units. Three units would probably have about 6-8 cars. He thought she would be lucky if they could fit 2 cars in the rear of the building. Where was she going to put all of the snow in the winter? He did not see a hardship. She could get good rents for a duplex.

E. J. Shea, of 30 Elm Court, spoke in opposition. He agreed with Mr. Gobbi relative to the parking issue. Parking was an issue and he really wanted to stress this because just one parked car on Elm Court prevents fire, police, etc. from getting through and they have experienced that many times. He does not feel any differently about this request than he did about their previous request for four units.

Mr. Parrott asked what the square footage of the apartments were. Ms. Tillman indicated that the building permit application lists units 1 & 2 as being 500 s.f. each and unit 3 being 1,100 s.f.

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

Mr. Rogers made a motion to deny the petition as presented and advertised. Mr. Holloway seconded. Mr. Rogers believed that the application was contrary to the public interest due to the fact that that particular area was very congested. They were requesting a great many variances, and the only difference with this application was that they were looking for 3 units, rather than 4 units. They were still looking for the alleviation of parking. The travel way was supposed to be 24' and it was only 8'. There was 0 open space in the area so that air movement and light was very limited. Mr. Rogers believed that the restrictions as applied to the property do interfere with the property owners reasonable use of the property but there was a relationship between the zoning ordinance and the specific restrictions on the property in that the ordinance was there to decrease congestion. This particular unit would not be allowed to have 2 units today if it were not grandfathered and they are now asking for a third unit. Mr. Rogers believed that the rights of others, due to the parking problems, would be injured if this variance were granted. The variance was not consistent with the spirit of the ordinance as the ordinance was there to allow less congestion of an area rather than to make it more congested. There would not be substantial justice in granting the variance because it would injure the property values of the surrounding individuals as well as contribute to an area that already was not particularly safe for emergency vehicles or snow removal equipment.

Mr. Holloway agreed with Mr. Rogers. He was concerned with emergency vehicles being able to get through that area as well as snow removal and where the snow would go.

Mr. Parrott felt that this was a very unusual situation. He would normally be very opposed to something like this but in this particular case the building was in such poor disrepair from the outside he felt that it was a detriment to the neighborhood. If this change were to allow the owner to upgrade the building, it would be a net gain. If the parking were in fact available in the back, he thought it would be a wash. Even if two spaces could be created he did not feel it would make the parking any worse than it was now. That was assuming that the 8' actually existed and the driveway could be constructed without encroaching on the adjoining property.

Mr. Rogers stated that they could not assume that an individual would fix up their house just because a variance was granted.

The motion to deny passed with a 5-2 vote, with Mr. Parrott and Mr. Berg voting in the negative.

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2) 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 # 15-3

Arthur Parrott stepped down from this hearing.

Attorney Pelech addressed the Board on behalf of David Lemeux. Present was Mr. Lemeux, the applicant, Christian Smith, of Beals & Associates, the engineer who provided the Board with the stormwater information, Charles Hoyt, the architect who provided the Board with the renderings, Mr. Watson, and Nick Crethensee, of SFC, who provided the Board with structural information regarding the existing building.

Attorney Pelech indicated that the property was located at 43 Cornwall Street, commonly known as the Tire Loft building. It was located on Lots 41 & 42, containing 8,410 feet. The building sits on one of the lots and the other lot was vacant. Attorney Pelech has been told that up until the 1960's a duplex sat on the vacant lot but was demolished. The existing building was built in the early 1900's and in the 1970's a second story was added and the building was converted to an automobile repair facility. Prior to that time it was a carriage house for another adjacent building. In the apartment district, an existing structure can be converted to four dwelling units without any relief from the zoning ordinance. By Special Exception it could be converted to eight dwelling units. Because of the condition of the structure, based on reports that the Board has from SFC, it was not able to be converted into dwelling units. The existing structure was non-conforming as it had a 3' right side yard and a 0' rear yard. This lot also directly abuts the Central Business district, which was the next lot towards Islington Street, which does not have any setback or lot size requirements. The proposal was to demolish the existing building and construct a 32' x 83' 2 1/2 story building. The lot currently has no green space. The applicant would propose to construct this building, which was a smaller footprint than the existing structure. A large median area and rear lot would be created, landscaping in the front, which would allow the city to have parking spaces along Cornwall Street where none exist now. Each of the townhouse units would have one enclosed parking space and there would be two additional parking spaces, one on each side of the structure. The applicant was attempting to create significant green space, two curb cuts, and extensive landscaping. Attorney Pelech distributed photographs of the

existing foliage between the McCormack residence and this site. It was very difficult to even see Mr. McCormack's house.

Attorney Pelech felt that the property met the five criteria necessary for the Board to grant the variance. The property was burdened by an unnecessary hardship, as defined by Simplex v. Town of Newington, in that the zoning restriction as applied to this property interfered with the reasonable use of the property considering the unique setting of the property in its environment. The property was unique as it was the one property in the neighborhood that was not residential. It was a non-conforming use at the present time. It consists of two lots, one of which was vacant and one which contained a non-conforming structure. The zoning restriction as applied to the subject property interferes with its reasonable use given the fact that four dwelling units could be placed on the property if the building were being converted. Attorney Pelech has provided two reports indicating that the building cannot be refurbished. The new building would meet all of the requirements of the zoning ordinance except the lot area per dwelling unit. The lot area per dwelling unit was considerably different depending on whether you convert an existing structure or construct a new structure. In addition to the fact that the surrounding lots were much smaller than what was required by the ordinance, Attorney Pelech submitted a summary of the lot size of surrounding properties. They average less than 2,200 s.f. of lot area per dwelling and they believe that made the applicant's request very reasonable.

Attorney Pelech stated that the subject property is unique as the structure was non-conforming, the use was non-conforming and its location in relation to the Central Business District was another factor to be considered. The second part of the hardship test was whether or not there was a fair and substantial relationship between the general purposes of the ordinance and the restriction on this property. They believe the proposal meets the second part of the test. If the building was going to be converted, they wouldn't even be before the Board. If the construction on the site was new, 3,500 s.f. of lot area per dwelling unit was required but only 1,000 s.f. of lot area per dwelling unit was required for a conversion. Attorney Pelech did not understand why there should be a difference. The balloon framing and structural integrity of the existing building is such that the conversion of the building is inappropriate and not feasible. The second floor lacks adequate ceiling height required by code, the location of the existing structure on the rear property line is within 3' of the property line and precludes emergency fire exits as well as emergency vehicles getting around that side of the building. A new building would be a much better situation than attempting to convert the old structure.

Attorney Pelech indicated that the third part of the hardship test required that they demonstrate that it would not injure the public or private rights of others. He did not believe that there were any public or private rights that would be injured as they would be complying with all setbacks and were attempting to make what was now an unsafe and unappealing condition better.

The second requirement was that the granting of the requested variance would not result in any diminution of values of surrounding properties. Attorney Pelech indicated that the proposed structure was approximately the same height and the footprint was slightly smaller than the existing building. It was substantially moved away from the rear property line. They would be increasing the amount of green space and include landscaping. Aesthetically, it would be more appropriate and keeping with the remainder of the neighborhood and would not result in any diminution of value of surrounding properties. Attorney Pelech submitted a letter from Mr. Gove, a realtor, stating that the proposed new building would only enhance the values of surrounding property values.

The third criteria was whether the requested variance would result in substantial justice being done. That required a balancing test of whether the hardship on the owner if the variance was denied was outweighed by the benefit to the general public. Attorney Pelech did not believe that there would be

any benefit to the general public by denying the variance. The granting of the variance would result in a more attractive building that would meet all of the requirements of the Zoning Ordinance with the exception of the 3,500 s.f. It would meet all of the requirements of the life safety code and the building code and would be a building that was more in keeping with neighborhood. The building would have a greater value and would enhance the tax base of Portsmouth.

The fourth criteria was whether the granting of the requested variance would be contrary to the spirit and intent of the ordinance. They meet all of the requirements of the zoning ordinance with the exception of the 3,500 s.f. of lot area per dwelling unit. However, if the existing building area was converted, they would only need 1,000 s.f. Attorney Pelech did not know why there was a difference. The Master Plan specifically dealt with this area and indicated that the area in and around McDonough Street and the apartment district should be an area where development should be encouraged and the density of 2,500 s.f. of lot area per dwelling unit should be sought. That never got into the Zoning Ordinance for some reason. They are very close to the 2,500 s.f. requirement.

Finally, Attorney Pelech indicated that the granting of the requested variance would not be contrary to the public interest. He could not see anything that would be contrary to the public interest. They would be building a new building within the building and safety code, it would increase the tax base and would be taking a building that had very little value with a non-conforming use and making it into a conforming structure.

In conclusion, Attorney Pelech felt that they met the five requirements for the granting of the variance.

A discussion was held regarding if the building were to be destroyed, could it be rebuilt and converted to four dwelling units. Ms. Tillman said that would have to be researched before she could answer.

Mike La Rousseau, of 249 Islington Street, which is the building that actually owned the carriage house back when it was constructed, spoke in support of the petition. He would like to see the building and/or land used for a more appropriate purpose. He felt that four units was reasonable.

Eugene Francoise, of 40 Cornwall Street, spoke in favor of the petition. He bought his property in 1970 and has watched the building deteriorate over the past 15 years. It was a dilapidated building surrounded by blacktop. The neighborhood has improved over the years. He has spent \$15,000 on his property this year. He strongly urged the Board to grant the Petition.

Dale Smith, of 275 Islington Street, spoke in favor. He felt the plan would enhance the neighborhood and thought the plans were very well thought out. There are other buildings with four units in the neighborhood. This property would have off-street parking.

Basil Richardson, owner of two lots on McDonough Street, spoke in favor. He indicated that his buildings have approximately 900 s.f. per unit and the neighboring property probably has around 1,000 s.f.. He felt the plan was well thought out.

Gino Boner, of 68 McDonough Street, spoke in favor. He just moved here about 3 ½ weeks ago. He has put a lot of time and money into his property. He would really like to see the Tire Loft come down.

SPEAKING IN OPPOSITION TO THE PETITION:

Attorney Robert Ciandella spoke on behalf of John McCormack, an abutter to the property. He confirmed with the Chair that the record of the proceeding would include the record of the prior public hearing as well as the Motion for Rehearing and the Objection. He indicated that Mr. McCormack and other abutters would address the five criteria that the applicant must met. Attorney Ciandella focused on two core arguments that would require the Board to deny the application. Those elements revolved

around the hardship test. First, the test as established by Simplex, the Zoning Ordinance as applied to the property, did not interfere with the reasonable use of the property, considering a unique setting of the property and its environment. He referred to the recent Bratter case where the Superior Court indicated that the only feasible way that that applicant could expand their commercial use was to expand in the residential portion of his property. This was a case where this applicant had a long menu of feasible uses. The Zoning Ordinance affords the applicant a number of perfectly reasonable uses and a full range of development options. As Mr. Pelech said, the applicant could use the existing structure to construct four or more units or he could tear down the structure and construct a two-unit building. The other development options that could be pursued were that the existing building could be converted to four dwelling units requiring 1,000 s.f. of lot area per dwelling unit or the existing building could be converted into more dwelling units by Special Exception. Each of these development options was reasonable and each could be pursued without a variance. Instead, the applicant proposed the development of four units, which would require 14,000 s.f. of lot area and only 8,410 s.f. exist. Whether it was felt that the last use, that the applicant proposes, was more reasonable was not legally sufficient to grant the variance. The issue was not which was a better use but does the Zoning Ordinance, as applied to this property, interfere with a reasonable use of the property.

Attorney Ciandella indicated that the second element of the test was that there be something unique in the physical character of the property that distinguishes it from the surrounding properties. Once the existing structure was torn down, there was nothing to distinguish the physical nature of the property from the surrounding properties. The key to whether the Board was creating precedent or not was the uniqueness of the physical character of the property. If there was no unique character of the property, then the Board would be creating precedent. So, what does that mean for this case? They submitted a spreadsheet that reported the square footage of each lot in the apartment district. Under that survey, there were 295 lots, 132 of them were under 3,500 s.f. and 55 were over 7,500 s.f. Therefore, lacking any unique physical character of the land, what the Board would be doing by adopting the position of the applicant was effectively adopting a rule that would effect 50% of the apartment district. If the Zoning Ordinance, as applied to this district, applied the same to more than 50% of the lots in that zone, then by definition and logic there was no unique character to this parcel. There was a real prospect of a domino effect because the Board would essentially be saying that they believe the City Council was wrong in saying that there should be 3,500 s.f. per unit density when there is raw land in the apartment district. Effectively, if the Board's decision were to support the applicant, it has the effect of saying that 50% of the apartment district density calculation which was made by the City Council does not apply.

Attorney Ciandella went on to address the second core argument against the petition which was, under Simplex, a fair and substantial relationship must exist between the general purpose of the zoning ordinance and the specific density, which is the subject of this application. In Bratter, the Court told the city that the general purposes of the city's zoning ordinance is to protect health, safety, general welfare of the community. To achieve these purposes, the city will restrict, among other things, the size and types of buildings constructed, the lot sizes that buildings can be built, setbacks, property use and in certain areas the amount of buildings allowed on one lot. Does the application of a specific density restriction on this property promote any one of those general zoning matters. The answer is yes. If the answer was no then the City Council was really wasting their time when they put it in the ordinance that they were going to try and regulate the apartment district when we have the opportunity. The idea was that, over time, the City Council and the Zoning Ordinance would influence the density in that area.

Attorney Ciandella spoke directly to Mr. Berg's comments of where does the 3,500 square foot density restriction come from? He stated, for the record, that the job of the Board is not to declare the zoning

irrational or unreasonable on its face. When something doesn't make sense to someone, the recourse is to seek rezoning through a legislative process. The job of the Board is not to take apart the ordinance and say it doesn't make any sense, we don't like this or we think it is irrational. It has been ordained as a matter of zoning. The Legislature has spoken and they said this is how we are going to influence density, over time, with this density restriction.

Mr. Berg stated that he did not agree with Mr. Ciandella and indicated that he felt it was their job as the Board to look at things that may not make sense because that was why people seek variances in the first place, to seek relief. He also asked about the mathematics in computing 295 lots where the average was 5,529 s.f. The subject property was 50% larger than that so wouldn't that make it unique? Attorney Ciandella did not agree. He felt that the test for uniqueness was how many lots in the district did the zoning ordinance apply to? If it applies to 60% or more, how can that be unique? He did not feel it was a mathematical test but rather a logical test. Mr. Berg felt that they were talking about use but Attorney Ciandella felt that were talking about the lot size.

Mr. Jousse asked if he was to assume that if the applicant were to tear down the Tire Loft and build a structure the size that he proposes to build with only 2 units in it, Attorney Ciandella would be happy? Attorney Ciandella indicated that it would conform to the zoning requirements and he will let the residents speak to that question themselves.

John McCormack, who is a direct abutter, spoke in opposition. He addressed the average lot size in the neighborhood. He disagreed with the area that the applicant used to describe the boundaries of the neighborhood. He used 295 lots and marked each one that were 3,500 s.f. in pink and those that were 7,500 s.f. and above in orange. There were 132 lots that exceed the 3,500 s.f. and 55 lots that exceed the 7,500 s.f. Mr. McCormack also indicated that the developer was attempting to exceed the square footage requirement by 100%. By allowing four units in the building, it would increase the number of people living in the building, adding to the already crowded neighborhood. Mr. McCormack visited the Tire Loft with a civil engineer and his opinion was that the building could be reconstructed, at considerable expense, but that was the crux of the issue – the expense. Mr. McCormack also indicated that if the applicant was to put up a building with 2 units, he would accept that as it was within the law.

Mr. Berg indicated that the question before the Board was relief from a per unit criteria. He asked what the density of the 295 lots on a per unit basis rather than a per lot basis? Mr. McCormack indicated that he couldn't answer that. He did disagreed with the applicant's math because he had his house down as 5 units and it's only 2 units.

Suzie Stroud, of McDonough Street, is a direct abutter, and she spoke in opposition. Her house was constructed in 1840 and is non-conforming, along with quite a few of the other lots on McDonough Street. At some point the City made the decision to increase the required lot area to 3,500 s.f. She said that everyone is working to improve the neighborhood and would love to see the Tire Loft property improved. The remedy for this property is to construct a building with two units. Ms. Stroud addressed some of the 5 criteria and stated that she did feel that the variance would be contrary to the public interest. She felt that this project would over-intensify the use. She was concerned that it was not consistent with the spirit of the ordinance. She was very concerned about snow being piled up against her wooden fence with abuts the property. She did not feel that substantial justice would be done by granting the proposal because there have been proposals denied based on density and she doesn't see how there was anything unique about this property. She had three realtors speak to her and indicate that it would diminish surrounding property values.

John Consadine, of 50 Langdon Street, spoke in opposition. He agreed that something needed to be done with this lot. He felt the proposed building was a beautiful building but it should be a two unit. He was very opposed to a four unit.

Joseph Carringer, of 28 McDonough Street, spoke in opposition. He agreed that something should be done with the lot and he did not feel that a four unit was appropriate. Parking is horrible in the neighborhood. This plan does not allow for any room for snow storage. He felt that two units would be appropriate.

Wendy Freedman-McCormick, of 48 Langdon Street, spoke in opposition. She felt that 2 units was more feasible. She supported the statements of her neighbors.

Michael Fenn, of 39 Langdon Street, indicated his opposition to the variance.

Marcus Sleeper, of 48 Langdon Street, spoke in opposition to the variance.

SPEAKING IN FAVOR OF THE PETITION:

Richard Gamester, of 176 Thaxter Road spoke in favor of the petition. He felt that Attorney Pelech covered all of the required criteria. He stated that the spirit and intent of the ordinance was only under perfect conditions. He felt that density was a wish list. He felt the property was now unique because they could now do something with it. The improvement would be to the entire neighborhood

Charles White, of 149 Islington Street, spoke in favor of the petition. He is the architect who designed the building and believed this would be a better performing building, although he would have loved to see the Tire Loft building renovated. There would be more green space.

REBUTTALS:

Attorney Pelech explained how he came up with his square footage figures. He did indicate that Mr. McCormack's property had 2 units, not 5. He counted only the lots in the apartment district. He took each and every lot and went through the past records to determine how many dwelling units were in each lot.

He also disagreed with Mr. Ciandella and felt that the Board was not doing their job if they didn't try to figure out what the City Council was doing in determining if this was in the spirit and intent of the ordinance. He referred to the Master Plan and encouraged the Board members to refer to it.

Attorney Pelech asked the Chairman to ask the people who spoke in opposition whether they were property owners or tenants. He felt that the definition of diminution of property values was different for a property owner than for a tenant.

Attorney Ciandella referred to the previous discussion regarding the merger clause and how that was recognized and moved. This was something that the City put in the Zoning Ordinance to move the city towards control of density. This was the same type of thing. He reiterated that there was nothing unique about this property because if you apply the density regulation to this district, it applied to more than half of the properties.

Vice-Chairman Horrigan stated that he would not ask the people to identify themselves as either property owners or renters. He felt that any citizen, regardless of their property owner status, has a perfect right to testify at a public hearing.

DECISION OF THE BOARD:

Mr. Berg made a motion to grant the variance as presented and advertised. Mr. Witham seconded. Mr. Berg felt that the granting of the variance would not diminish the values of surrounding properties. As he is a real estate appraiser, he felt qualified to say that he felt this proposal would have a positive impact on the neighborhood. He felt the requested variance was consistent with the spirit of the ordinance. He felt that was obvious because the zoning ordinance allows 1,000 s.f. per unit under

certain circumstances, that being the conversion of the existing building. The property has 2,100 s.f. per unit so he does not see the subject lacking 1,500 but rather having 1,000 more than was required with the unfortunate circumstance that the existing building could not be saved. He did not believe that the requested variance would be contrary to the public interest. There were neighbors both for and against but he went back to his notion of diminishing property values and the fact that the neighbors unanimously felt something had to be done that was beneficial to the neighborhood. Regardless of whatever else could be done to improve this property, this variance application was a proposal that would benefit the public interest and would make a nice looking property. Mr. Berg felt that special conditions existed with respect to the property. Mr. Berg's understanding of Simplex was that the notion that anything that is reasonable can be done to the property prohibiting the granting of a variance is pre-Simplex. Simply because this property can accommodate a duplex does not render the application for four units without merit. Rather Simplex looks at whether a reasonable use is prohibited by the zoning and in this case Mr. Berg felt that the zoning recognized the permissibility of a four unit because if the subject were in better condition it could accommodate a four unit. The hardship imposed by the zoning ordinance and by Simplex was that the reasonable use by zoning was prohibited because the unique circumstance of this property, that being the condition of the building, as well as the lot size, stopped the property from being used as a four family and otherwise permitted use. Therefore, the zoning restriction as applied to the specific property interfered with the property owner's reasonable use of the property. No fair and substantial relationship existed between the general purpose of the zoning ordinance and the specific restriction on the property. That goes back to the same point that, if the building could be salvaged, it could accommodate four units and eight with a Special Exception. Therefore, there wasn't a fair and substantial relationship in this circumstance. The variance would not injure the public or private rights of others. Each situation is unique and another vacant lot would not be able to spring up with multiple units. Mr. Berg also felt that substantial justice would be done by granting the variance.

Mr. Witham prefaced his second by saying that he quickly learned that it's one thing to observe and watch this on TV and have an opinion and it's another thing to actually sit and vote. The Tire Loft was one of his favorite buildings and he would hate to see it go but his job was to uphold the zoning and he supported the motion. He felt there was a lot of talk about density and how it needed to be regulated. The City Council, a legislative body, has spoken to deal with density with the 3,500 s.f. criteria. As he sees it, the zoning has also spoken that this property can have four units and up to eight units. Now, the property owners are saying they can meet all of the zoning criteria except for the unit size. Mr. Witham does not follow the rationale to now say that the property can only handle two units. He feels that this would move towards a greater conformity in that all of the dimensional requirements would move towards conformity. There was talk about the other vacant lot in the neighborhood however Mr. Witham pointed out that that was nothing more than a vacant lot and there wasn't any special uniqueness about it, compared to this lot. In regards to the unique setting of the property, Mr. Witham believed it was the unique setting of the property in relation to its environment. Its environment would be roughly 2,200 square feet per unit and this request was for roughly 2,100 square feet. Mr. Witham believed that was very close and was consistent with the rest of the neighborhood. He felt that some property values may go down, but not as a result of the variance. He felt that substantial justice would be done because there would be a much safer project in terms of parking, emergency vehicle access, more green space, better street scape, and in light of that it was consistent with the spirit of the ordinance.

Mr. Rogers indicated that this was a difficult decision for him and there were a great number of things that he agreed with but he felt it had to meet all of the standards and the one standard that stood out to him was that you need 1,000 square feet in the existing building but if that building was torn down and a new building was constructed, then the standard was 3,500 square feet for the density. The

restrictions as applied to this particular property do not interfere with the property owners' reasonable use of the property. Therefore, he opposed the motion.

Vice-Chairman Horrigan indicated that both sides had made very persuasive arguments for their point of view. It struck him that the issue of the old building and what it would accommodate in a very narrow sense was irrelevant because the petition before the Board was to demolish the building in which case it triggers the 3,500 square feet lot area per dwelling unit requirement. What might have been in the old building is interesting but it was not germane this evening. He was struck by the fact that Petitions from this neighborhood, which he calls the "McDonough Street Neighborhood", which runs parallel to Islington Street, almost inevitably generate a lot of neighborhood response, both for and against. The theme that comes out of previous petitions from this neighborhood over the years, including this petition before the Board tonight, was density and congestion issues. Given the comments that the Board heard from immediate abutters, it strikes him that the petition failed on the criteria of whether a fair and substantial relationship exists between the purposes of the zoning ordinance and the specific restriction on the property. He felt that density was extremely important to the residents and he felt it would be unwise of the Board to simply wave them aside. He respectfully would not be supporting the motion.

The motion to grant failed with a 3-3 vote, with Mr. Jousse, Mr. Rogers and Vice-Chairman Horrigan voting in the negative.

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At 10:40 pm a motion was made to continue through Petition #5 and table the remaining items until the reconvened meeting scheduled for next Tuesday, May 27, 2003 at 7:00 pm. Said motion passed unanimously.

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3) Petition of **The Morley Company, owner, Dow's Automotive Services, applicant**, for property located at **909 Islington Street** wherein a Special Exception as allowed in Article II, Section 10-208(36) is requested to allow a 2,400 sf, 3 bay automotive service center with related office space and storage in a district where such use is allowed by Special Exception. Said property is shown on Assessor Plan 172 as Lot 7 and lies within the Business district. Case # 5-3

Mr. Rogers stepped down from this hearing.

SPEAKING IN FAVOR OF THE PETITION:

Attorney Pelech spoke on behalf of Louis Dow, of Dow's Automotive Services. Mr. Dow will be relocating from Haymarket Square to 909 Islington Street, which was directly behind the Ampet Gas Station. The property has access from Islington Street. Attorney Pelech addressed the criteria they needed to meet for the Special Exception. This was a use allowed by Special Exception, there were no known hazards, all vehicle liquids will go to the appropriate recycling facilities, there was no potential for fire explosion or release of toxic material. There would be no detriment to property values. It would not create any smoke, dust or other pollutants. There were no residents in close proximity. It would not change any essential characteristics of the area. It was not going to create any traffic or safety hazard or increase in traffic. There was ample parking on site. There was ample space for traffic and travelways. It would be safer than where Dow's is located now. There would be no excessive demand on municipal services and no significant increase in stormwater runoff. There would not be any external changes to the property rather than putting some windows in the brick façade. In conclusion, Attorney Pelech felt that they met the six criteria necessary for the Board to grant the Special Exception.

Vice-Chairman Horrigan asked if all repairs of service work would take place inside the building? Attorney Pelech agreed and indicated that no inoperable vehicles would remain for more than a two week period and Attorney Pelech indicated that he would be surprised if any vehicle stayed overnight for more than one or two days. Vice-Chairman Horrigan indicated that the neighborhood had complained a few years ago about a gas station nearby that was storing cars outside for lengthy periods. Therefore, Vice-Chairman Horrigan requested that they accept a tighter schedule and Attorney Pelech agreed to one week for outdoor storage.

DECISION OF THE BOARD:

Mr. Parrott made a motion that the Special Exception be granted as presented and advertised, with the stipulations that 1) All repairs and service work shall take place within an enclosed building; 2) No vehicles in an inoperable condition are to remain on the site for more than a one week period unless enclosed in a building; and 3) repaired or rebuilt vehicles shall not be sold upon the premises. Mr. Berg seconded.

Mr. Parrott stated that this was an entirely commercial district and he could not see where the use would cause any problems for anyone in the area except in the same building and that would be up to the property owner. This looked like a good location. Mr. Berg agreed with Mr. Parrott and added that he felt it met all of the criteria for a Special Exception. He felt this would revitalize the area as far as business uses and would benefit the community by allowing a business person to continue to thrive.

Vice-Chairman Horrigan also agreed that this would be a very good location for this particular business.

The motion to grant, with the stipulations, was granted unanimously with a 6-0 vote.

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4) Petition of **Irene Barthholomew, owner, Robin Bettencourt applicant**, for property located at **90 Gates Street** wherein a Variance from Article III, Section 10-302(A) is requested to allow 6' x 9' shed creating 35.5% building coverage where 30% is the maximum allowed. Said property is shown on Assessor Plan 103 as Lot 74 and lies within the General Residence B and Historic A districts. Case # 5-4

**SPEAKING IN FAVOR OF THE PETITION:**

Robin Bettencourt addressed the Board. She will be using the shed for storage for yard equipment, bikes, garbage cans, lawn mowers, etc., so that they don't have to be stored outside. The shed would not have a foundation. The plans that she submitted were for an 8' x 12' shed but it will actually be a 6' x 9'. The hardship was the lot size and the lack of storage space. She had letters of consent from four of the direct abutters. Quite a few of the surrounding properties also have sheds. She did not believe that this would be contrary to what the zoning ordinance had intended.

**DECISION OF THE BOARD:**

Mr. Berg made a motion to grant the petition as presented and advertised. Mr. Parrott seconded. Mr. Berg indicated that this was a dense residential area with very small lots. Some sort of out storage building was essential. The hardship was that in order to provide adequate storage, a variance was required as it would be set close to property lines. The neighbors had spoken in support so the Board cannot say that this was contrary to the public interest. An addition of an attractive structure would not have any adverse effect on property values. Substantial justice would be done by allowing her to better utilize her property and it would stop the accumulation of trash cans and bicycles. It was consistent with the spirit of the zoning ordinance as it was a residential neighborhood and accessory uses, such as

garden sheds, were consistent with what was intended. There was no fair and substantial relationship between the general purpose of the zoning ordinance and the specific restriction on the property. Mr. Berg was quite certain that it was not the intent of the ordinance to prohibit garden sheds simply because it increased the lot coverage by an additional 5%.

Mr. Parrott felt the shed was attractive and was being placed in the logical corner of the lot where it would not cause the neighbors any concern. It increased the lot coverage by a very small amount. It could only be a positive improvement for the whole neighborhood and there was no reason not to grant the variance.

The motion to grant passed unanimously with a 7-0 vote.

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 5) Petition of **Eleanor M. & Frank W. Collins, Trustees, Eleanor M. Collins Revocable Living Trust, owners**, for property located at **15 Clover Lane** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 7 ½' x 8' deck creating 23.2% building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 236 as Lot 42 and lies within the Single Residence B district. Case # 5-5

SPEAKING IN FAVOR OF THE PETITION:

Frank Collins addressed his Petition. He distributed photographs to the Board. By granting the petition it would allow him to get rid of an eyesore, a safety hazard and would allow him to add railings to the steps. He would be building a deck and covering the stairs and the wood framing would allow the construction of railings which were eliminated with the concrete stairs.

Mr. Jousse asked if he felt the current steps were a safety hazard? Mr. Collins agreed that they were.

Vice-Chairman Horrigan asked if he felt a deck would enhance the safety of the entrance as well as allow a greater pleasure in using your property? Mr. Collins agreed that they would be allowed to sit on it and enhance the value of the property. He spoke to his neighbors and they do not have any objections.

DECISION OF THE BOARD:

Mr. Berg made a motion to grant the variance as presented and advertised. Mr. Parrott seconded. Mr. Berg indicated that there wasn't anything contrary to public interest as they were putting a deck which was a permitted extension of the property. The requested variance was consistent with the spirit of the ordinance as it was an improvement to a residential property in a residential neighborhood. Substantial justice would be done by granting the variance as the current steps were a safety hazard. Rather than rebuild them, the property owners were attempting to improve the property. There was no reason to believe that this would diminish the values of surrounding properties in any way. The special conditions were that the property was a little smaller than some lots and required a variance for the overall lot coverage. The zoning restrictions as applied to the subject property interfered with the property owners reasonable use, considering the unique setting. There was no fair and substantial relationship between the zoning ordinance and it's specific restriction. The intent of the ordinance was to prevent the over-building of lots and this certainly isn't what was happening. The variance would not injure the public or private rights of others.

Mr. Parrott felt this appeared to be a cost effective solution to a condition that had deteriorated by weather. It wouldn't cause the neighbors any concerns and it would improve the property. Mr. Parrott also agreed with everything that Mr. Berg said.

The motion to grant passed unanimously with a 7-0 vote.

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**IV. Adjournment**

There being no further business to come before the Board, the Board acted unanimously to recess at 11:10 p.m. and reconvene on May 27, 2003 at 7:00 p.m. in the City Council Chambers.

Respectfully submitted,

Jane M. Shouse  
Secretary

/jms