

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

7:00 P.M.

May 27, 2003

MEMBERS PRESENT: Chairman Charles Le Blanc, 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: Lucy Tillman, Planner

~~~~~  
**I. APPROVAL OF MINUTES**

Meeting of December 17, 2002 – Attorney Charles Griffin noted that on page 6 the Minutes currently read “that none of the variances would result in unnecessary hardship” and the Planning Department has confirmed that the tape actually said “that denial of the variances would result in unnecessary hardship”.

Motion to accept corrected minutes passed unanimously.

**II. PUBLIC HEARINGS**

6) Petition of **Thadeus Drabkowski, owner, Thomas Battles, applicant**, for property located at **948 US Highway 1 (a/k/a Route One By-Pass North)** wherein a Variance from Article III, Section 10-304(A) is requested to allow the existing building to be converted into 6 apartments totaling 4,950 sf and nonresidential uses totaling 3,250 sf with: a) 9% open space where 15% is the minimum required, b) 17.1’ front yard where 20’ is the minimum required; and, c) 7.6’ and 9.1’ left side yards where 15’ is the minimum required. Said property is shown on Assessor Plan 142 as Lot 17 and lies within the Business district. Case # 5-6

**SPEAKING IN FAVOR OF THE PETITION**

Aaron Brown, of Atrio Properties, addressed the Board. He indicated that this property had been the subject of many discussions and Thomas Battles would like to purchase this property for a use that was consistent with the zone. Mr. Brown outlined the five steps necessary to meet the requirements in a written memo that was distributed to the Board.

The requested variance would not be contrary to the public interest. This property was granted a variance in 1996 and their variance requests essentially clean up the 1996 variances. They were not sure whether that was an oversight or why they weren’t addressed at that time. There was a lot line revision at that time. This building was built in 1979 and literal enforcement of the setbacks on this property would create a substantial hardship on the applicant. The most difficult part of this property was that it was a corner lot and it abuts two zones. It was part of the business district and it abuts the general residence district, which creates a lot of issues. Mr. Battles is planning to do a 2/3 residential use and a 1/3 commercial use, which was allowed in the district.

The other item that they wanted to address was that Mr. Battles had met with the neighborhood. The fence between the property and the residential neighborhood had been a sore point but Mr. Battles was willing to replace and repair the fence as needed. They were looking for 9% open space where 15% was required and for some reason that variance was not requested back in 1996. The other issue that seemed to be forgotten was the setbacks on the sideline.

Mr. Berg asked whether any expansion to the building was planned. Mr. Brown indicated that there were no expansion plans. Mr. Berg confirmed that the existing building was already nonconforming.

Mr. Parrott asked about the written memo that Mr. Brown distributed. He asked for clarification regarding the statement that read "The fact pattern surrounding this property is only corrected by granting the variances." Mr. Brown stated that the property was allowed to be created in 1996 but no variances were requested at that time. The reason they were there was to correct that past oversight. They were not looking to expand the property or change anything but only to use the current nonconforming building. Mr. Parrott asked about the current fence, which had fallen into disrepair. Mr. Brown indicated that he had not had any discussions with the current owner about the fence and could only assure the Board that the Applicant, who was an option holder on the property, would maintain the fence.

Vice-Chairman Horrigan asked how long the building had been vacant? Ms. Tillman indicated that she wasn't sure the building had ever been completely tenanted up. There were a couple of commercial spaces used but she did not believe the entire building had been occupied since it was built.

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

Donald Coker, of 90 Fleet Street, addressed the Board and indicated that he did not think this was a good idea. There was a direct cause why this property had never been occupied. He admits to the constitutionality of free speech of the business next door. He felt it was the effect of that kind of business being in close proximity to another building, which was around 50' from building to building. The City regulates sexually oriented businesses and the Board has the right to protect the general public from the secondary effects. The applicant was requesting to put 6 apartments in the building within 50' of a sexually oriented business and Mr. Coker did not feel that was a good policy. He felt it failed the tests for the variances.

Lenore Weiss Bronson, of 828 Woodbury Avenue, indicated that the city ordinance did not allow any minor to loiter in any part of such establishment, including parking lots immediately adjacent to such establishment. She felt this was important as a result of the setbacks and close proximity. There should be 500' between the sexually oriented business and the proposed building.

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

Gene Cummings, of 47 Cate Street, spoke. He lives directly across from the property and the porn shop and lived there prior to the porn shop. He was concerned that his property be kept separate from the porn shop property and wanted the fence to be repaired and maintained. Thomas Battles had assured the neighbors that he will maintain this fence. He was concerned about the children who may reside in the apartments.

Alain Jousse, of 197 Dennett Street, addressed the Board. He indicated that he had no objections to the forward movement of this project. He would like a stipulation that the solid fence be continued in a northerly direction along Adler Way, all the way to the Route 1 By-Pass access. He would also like the removal of the small section from the end of the fence to the building so that foot traffic could go around the building but could not go from the property to Adler Way. That would make it harder for tenants or visitors to park on Adler Way.

Tom Battles assured the Board that he had no problem with extending the fence and would maintain it. He felt the project would be in the best interest of the community.

Vice-Chairman Horrigan addressed the intermingling of the two properties. He asked if there was some possibility of a separation being maintained between the properties? Mr. Battles had spoken with the owner of the adjoining property and he had assured him that he will maintain the fence to produce another barrier between the two properties. He was also planning to make some improvements to his building.

Chairman LeBlanc read a letter from William Eley, 188 Dennett Street, that was given to the Board by Alain Jousse. Mr. Eley was in opposition to the application.

Mr. Coker stated that there was no hardship except a self-imposed hardship. He did not believe this application was in the stated purposes of the Portsmouth Zoning Ordinance, which was to promote the health, safety and general welfare and for the future development of the City. He urged the Board to deny the Petition.

### **DECISION OF THE BOARD**

Mr. Rogers made a motion to grant the Petition as presented and advertised. Mr. Berg seconded. Mr. Rogers did not feel that the variance was contrary to the public interest. He felt this would be an improvement to the area which would be in the public interest. The property itself and its hardship was put in this particular position by the City changing the frontage of the property from a side street to the highway. The reasonable use of the property was being interfered with by this particular zoning ordinance. Regarding no fair and substantial relationship existing between the general purpose of the Zoning Ordinance and the specific restrictions on the property, it was evident that this property was in a very difficult location. They were asking for dimensional setbacks which were fairly minimal so he did not feel that they were inhibiting the variance itself. He did not feel it would injure the rights of the public or private rights of others as it was decreasing the problems that they were having in that area. Many of the neighbors were talking about sexual activity and other things being found in the area and by eliminating a place that can be created in, they are helping to increase the value of that particular area rather than decreasing it. Therefore, he felt that substantial justice would be done by granting the variance. He did not feel that it would demean the value of the surrounding properties.

Mr. Berg agreed with everything that Mr. Rogers said. He stated that the ordinance as it currently exists interferes with the property owner's reasonable use of that property. Basically, they were talking about dimensional relief. A number of uses would require the same variances. He felt the building was very well suited for the use that the applicant has proposed. This building had been vacant for as long as he could remember. He objected to the characterization that this was a "slum waiting to happen". He felt that simply speaks to the public's misunderstanding of the affordable housing issue and that affordable housing was the same as low income housing or that affordable house evolves into low income housing. He believed that was the kind of thinking that sets Portsmouth back not forward.

Chairman LeBlanc indicated that the Planning Department memo asked that the stipulation regarding the fence be reiterated. Mr. Rogers indicated that he wanted to add that stipulation to his motion. He asked that the stipulation increase the fence to the Route One By-Pass, contingent upon Traffic and Safety approving the height of that fence. Mr. Berg was in agreement.

Vice-Chairman Horrigan spoke regarding the concern of traffic between this property and the property to the south. He asked that the Motion include a stipulation that a fence and/or vegetation be placed along the right hand side of the property as well, which would serve as a barrier to traffic between the two properties. Mr. Berg was opposed to this stipulation as he felt the commercial tenants may want some visibility from the highway.

Mr. Holloway discussed when the Board subdivided the property back in 1990-1991. The same concerns were discussed at that time. He did not believe they should add additional stipulations to the Motion.

Vice-Chairman Horrigan made a motion for a fence and/or vegetation or a combination of both be placed along the right side of the property. Mr. Parrott seconded. Vice-Chairman Horrigan felt there was a public issue and the only control that they have on the issue of the possibility of traffic back and forth between the two properties was to somehow require delineation between the two properties. Mr. Parrott asked that two conditions be added to the stipulation: 1) that an amount be escrowed to guarantee that the fence was installed and maintained and 2) that the City inspect the fence one year after the approval of the variance. Ms. Tillman clarified for the Board that the driveway was within 24' of where the fence was being proposed. He certainly would have ample space to put in a fence. However a fence with landscaping would require him to come back before the Board for a variance on the width of the driveway.

Mr. Rogers indicated that he would not support the stipulation. He felt that Mr. Berg was correct and sometimes the Board over-legislates properties. The owners of these two properties should have the right to put up a fence or not put up a fence between the two properties.

The motion to add the stipulation failed with a 3-4 vote.

The motion to grant with the stipulation that the fence be maintained on the left hand side of the property, and extended to the Route-One By-Pass, passed with a 6-1 vote with Vice-Chairman Horrigan voting in the negative.

~~~~~

7) Petition of **Kathleen L. Wells, owner**, for property located at **36 Wilson Road** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 12' x 14' breezeway connecting a formerly approved detached one story garage making the garage part of the principal building with a 6' left side yard where 10' is the minimum required. Said property is shown on Assessor Plan 251 as Lot 59 and lies within the Single Residence B district. Case # 5-7

SPEAKING IN FAVOR OF THE PETITION

Kathleen Wells addressed the Board. She was before the Board last month and received a variance to rebuild her garage 6' feet from the left side. She went back and discussed the project with her children and they decided that it would be better for her to put a breezeway between the garage and the house. Therefore, she was back before the Board.

Ms. Tillman clarified for the Board that now that her garage was going to be attached, it refers to a different part of the ordinance. Therefore it required a different variance than a detached garage. She was not asking for any more relief.

DECISION OF THE BOARD

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Parrott seconded. Mr. Rogers did not feel that this was contrary to public interest. She had already requested this variance once. She would be decreasing the non-conformity of the property, making a setback larger than what was previously there. Before it was right up against the property line. All she was doing was adding a breezeway and making it one large building as opposed to two separate buildings. The zoning restriction as applied to this building interfered with the property owners reasonable use of the property because at present the building was in disrepair and needed to be fixed up. The breezeway would help her expand the amount of living area. It would allow her to maintain the side of the building without going on the neighbor's property. There was no fair and substantial relationship between the general purposes of the ordinance and the restrictions on this property. This was one of those cases where they are looking for less non-conformance, not more non-conformance. The property did need to be repaired and he did not feel that the neighbors were going to be interfered with. The value of surrounding properties would not be diminished. He felt it would be in the spirit of the ordinance. He felt there was substantial justice in granting the variance. It was allowing access to the side of the building, it was allowing the building to be repaired easier and it was not effecting the neighbor in any respect.

Mr. Parrott felt that the requested variance would be in the public interest as it would pull the building off of the property line. The granting of the variance would not only enhance the value of the property but all of the surrounding properties and it would not encroach on anyone in any way.

Vice-Chairman Horrigan stated that direct access to a garage from the main dwelling was in the public interest due to New Hampshire weather. Also, he felt that by adding the breezeway, the overall configuration and appearance of this property would improve. Currently, the garage seemed out of place.

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

8) Petition of **Joan W. Sanborn, Trustee, Joan W. Sanborn Revocable Trust, owner**, for property located at **191 South Street** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 9' x 10' one story addition creating 41.9% building coverage where 30% is the maximum allowed. Said property is shown on Assessor Plan 111 as Lot 39 and lies within the General Residence B and Historic A districts. Case # 5-8

SPEAKING IN FAVOR OF THE PETITION:

Joan Sanborn spoke on behalf of her petition. She indicated that she didn't meet the setback requirements. She spoke to her neighbors and they really won't even see the addition. Her present lot coverage is over 30%.

Vice-Chairman Horrigan asked if the proposed addition would be covering the bulkhead? Ms. Sanborn indicated if this variance was approved she would have to go before the HDC and prior to that she would hire an architect to decide whether the bulkhead could go on the back of the house.

Mr. Parrott asked if bulkheads were excluded from lot coverage. Ms. Tillman confirmed that they were, as long as they were under 18".

DECISION OF THE BOARD:

Mr. Parrott made a motion to grant the petition as presented and advertised. Mr. Witham seconded. Mr. Parrott stated that the requested variance would be in the public interest. It would be hidden in the back of the house and wouldn't be visible from the front. It was in the middle of the lot so it wouldn't interfere with anyone else's pleasure. Special conditions existed with respect to the property and the configuration of the house. The size of the lot was quite small and that couldn't be changed which was a special condition of the hardship. The variance would not injure the public or private rights of others. He did not see any fair or substantial relationship between the general purpose of the zoning, to protect the public interest, and this variance. The variance was consistent with the spirit of the ordinance, to allow people a reasonable use of their property. Substantial justice would be done by the granting of the variance. This variance would increase the property value.

Mr. Witham agreed with Mr. Parrott and added that, on the surface, it appeared that quite a bit of relief was being requested, going up to 41% of building coverage. The increase from what was existing was just a little over 3% so it was a minimal increase in the lot coverage. As lot coverage was to control density and where they have situated the addition would not have any impact on the neighborhood. He felt the variance should be granted.

The motion to grant was granted unanimously by a 7-0 vote.

9) Petition of **Thomas P. and Dani M. Rooney, owners**, for property located at **29 Spring Street** wherein the following Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow: a) a 6' x 7' front entry with a 2.5' front yard where 15' is the minimum required, and b) a 5' x 14' porch to the right side of the dwelling with both additions creating 28.8% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 130 as Lot 21 and lies within the General Residence A district. Case # 5-9

SPEAKING IN FAVOR OF THE PETITION:

Thomas Rooney addressed the Board. He was before the Board last November for renovations to a family room. The rear porch was an addition to the original design. He also pointed out that he had two letters of support from his neighbors. He pointed out that he had provided a copy of the architect’s drawings of the porch. It would allow for a covered entrance way into the rear. When someone came to the front door now they can’t stand at the top of the stairs when the door is being opened. It was very dangerous on Halloween. They were intending to widen the steps so that someone could stand to the side when they open the door.

DECISION OF THE BOARD:

Vice-Chairman Horrigan made a motion to grant the petition as presented and advertised. Mr. Witham seconded. Vice-Chairman Horrigan indicated that both variances were being triggered by improvements in entrances to this house. It was in the public interest to improve entrances to homes. He could not see how this could possibly interfere with someone else’s public interest. Regarding the hardship, the zoning restriction would prevent reasonable use because it would prevent the homeowner from improving access to their home. In the same vein, there would be no fair and substantial relationship between what they were asking for and the spirit of the ordinance. The spirit of the ordinance was to allow property owners to enjoy their properties as much as possible. The variance would not injure the public or private rights of others, which he already addressed. The requested variance was consistent with the spirit of the ordinance as the ordinance explicitly was in favor of improved access to homes. Substantial justice was done for the same reason. It would not diminish the values of surrounding properties and would probably enhance the surrounding properties.

Mr. Witham felt that it was a safety concern to enlarge the front steps and that certainly was the spirit and intent of the zoning ordinance to address issues such as that. Concerning the lot coverage issue where they are going to be slightly 4% over what was allowed and for this area of town this was very reasonable. In terms of density, this would have little or no effect on any of the abutters.

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

~~~~~  
10) Petition of **Lawrence N. & Ruth S. Gray, owners**, for property located at **80 Currier’s Cove** wherein a Variance from Article II, Section 10-207(13), Article III, Section 10-303(A); and, Article IV, Section 10-401(A)(1)(b) to allow a third dwelling unit in an existing building on a 7,358 sf lot where 22,500 sf of lot is required for three dwelling units, and 2) Variances from Article XII, Section 10-1201(A)(2) and Section 10-1201(A)(3)(a)(3&4) and Section 10-1204 Table 15 to allow 4 parking spaces to be provided that are designed to park one behind another and to back out onto the street where 5 parking spaces are required and are to be designed so that any motor vehicle may proceed to and from a parking space without moving another vehicle and not back out onto the street with a 24’ maneuvering aisle. Said property is shown on Assessor Plan 204 as Lot 14 and lies within the Single Residence A district. Case # 5-10

A motion to table this petition until the next scheduled meeting passed unanimously with a 7-0 vote.

~~~~~  
11) Petition of **Catherine A. Irvine, owner, Jeffrey Marple, applicant**, for property located at **300 Court Street** wherein the following are requested: 1) Variances from Article II, Section 10-207(13), Article III, Section 10-303(A); and, Article IV, Section 10-401(A)(1)(b) to allow a third dwelling unit in an existing building on a 7,358 sf lot where 22,500 sf of lot is required for three dwelling units, and 2) Variances from Article XII, Section 10-1201(A)(2) and Section 10-1201(A)(3)(a)(3&4) and Section 10-1204 Table 15 to allow 4 parking spaces to be provided that are designed to park one behind another and to back out onto the street where 5 parking spaces are required and are to be designed so that any motor vehicle may proceed to and from a parking space without moving another vehicle and not back out onto the street with a 24’ maneuvering aisle. Said property is shown on Assessor Plan 108 as Lot 12 and lies within the Mixed Residential Office district. Case # 5-11

Mr. Parrott and Mr. Berg stepped down from this hearing.

SPEAKING IN FAVOR OF THE PETITION:

Attorney Bernard Pelech spoke on behalf of Catherine Irvine and Jeffrey Maple. This property is a former church that was proposed by Catherine Irvine and converted into an artist studio and two residential dwelling units. Mr. Marple was seeking to convert the artist's studio into a third dwelling unit and in so doing he needs relief from the Board. The Planning Department had previously determined that this was not a residential use so it does not qualify for a conversion of up to 4 dwelling units if this were a residential structure. Therefore, a variance is needed because the lot area requires an addition of 7,500 s.f. in non-conversions rather than 1,500 s.f. in conversions. The second variance being requested is for parking spaces. The addition of a third dwelling unit would make the currently conforming parking non-conforming. They would no longer be back to back out onto the street nor would they be able to park one car behind the other.

Attorney Pelech indicated that they felt that the proposal before them met all of the five criteria to grant the variances. He felt this was a unique lot. It is very small lot with a large building on it. It is very difficult to create parking on the lot. The plan is to place one dwelling unit on each level. Each unit would be substantial in size. Because of the location of the lot and the size of the building, they believe there is a hardship which prevents a reasonable use of the property. There is no way to put parking on the site that conformed with the requirements. They did not believe there was any fair and substantial relationship between the general purpose of the ordinance as it is applied to this particular piece of property. One side of Court Street is Central Business where the parking requirements are one thing and the other side of Court Street, where this property is located, is the MRO district where the lot area per dwelling unit becomes 7,500 s.f. and the Central Business District there is no minimum lot area and the lot has to be 1,000 s.f. Across from this structure, there aren't really any structures but there are parking lots. The surrounding uses of properties are primarily commercial in nature. They do not believe there is a fair and substantial relationship, given the size of the lot and the size of the building on the lot. They believe that the granting of the requested variance would not injure any public or private rights of others. Other than the addition of the third dwelling unit, there are no exterior changes to the building nor to the parking area. They did not believe that this would result in any diminution of value in properties. The four parking spaces would be utilized as they are now. Parking is not allowed on the street so there would not be any on-street parking by tenants. They would have to park in a parking lot or make arrangements elsewhere for their vehicles. They believe that substantial justice would be done by granting the requested variance. The hardship on the owner is certainly going to outweigh any benefit to the general public in denying the variance. This would create an additional housing unit where there is a shortage of housing. Substantial justice would not be done if the variance were denied. They do not believe that the granting of the requested variance would be contrary to the spirit and intent of the ordinance. They believe the spirit and intent of the ordinance in setting up the parking requirements is to prevent overcrowding. There are four parking spaces on site and given the proximity to public parking and given the fact that there won't be any on-street parking, the spirit and intent of the ordinance will not be violated. As indicated, they did not believe that adding a third dwelling unit was going to violate the spirit and intent of the ordinance as to lot area per dwelling unit. If this were a conversion, a much smaller area per dwelling unit would be allowed. Up to four units are allowed in the district. They do not believe that granting of the variance would be contrary to the public interest. They feel it would be a benefit to the general public. In addition to adding a dwelling unit to the city where there is a shortage, the overall net effect to the general public will be a benefit. There will be the shortage of one parking space but there will also be the creation of an additional housing unit and enhanced tax base. Overall, they believe this will be a general benefit to the public.

In conclusion, Attorney Pelech indicated that they felt that had met the five criteria necessary for the Board to grant the variances and they would ask that the Board grant them. Also present was Jane James who was standing in for Jeffrey Marple. Attorney Pelech commented on the Planning Department's memo concerning the two alternative plans for parking. They would prefer to go with Alternate Parking plan #2.

Mr. Rogers asked if Attorney Pelech could be more specific on which parking option he would like the Board to vote on, rather than leaving it up to the Board as a type of smorgasbord. Attorney Pelech indicated that they would prefer Alternate Plan #1, which is the five parking spaces. Alternate Plan #2 is what is currently existing on site. The reason that alternates can be submitted to the Board is an area that was discussed in case entitled Carboneau v. Town of Rye, which an applicant came before the Board of Adjustment with two alternatives and asked the Board which plan they preferred. The Supreme Court remanded the case back, indicating that the Board of Adjustment can give advise to applicants.

There was a discussion and clarification over the alternative parking plans. Attorney Pelech confirmed that they would prefer Alternate Parking Plan #1.

Chairman Le Blanc asked how many bedrooms would be in the apartments. Ms. James indicated that they expect two to three bedrooms in each of the apartments.

Vice-Chairman Horrigan referred to Alternative Parking Plan #1 and asked if there was some way to prevent cars from parking in the turn around area? Attorney Pelech indicated that the only solution would be signage.

SPEAKING IN OPPOSITION TO THE PETITION:

Sara O'Donnell, owner of The Inn at Strawberry Banke, 314 Court Street, addressed the Board. She had a few concerns. Her first concern was regarding the boundary issue regarding a stone wall fence that the current owner erected. She had since found out that the fence is directly on the property line so it encroaches on her property line. She has concerns about further encroachment on her property as a result of the use change. Also, the parking is a concern of hers and always seems to be an issue in Portsmouth. There have been people parking in the lot next to her and she is concerned that this encroachment would increase.

Peter Michaud, an employee of the Society for the Preservation of Antiquities, who owns the Langdon House next door spoke. He was concerned about a second means of egress for the upstairs apartments.

DECISION OF THE BOARD

Mr. Witham made a motion to grant the petition as presented and advertised, with the Alternative Parking Plan #1. Mr. Rogers seconded. Mr. Witham felt that on the surface this petition was pretty easy to jump all over. He felt this was about as unique of a setting as you could find, especially when you go back and it was a church. It has been a very successful conversion. Now they are asking to convert an artists studio to an apartment. Mr. Witham does not feel this would be over-utilizing the property to only have three units in a building this size. The units would all be over 2,000 s.f. As Attorney Pelech indicated, it is allowed to back out of parking spaces with two units. Looking at the setting of this building, there is absolutely no way they could meet the 24' wide travelway. He felt that it was a fairly safe street to back out onto. The structure is located about 30' from a zone where they simply have to pay \$500 to meet the parking requirements. That makes the setting very unique for this property.

Mr. Witham did not believe the requested variances would be contrary to the public interest. He felt there would be very little impact on the public. It would in the public interest to have this converted successfully from an artists studio to an apartment. The zoning restrictions as applied to the property interfere with the reasonable use, especially when you see how restrictive the zoning is to this property. It is hard to find a building this large on such a small lot, which makes it virtually impossible to meet the proper requirements. Therefore, it interferes with the reasonable use of the property. In terms of a substantial relationship between the purpose of the zoning and the specific restrictions on the property, there definitely is a relationship between the restriction of not allowing cars to back out. The speed on the street is very well controlled and it will not be an unsafe situation. The Church used to have 7 cars backing out at one time. He did not believe the variance would injure the public or private rights of others. The plan is tastefully done and there is a turn-around area provided to allow people to pull out straight ahead if they so choose. He felt the variance was consistent with

the spirit of the ordinance to allow buildings that had a previous use to continue on. It would be in the spirit of the ordinance to allow an artists studio to become an apartment. Substantial justice would be done in granting the variance. There would be virtually no impact on the surrounding properties and would not diminish the values of surrounding properties.

Mr. Rogers agreed with Mr. Witham. This property had been residential at one time. Someone could put up to four apartments in the building. In this area of the city, the buildings are small and have been there a long period of time and by adding one more apartment they would make it a reasonable use for the building and causing the building to be used in an appropriate way. Mr. Rogers felt that special conditions exist because the zoning restrictions on the property interfere with the reasonable use of the property. Had it been a residential property, it could be used in this manner. As it used to be a church, it is restricted on its use. Mr. Rogers agreed with Mr. Witham that it was probably going to be high-end apartments. He did not believe that there was any fair and substantial relationship between the general purposes of the zoning ordinance and the specific restrictions on the property. He could understand why the ordinance requires more square footage than what they have but all of the houses in that area have a very small footprint and there is nothing that they can do about it. He did not believe they would be diminishing the property values in the area. He felt there was a need for housing in Portsmouth and this was a very appropriate use of the property.

Chairman Le Blanc indicated that he did not support the motion. They currently have a 7,358 s.f. lot where they need 22,000 + s.f. for the dwelling units they want to put in the building. They cannot provide five parking spaces where the residents can drive out onto Court Street and Chairman Le Blanc disagrees and feels that Court Street is a fairly busy street. He feels that would create a safety hazard. This is a large building that takes up a large portion of the lot that doesn't leave alot of space for parking. There are reasons for the square footage requirements, such as light and air and open space, and to use the fact that other buildings in the area are just as densely used as possible does not give them the right to allow this particular unit increased to three dwelling units.

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

~~~~~

A five-minute break was taken

~~~~~

12) Petition of **Eric D. Weinrieb, owner**, for property located at **1 Jackson Hill Street** wherein a Variance from Article IV, Section 10-402(B) is requested to allow a 12' x 16' shed including a 3' x 12' roof overhang with a 4'6" rear yard where 10' is the minimum required. Said property is shown on Assessor Plan 141 as Lot 30 and lies within the General Residence A and Historic A districts. Case # 5-12

SPEAKING IN FAVOR OF THE PETITION:

Eric Weinrieb, of 1 Jackson Hill Street, addressed the Board. His home was built in 1740 and was possibly the slave quarters for the Jackson House, which is his direct abutter. His basement was very unuseable as there was a stream running through it and was a direct discharge into the North Mill Pond. His only storage area was the existing shed which was in very poor condition and had some unsightly solar panels. He intended to take down the existing shed, remove the solar panels and create a structure that he could walk in at grade to access the shed.

He felt that a denial of the variance would create an unnecessary hardship. If the variance was not approved, the existing shed would remain on the property. It was difficult to get lawn mowers and power equipment in and out of the shed as there were 4 stairs. He typically kept some of the equipment outside, within 50' of the tidal

buffer, and there was potential for contamination. Having a new shed would allow him to store his equipment inside. The construction would not decrease the value of surrounding properties and potentially it would increase the values. The current shed was extremely unsightly. The new shed would be lower in height. The proposed use would not be contrary to the proposed ordinance. The shed, as it stands today, was somewhere between 20' – 30' high, including the solar panels. The new shed would be more historic in design and he would be going before the HDC for approval. It would be less visible from the Jackson House property and he would store more equipment inside the building and there would be an overhang where he could store kayaks and other items which wouldn't be as visible. The variance would be a benefit to public interest. The solar panels and everything about the current shed was unsightly and it would be a benefit to the public if they didn't have to see that. Granting the variance would do substantial justice. It would allow him to fully utilize his property so that he would have adequate storage for his lawn mower and other items that people normally keep in their basements. With his water problem he was unable to store things in his basement.

Mr. Rogers asked if the footprint was pretty much the same but he was rotating it? Mr. Weinrieb confirmed that he would rotate it so that it would be parallel with the existing house. It would be entirely on his common area property.

Vice-Chairman Horrigan asked if any of the current vegetation would have to be removed? Mr. Weinrieb stated that all of the trees would remain. There was a shrub in front of the shed that would be removed and that was only visible from the entrance to his home.

Peter Michaud, an employee of the Society for the Preservation of NH Antiquities, who owns the Jackson House, spoke in support of the project. They felt it was more conforming with what was already there and the current shed and solar panels were unsightly. Overall, they believe it would be an improvement to the neighborhood.

DECISION OF THE BOARD:

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Parrott seconded. Mr. Rogers stated that the current shed was in pretty bad shape and looked very unsightly. He did not believe the requested variance was contrary to public interest because the old shed and the solar panels looked pretty bad and were in grave need of repair. The restrictions that apply to this specific property interfered with the homeowners reasonable use of the property in that he was taking a building that was in bad shape, tearing it down and replacing it with a very similar building. The removal of the solar panels would make it much more attractive. Mr. Rogers did not feel that there was a fair and substantial relationship between the general purpose of the zoning ordinance and the specific relationship to this property. The setbacks were to protect other people's properties and it appears that the surrounding properties were greatly improved by the new shed. He did not believe that any other public or private rights would be injured. The variance was consistent with the spirit of the ordinance. Substantial justice would be done because in order to keep his lawn care equipment off of the property he would need someplace to store it. This would improve a currently unsightly area of this property. There would not be any diminution in values of properties and if anything, it would improve the property and would make a more attractive view for the abutters.

Mr. Parrott agreed with Mr. Rogers and felt that this small lot was very restrictive. This seemed like a good solution all around and would not negatively effect any of the neighbors.

Chairman Le Blanc stated that the shed was not a luxury but rather, with the unique water situation in his house, was a necessity. There needed to be some way to keep the equipment out of the basement.

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

13) Petition of **James and Edna Pantelakos, owners, Chris and Petra Barstow, applicants**, for property located at **188 Edmond Avenue** wherein the following are requested to allow a 1,020 sf addition to the existing building for a grocery market with a restaurant (cafe) with both inside and outside seating: 1) a Variance from Article II, Section 10-206 to allow a single family dwelling in a residential district that only allows single family dwellings, and 2) a Variance from Article III, Section 10-304(A) to allow said addition to have: a) a 24' right side yard where 30' is the minimum required, and b) 12.7% open space where 20% is the minimum required, 3) a Variance from Article XII, Section 10-1203(1) to allow the loading berth to be located within the required right side setback; and, 4) a Variance from Article XII, Section 10-1204 Table 15 to allow 544 parking spaces to be provided where 593 are required. Said property is shown on Assessor Plan 220 as Lot 78 and lies within the Single Residence B district. Case # 5-13

This Petition was withdrawn by the applicants.

14) Petition of **Lafayette Limited Partnership, owners, Philbrick's Fresh Market LLC, applicant**, for property located at **775 Lafayette Road** wherein the following are requested to allow a 1,020 sf addition to the existing building for a grocery market with a restaurant (cafe) with both inside and outside seating: 1) a Variance from Article II, Section 10-208(20)(A) to allow a restaurant use on a lot which directly abuts a residential district, 2) a Variance from Article III, Section 10-304(A) to allow said addition to have: a) a 24' right side yard where 30' is the minimum required, and b) 12.7% open space where 20% is the minimum required, 3) a Variance from Article XII, Section 10-1203(1) to allow the loading berth to be located within the required right side setback; and, 4) a Variance from Article XII, Section 10-1204 Table 15 to allow 544 parking spaces to be provided where 593 are required. Said property is shown on Assessor Plan 245 as Lot 1 and lies within the General Business district. Case # 5-14

SPEAKING IN FAVOR OF THE PETITION:

Attorney Bernard Pelech addressed the Board on behalf of Philbrick's Fresh Market. Attorney Pelech indicated that this location was the Lafayette Plaza which was Portsmouth's oldest shopping plaza. Phil Philbrick, who was one of the principals of Philbrick's Fresh Market, LLC, was proposing a mid-sized grocery store that fits in between today's modern supermarket and the neighborhood convenience store. He was proposing to locate in what was formally the Stroudwater Bookstore and put in a grocery store specializing in fresh and organic produce with a butcher shop, a seafood market, Me & Ollie's Bakery, a deli, health foods, vitamin supplements and wines.

Attorney Pelech first spoke about open space. They were seeking a variance for 12.7% open space. They needed a variance because they were expanding the non-conforming building but were not decreasing the amount of open space. They were proposing 1,200 s.f. of addition which would be a loading berth which would be constructed on what was currently hot top.

The second variance was to be within 100' or directly abut a residential district, which used to be Ledgewood Apartments. This Board previously granted a variance to Margarita's to be within 30' of that district. Their variance would be 350' from the closest residential structure in Ledgewood.

The third variance is for a 24' sideyard setback. That was what exists now between the building and the radio station property line. They were basically extending the plan of the existing building and were not getting any closer to the property line than the building already was.

The fourth variance was for parking. They were seeking a variance to allow 544 parking spaces when 593 spaces were required. With the Margarita's plan that was approved in 2002, which had since lapsed as they never did their expansion, the Board granted a variance for 522 spaces where 595 were required.

The last variance was to allow the loading berth to be located in the side yard. There was no other place to put it as this was the corner of the building and there was no space to put an additional loading berth in the rear of the building.

Attorney Pelech then addressed the five criteria. The Simplex test required them to demonstrate that the ordinance interfered with a reasonable use of the property and that the property was somehow unique. When the Plaza was constructed in the 1960's, there was something called the Commercial Zone. There were no side yard or front yard setbacks at all. The reason this building sits 24' from the property line is that there was an easement of 20' in width that Clear Channel Radio had. Also, when the Plaza was constructed, there was no required setback from property that was zoned residential. In this case, they are so far away from Ledgewood that they would not have any impact on that property. The lot is unique. The parking that was created then is the parking that exists now. The open space is what was created. This property was unique because it was built when a lot of the current ordinances were not in existence.

Attorney Pelech did not believe there was any fair and substantial relationship between the general purpose of the ordinance as it relates to this particular piece of property. The distance from the residentially zoned property was over 300'. The best argument that could be made for the parking was that a good portion of the property was used by Rotary at Christmas time, which was the busiest time for retail businesses, and there still was no parking crunch. The two biggest tenants, Ethan Allen and Pier I, have a very low parking ratio. That was part of the reason why there were always parking spaces, even at Christmas.

He did not believe this variance would injure the public or private rights of others. He was not aware of any rights that would be interfered with. This proposal was primarily 19,500 s.f. within an existing building. Granting the requested variance would not diminish the value of surrounding properties. The properties in the area, with the exception of Ledgewood, were commercial in nature and basically surround the property. Attorney Pelech felt it would enhance the area. The renderings show that this would be giving a facelift to this shopping plaza. They felt that substantial justice would be done by the granting of the variance. They could not see any benefit to the public in denying the variance. There would be a great benefit to the public in granting the variance, given the need for this type of use, given it's proximity to Portsmouth residents and given the ample parking. This was not designed to compete with the large supermarkets.

Attorney Pelech indicated the requested variance would not be contrary to the spirit and intent of the ordinance. This plaza was constructed when the Portsmouth Zoning Ordinance was probably 10 pages and there were probably 4 zones and just about anything was allowed. They were basically occupying an existing, vacant space, other than building a small loading berth. The parking would not be contrary because there was adequate parking. The proximity to the residential district was not going to be contrary to the spirit and intent of the ordinance as it was going to be 300' away. The open space was created prior to the ordinance requiring 20% open space and to increase the open space they would have to decrease the parking.

In conclusion, Attorney Pelech did not believe the granting of the requested variances would in any way be contrary to the public interest. The City has five supermarkets that are all 2-3 times the size of this proposed market. The only other thing that the City has is the convenience store and this fits the niche in the middle. Essentially, they believe that this was in the public interest because it provides a product that is desirable to the general public. He felt that they had met all of the criteria to grant the variances. John Chagnon of Ambet Engineering, Mr. Philbrick, and Roger from Me & Ollie's were present to answer any questions.

There would be about 35 employees, full and part time and at any one time there would be 15-20 on site. The operation would be open 7 days a week and open from 8:00 a.m. to 8:00 p.m. except on Sundays the hours of operation would be 10:00 a.m. to 6:00 p.m..

Chairman Le Blanc asked about the outdoor café and whether it was enclosed or under the walkway. Attorney Pelech indicated that it was not enclosed, it was seasonal and would be under what is now the canopy. There would be 16-18 seats. The indoor café area was also shown on the plan and had 18 seats.

Vice-Chairman Horrigan asked about the outside lighting and whether it would be directed downward. Attorney Pelech indicated it would be a period type of down-facing, gooseneck lamps. The signage would be exterior

lighted, not interior and a variance would not be required. They would be going before the Technical Advisory Committee for site review approval.

Phil Philbrick, the Applicant, stated that they would like the opportunity to bring this type of store to Portsmouth. Their marketing research has indicated that it would be well received. It would be the only locally owned and independent market.

DECISION OF THE BOARD:

Vice-Chairman Horrigan made a motion to grant the petition as presented and advertised. Mr. Holloway seconded. Vice-Chairman Horrigan indicated that he would be addressing four different variances, one of which involved a use, two involved dimensional requirements and then there was a parking requirement. He started with the hardship criteria. The zoning restrictions as applied to this particular property would interfere with the owner's reasonable use of the property. It was a commercial shopping mall and the entire area was surrounded by commercial businesses. There was an abutting residential district but it was quite a distance away and this particular site was the furthest removed from the residential district. He also reminded the Board that they had granted variances in the past to a restaurant which was at the other end of the shopping mall which is closest to that residential area. He therefore felt it would be unreasonable to not allow a restaurant on this particular part of the property. He felt there was no fair and substantial relationship between the general purposes of the zoning ordinance and the restrictions on this property. Certainly, a grocery store/restaurant would enhance the public benefits from this property. The zoning ordinance did not intend that these dimensional variances or the small number of parking places or the residential area would somehow block a proposal of this type. As far as the variance injuring the public or private rights of others, the public's rights certainly weren't going to be violated. The private rights would be the abutting business property owners and the Board did not hear any testimony from them that they oppose this. It would enhance their businesses as well. This was a very reasonable proposal and to deny it on the grounds that they have in front of them would not be fair.

Going back to the first variance criteria of whether this would be contrary to the public interest, Vice Chairman Horrigan indicated that the public interest would be well served by this particular proposal. What they were giving up in return was very minimal. The open space was not changing at all. A 6' allowance on the right side yard seemed to be minimal relief, especially considering that the right side yard was essentially abutted by large open space owned by the broadcasting station. Allowing a loading berth to be on the right side for the produce section made sense for the type of store that it would be. That would not intrude on the rights of the immediate abutter, WHEB radio. As far as the parking spaces, he felt they should look at the past history. They have repeatedly granted relief on the parking on this lot, not because they are challenging the parking requirements of their zoning ordinance but mainly because they have to accept the reality of the situation that this was a parking lot which is never full, not even at Christmas time.

Vice-Chairman Horrigan stated that the requested variance would be consistent with spirit of the ordinance. He felt the spirit of the ordinance clearly dictated that this type of business was very desirable to the City of Portsmouth and the variance was certainly consistent with the ordinance as he understood it. Substantial justice was done by the granting of the variance. This space had been empty for a long time and it clearly had been difficult for the owner to rent and they would be granting the owner justice by agreeing to this proposal.

The variance would not diminish the values of the surrounding properties. One only has to look at the architectural rendition and also the use of this building to realize that this was going to drive up the values rather than diminish them.

Vice-Chairman Horrigan indicated that he felt it was a very desirable proposal and he felt the Board should vote for it.

Mr. Holloway seconded for discussion and agreed with Vice-Chairman Horrigan. He felt it would be a fine use for that piece of property and it would be something new in the City of Portsmouth that would enhance the community.

Chairman Le Blanc added that he felt the relief being sought, although there were a number of variances being requested, all seemed quite minimal for the size of the project that would be going in and for the size of the lot. That was what he felt was the unique criteria for this request. It was a huge lot and it was surrounded by businesses on almost all sides and the residential area was quite a distance from this project.

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

~~~~~

15) Petition of **Louis F. Clarizio, Trustee, SOS Realty Trust, owners**, for property **located off Cass Street** wherein the following are requested for the construction of a 32' x 34' two story building for one dwelling unit and office space: 1) a Variance from Article III, Section 10-303(A) to allow: a) a 13' rear yard where 15' is the minimum required, and b) 7,454 sf of lot area where the minimum lot size is 7,500 sf and where 7,500 sf is required for a dwelling unit, and 2) a Variance from Article XII, Section 10-1201(A)(3)(c)(1) to allow parking 6' from a residential lot line where 50' is the minimum required to a residential lot line. Said property is shown on Assessor Plan 156 as Lots 33 & 34 and lie within the Mixed Residential Business district. Case # 5-15

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

John Chagnon, of Ambet Engineering, spoke on behalf of Louis F. Clarizio, Trustee of SOS Realty Trust, owner and applicant. They were proposing to combine two lots that would total 7,454 s.f. They were located in the MRB District with frontage on Cass Street. The surrounding uses were multi-family, residential, and commercial uses. The applicant proposed to construct a duplex with office space on one side and a single-family residence on the other side, which were allowed uses. The relief being requested was three variances. The first was to allow the lot to be 7,454 s.f. where the minimum lot size requirement was 7,500 s.f. They would be 46 s.f. short of the requirement. The second was to allow a 13' rear setback where a 15' setback was required. They would be 2' short of the requirement. The Planning Department had suggested that the structure could be rotated and no relief would be required however, due to the design of the building, the streetscape view was the longer dimension and would not fit in a different location. The third was to allow parking 6' from the residential lot line where 50' was required. Throughout the area, parking for the businesses were within a few feet of the lot lines. In fact, along lot 34 there was a parking area 15' from a residential lot line. They plan to offset the difference between 15' and 6' with some screening such as hedges and a fence. The applicant felt that they met the five criteria necessary to grant the variance.

Mr. Chagnon felt that special conditions existed with respect to the property such that a literal enforcement of the zoning ordinance resulted in an unnecessary hardship and interfered with the owners' reasonable use of the property. Both proposed uses were allowed and they were only 46 s.f. shy of the required square footage requirement. None of the surrounding lots are 7,500 s.f. in size. It was one of the largest residential lots in the area.

There was no fair and substantial relationship between the zoning ordinance and the specific restrictions on the property. The minimum lot size was somewhat arbitrary and did not represent the lots in this neighborhood. The requested rear setback relief of 2' was more than other lots in the neighborhood who had a 0' setback. The 13' rear yard would provide ample light and air and therefore the general purposes of the zoning ordinance would be met. The applicant planned to leave up the fence and plant additional trees.

Granting the variance would not injure the private or public rights of others. Allowing the proposed structure to be built would not interfere with any rights of others. The parking was presently 15' from the property line and

had existed since the property was used commercially by a bank. By adding the plants, it would be an improvement over what presently existed. Granting the variance with regard to lot size would have no effect on others. Abutting properties would not be effected by the setback as there was a fence and they were proposing to add plants.

Mr. Chagnon indicated that granting the variance would not diminish surrounding property values. The fact that the applicant's lot was 46' s.f. short would not diminish surrounding property values given the average size of lots in the neighborhood. Parking within 6' of the property line would not diminish property values as there would be additional screening and would be amenable to conditions for improvement such as fencing. The applicant had located the proposed structure in such a manner so that the area in front of the abutting residence with vacant green space in front of that structure so as not to block the view to the street. This building did not utilize every square inch of area between the setbacks and a larger structure could be built on this lot without setback relief.

Substantial justice would be done by the granting of the variance. Without a variance, the lot could not be used for residential purposes. As such, a hardship upon the owner would be substantial and would certainly outweigh any benefit to the general public in denying the requested variance. The general public would be benefited in that an additional housing unit would be created on what was now a vacant lot and the tax base to the city would be increased.

Mr. Chagnon felt that the granting of the requested variance was consistent with the ordinance. Establishing the 7,500 s.f. lot size requirement per unit was to prevent over-intensification of the use of property. The fact that the average lot size in the immediate community was over 50% of the required lot size and the applicant's proposal was 99.39% of the required lot size, granting the variance regarding lot size would not be contrary to the spirit and intent of the ordinance. Furthermore, he stated that the rear yard setback in relation to Lot #32 would not be contrary to the spirit and intent of the ordinance. There would be plenty of air and light and plenty of room for emergency vehicles to access. Parking within 6' of the residential line with proper screening would not have as much of an impact on the abutters as 15' from the line. The granting of the variance would not be contrary to public interest. The public interest would be benefited by the creation of additional housing, construction on a vacant lot, utilization of vacant land in an already built-up urban area and was consistent with surrounding properties.

In conclusion, the applicant felt that they had met all of the five criteria and they requested that the Board grant their application. They also requested that the Board consider voting on the request for lot size separate from the setback and parking variance.

Mr. Jousse asked if the proposed building could be made 32' deep and 34' wide? Mr. Chagnon indicated that the building was a modular and was constructed per plans that were bought off the shelf. This was a standard item of that particular company.

Vice-Chairman Horrigan asked for clarification of where the 6' setback would be? Mr. Chagnon indicated it was along the southerly part of the proposed parking lot. Vice Chairman Horrigan asked why the building had to be squeezed in where it was? Mr. Chagnon indicated that the ordinance requires a 24' travelway for two-way travel. Mr. Chagnon also stated that the adjacent property was owned by the applicant and cars can drive straight through to Albany Street. No barrier was planned between the lots.

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

Attorney John P. McGee, Jr., spoke on behalf of Hubert Krau and Heather Johnson, the owners of 52 Cass Street, which was the property to the rear of the proposed building. He felt that the proposed plan was contrary to the whole concept of zoning as we know it. He felt this was a massive sized building being squeezed onto the lot. Going back to 1983, Durham Trust came before the Board and their plan showed three individual lots on which their business was to be operated. Dr. Clarizio was using one for a parking lot in conjunction with the

main building which fronts on Islington Street. That was why he wanted to maintain access to Albany Street. They didn't want a separate lot but rather they wanted another building on the same lot and they were trying to double-dip. They were also concerned about open space. They prepared pictures showing what it would look like if this structure were placed in front of his client's home. It would block air and light. They solicited two opinions from real estate people indicating that this would adversely effect their home. They felt the proposed building was too intense. Also, they questioned whether the applicant had adequate frontage as it only appeared that they had 92' of frontage on Cass Street. They felt that this was an attempt to put a second commercial building on a small area of combined lots that Dr. Clarizio acquired.

Chairman Le Blanc asked if that was one lot that the applicant owned? Attorney McGee indicated that the two small lots that were being talked about do not meet the criteria of an individual lot and they were vacant so, under Portsmouth Zoning Law as it has been enforced since around 1970, they merge together into one larger lot. They submit that under the merger principals allowed in Vachon v. Concord, this was one lot, including the doctor's main building, the parking lot area which extends down to Cass Street and the open space area that was right in front of his client's house.

Hubert Kras, of 52 Cass Street, spoke in opposition. He provided pictures to the Board showing what their view would be if the proposed building were allowed. He and his wife, Heather Johnson, were opposed to the granting of the variance for the following reasons: They would face increased traffic and would increase the parking problem on Cass Street. Where would all of the people park that currently use this vacant lot for parking? They also provided the Board with a Petition signed by numerous abutters who objected to the variances. The value of their property would be negatively effected as they would now have parking lots on three sides of their property. They would have loss of privacy and their property would be visibly landlocked. There would be increased foot traffic. The applicant did not have sufficient street frontage. The floor plan that was submitted was quite ambiguous and didn't clarify the intended office use. The design of the building seemed to be driven by the need for two-way traffic.

Mr. Rogers asked if he would object to the building if they were able to meet all of the setbacks? Mr. Kras was opposed to the structure that did not relate architecturally to the lot or the rest of the street. If it were more appropriate he would be all set.

Denise Rollins, of 149 Cass Street and President of the Cass Street Neighborhood Association, spoke in opposition to the variance. Most of the neighborhood consisted of single family homeowners with some duplexes and multi-family buildings. The Neighborhood Association had worked hard to clean up their area. Residents had renovated and restored their properties, and had turned it into a safe haven. They oppose having an office building anywhere on Case Street. Placing it on an undersized lot would provide further traffic stress.

Alice Giordano, of 49 Cass Street, spoke in opposition. She felt the applicant was seeking to build an oversized building on an undersized lot in a predominantly residential neighborhood. She felt that facts were omitted from the application. She felt the property was one continuous lot and had been used that way for the past 40 years. The Planning Department's files reflect previous and repeated waivers, special exceptions and variances for a variety of reasons. She felt it was brazen for the property owners to come forward once again and ask for more variances on lots that are already non-conforming. Their parking spaces keep creeping closer and closer to residential property lines. They are now asking to park cars only 2' from a residential property line. Ms. Giordano indicated that maybe next year Dr. Clarizio will look for a variance to park his cars in their living rooms. This would have a negative effect on all surrounding property values.

Maura Sutton, of 26 Cass Street, indicated that if this were granted, she would be surrounded on three sides by commercial buildings. She disputed the property line on their plan and where her fence was shown. She felt this was a residential neighborhood and putting a commercial property on the street would diminish everything they have worked so hard accomplish.



Julie McNeil, of 161 Cass Street, stated that they had put a lot of time and money into their property. There was a parking problem and this proposed new building would make it much worse.

Tom Nyland, of 49 Cass Street, agreed with the previous residents. He felt that all three lots were needed to meet the setbacks for his practice. He was bothered by the fact that they were planning to build a modular home. That just showed him that they were trying to get a building on the lot as quickly as possible for the maximum profit. It would not look right and would stand out.

Amanda Donovan, of 68 Cass Street, agreed with her neighbors and was opposed to the petition. She felt it would cramp their neighborhood and none of the neighbors would benefit from it. They have worked very hard to make it a nice neighborhood and she was very proud of what they have done.

Heather Johnson just wanted to go on record that she opposed the granting of the variance. She felt a picture was worth a thousand words and the Board had been presented with plenty of pictures by her husband, Hubert Kras. Her other main concern was the traffic going onto Islington Street from Cass Street as well as the already crowded parking problem. Businesses on Islington Street park on Cass Street because there isn't enough on site parking on Islington Street. City Hall records show that there were the same concerns 20 years ago by neighbors about increased traffic and parking problems.

#### **REBUTTALS:**

John Chagnon passed out a copy of the tax map with the proposed structure and abutting structures. The first issue that he addressed was the zoning which they had no control over. The proposed use was consistent with the Zoning Ordinance. This was zoned mixed residential/business. The second issue was the appearance of the structure. This area was not in the historic district so appearance should not be an issue. He felt the building was in keeping with the structures in the neighborhood. It just happened to be more square. They did a property survey of the three lots. There were three lots on the Portsmouth tax maps and there was nothing in the deeds indicating that the subject property was affected by an off-site lot. If the neighborhood wanted to insure that only residential use was allowed then they should change the zoning. They were not asking for a lot of relief. They were not utilizing all of the open space with the structure.

Mr. Chagnon indicated that they would not be opposed to a tabling motion to clarify any of the issues.

Attorney McGee wanted to make sure that the plan that he submitted was part of the record. He did not feel that they had answered the question regarding the three lots. Attorney McGee stated that these were three lots that had been joined together since 1983. He felt there were serious questions about whether or not there would be enough open space on the remaining Clarizio property. It was key that they were attempting to push the building over as far as possible to the left so that they could have a throughway because they know that Dr. Clarizio's office would still need that parking. That parking was critical to his operation. He felt this was an attempt to squeeze out for commercial profit every last drop of money without regard to zoning.

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

Mr. Rogers made a motion to table until the next regular meeting for clarification on the frontage and whether these were merged properties. The motion was seconded. The motion failed on a 3-4 vote, with Vice-Chairman Horrigan, Mr. Holloway, Mr. Parrott and Chairman Le Blanc voting in the negative.

Mr. Parrott made a motion to deny the Petition. Mr. Holloway seconded. Mr. Parrott felt there were numerous, serious issues raised. The question of whether adequate frontage was available was a serious issue. There was a serious question as to whether or not the lots had been combined. There were questions raised about whether Lot #24, as a stand-alone lot, met various requirements. They had an unusually large number of neighborhood property owners who took the trouble to object to this project in writing and in person and that rarely happens unless there are serious issues. The design was a case of trying to put too much on too small of a location. This

block has some very unusual shaped lots and was a real hodge-podge of lots. This was what happens when you don't have good planning. But they are what they are and they have to deal with them and this proposal, in Mr. Parrott's judgment, would not improve the neighborhood one bit. His specific concern was asking for relief from a 50' setback and providing only 6'. They were not hurting anybody because these were vacant lots and this was not somebody with a hardship situation where some relief may be appropriate. There was no hardship whatsoever. It was clearly a case of new construction. There were more reasons that he could cite but those were sufficient to deny the petition.

Mr. Holloway agreed with Mr. Parrott. He did not see any hardship.

Vice-Chairman Horrigan indicated that he supported the motion. He stated that, when he looked at the site and discovered 52 Cass Street, his heart sank as he realized that this proposal was going to eventually dwarf that property, which was a very nice and nicely landscaped home. The location of the building seemed to be driven by the need to preserve a street or alley between Albany and Cass Streets and if these two lots were joined together could easily accommodate a building with a different relationship to the surrounding residential structures. He felt this plan was totally insensitive to the abutters. The 15' rear setback was a minimum requirement. Generally, he was very wary of any proposal that required parking right on top of residential property and one could argue that they couldn't meet the 50' requirement but what they are proposing was literally in the neighbor's backyard. That was happening so that they could preserve the right of way from Cass Street to Albany Street. Vice-Chairman Horrigan did point out to the neighbors that the zoning was mixed residential business and the fact that it was going to be used for residential and a business office was not before the Board. The setback requirements were not preventing the owner of this property from making a reasonable use of the property. This was a vacant lot and there were many possibilities. There was a fair and substantial relationship between dimensional requirements because if the Board violates those, they are essentially inflicting damage in property values in this case. He did not see the hardship.

Mr. Rogers could not support the motion. He felt there were things in the Simplex test that they have to consider. They were talking about the frontage and whether the property had been merged but he did not believe those concerned them regarding the dimensional setbacks and the parking. If you don't know one way or the other you can't use that to deny a variance. He felt the neighbors were very eloquent and that it was a lovely neighborhood but he was worried about the legalities. The lots in the area are oddly shaped and he felt that created a hardship. Whether the landowner was doing it for profit or whatever purpose, he did have a right to use his property in the way that he wished as long as it met certain requirements.

Mr. Witham agreed with Mr. Rogers and felt it should be tabled for clarification on some of the issues. Therefore, he was looking at three variances. He felt the 13' setback where 15' was required was minimal relief and this probably met more dimensional requirements than most of the other buildings on the street. The lot area requirement was shy by 46 s.f. which was also minimal. In terms of the parking, where they were requesting 6' where 50' was required, it seemed like no one would ever be able to meet that requirement in that area. As much as he felt it was probably one of the least attractive buildings he has seen, he was not being asked to vote on aesthetics. There was also talk about what Dr. Clarizio was going to be using it for and that was also not part of his decision making. Mr. Witham felt that the petition met the requirements for a variance.

Mr. Jousse indicated that he would support the motion. He felt that the hardship was self-created. A building of that size will fit on the lot, within the setbacks and without any relief. Because this piece of property could be used successfully in another location, which would show some sensitivity to the neighbors and their well being, he supported the motion to deny.

Vice-Chairman Horrigan stated that if the motion fails on these two variances that were being requested, he did not refer to the road frontage issue or the merger of the property issue. He believed it failed with what they had before them that evening.

The motion to deny passed with a 5-2 vote, with Mr. Rogers and Mr. Witham voting against the motion. The Petition was denied.

Motion was made and seconded to continue past 10:00 pm and it was granted unanimously. A 10 minute break was taken.

16) Petition of **Deborah C. and Harry D. Hobbs, owners**, for property located at **489 Sagamore Avenue** wherein a Variance from Article III, Section 10-301(A)(2) is requested to allow a 26' x 36' freestanding second dwelling unit on the property to replace one of the existing free-standing dwellings on the property in a district where no more than one free-standing dwelling shall be built upon any single lot. Said property is shown on Assessor Plan 222 as Lot 25 and lies within the General Residence A district. Case # 5-16

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

Attorney Bernard Pelech spoke on behalf of the applicant, Deborah and Harry Hobbs, of 489 Sagamore Avenue. The property was approximately 1.35 acres, which was about 8 times the required minimal lot size. There were presently two dwelling units on the lot. The second dwelling unit was a small single family unit, 20' x 20', referred to as "The Cottage". It had existed on the lot for many years. It was in horrible shape and was in need of extensive repair. They were proposing to replace the structure with a 26' x 36' two story structure which would have a 2 car garage on the first floor and a second dwelling unit on the second floor. In this district, up to four family dwelling units are allowed. The structure meets all of the setback requirements and lot coverage. They were looking for relief to allow a second free standing dwelling unit on a lot where no more than one free standing dwelling unit was allowed. The problem with this property was that there were already two free-standing dwelling units on the lot. They were not seeking to add a dwelling unit but simply to replace a dwelling unit with a new structure. He believed that the five criteria were met.

Attorney Pelech indicated that there was a hardship because of the uniqueness of the lot due to it's massive size. It is 8 times the minimum lot size. It also directly abuts a Garden Apartment/Mobile Home district which was the Sagamore Apartment district. These two factors render the lot unique. There was no fair and substantial relationship between the general purpose of the zoning ordinance as it applied to this particular lot. If this were a 75 s.f. lot a second dwelling unit would not be appropriate. Granting the requested variance would not result in any interference with any public or private rights of others. This building sits over 200' from Sagamore Avenue. The other dwelling on the lot was 145' from Sagamore Avenue. Attorney Pelech did not believe that the granting of the requested variance would result in any diminution of surrounding property values. What was being proposed was probably more appropriate than what currently exists as it will be architecturally similar and more in keeping with the building codes and will improve the aesthetics. There would be provisions for vehicles to be parked inside the structure. He did not believe there would be any diminution in property values. He felt that substantial justice would be done by granting the variance. If the applicant was not allowed to replace the second free standing dwelling unit then there would be a substantial hardship upon them. It would not be outweighed by any benefit to the general public. It would eliminate an existing housing unit if denied and that would not benefit the public interest. It would not be contrary to the spirit and intent of the ordinance. When you have a lot this size, allowing two free standing dwelling units which are already in existence would not be contrary to the spirit of the ordinance. There was plenty of circulation of light and air, there was plenty of open space, the setbacks from the street are such that it was difficult to realize that there were two free standing dwelling units on the property. Attorney Pelech did not feel the granting of the variance would be contrary to the public interest. Allowing this new structure would certainly benefit the public by way of an enhanced tax base and would allow a second dwelling unit to exist on the property. They felt that the application met all of the criteria for granting the variance.

Mr. Rogers asked Attorney Pelech to address the Planning Board's suggest that they attach the garage to the existing building. Attorney Pelech indicated that the main structure already had a garage and was currently non-conforming, being only 3' from the right side property line.

Mr. Berg asked for elevations. Attorney Pelech indicated that the structure would be 1 ½ stories and would be a cape with two dormers. Once the eaves were taken into account the new structure would be a little bit larger than the existing structure.

Mr. Witham indicated that he has issues with these types of garages and he was concerned about the size of it. He read the plans that there would be two full height walls. He disagreed with the applicant's statement that the second floor was 4' to 6' because the plans reflect two full height walls.

Vice-Chairman Horrigan was surprised to see that the new dwelling unit would not be built on the same footprint. He asked for clarification of why it was pivoted around to another spot. Mrs. Hobbs indicated that the cottage was currently rented. They were trying to build a brand new structure so that the tenant was not displaced. Once the new building was built they will tear down the old structure.

Chairman Le Blanc asked how old the cottage was. Mrs. Hobbs believed it was built around 1950. He asked if it was going to be a 2-car garage. Mrs. Hobbs confirmed that it would be a 2 car garage which would be used for storage which they currently don't have.

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

A motion to grant the petition as presented and advertised, with the stipulation that the existing cottage will be torn down within 30 days after the issuance of a Certificate of Occupancy on the new structure, was made by Mr. Berg. Mr. Holloway seconded. Mr. Berg felt that this would improve the existing building. It was no more intense than what was already there. It was not contrary to the public interest. The hardship was that the zoning ordinance did not allow a second dwelling unit but there already was a detached dwelling. The new structure would be more attractive and a more modern building. Repairing the existing structure was not an option as it was in such disrepair. Repairing the existing cottage was not reasonable. The requested variance was consistent with the spirit of the ordinance as it was a multi family neighborhood and there already was a second detached dwelling so they were only replacing what was already there. Substantial justice would be done because the property did not have any storage so they would be adding much needed storage space. The variance would not diminish the values of surrounding properties. The only addition would be the garage and garages are very commonplace. Therefore, he felt the variance should be granted.

Mr. Holloway agreed with Mr. Berg. He felt it was about time the property used a variance. There are other properties in the area with two dwellings on their lots. The lot size was not a problem and he would support the motion.

Mr. Witham indicated that he would not support the motion. He felt that on occasion the Board had been lulled into the "just replacing what's there" approach. He mentioned the garage over the house by Thaxter. They wanted to replace a garage and it just happened to be two stories. It is totally out of scale. There is the one on Cabot Street that was simply to replace a carriage house. It got built to a full two story height and neighbors have complained to Mr. Witham, asking how it was able to be built. He did not see this application as a replacing issue. This was a structure that was going to be much greater than the main house. He felt they were fortunate to have a cute little cottage on the property but this was no longer a cute little cottage but rather was a large scale structure that does about a few neighbor's backyards. He did not believe that was the spirit and intent of the ordinance. He did not see any substantial justice being done by granting the variance as a garage already exists on the property. There was also a statement that this was more appropriate than a cottage and he did not agree with that. He did not feel that this was an accessory structure.

Mr. Rogers agreed with Mr. Witham. He indicated that they were taking a 20' x 20' cottage and replacing it with a 26' x 36' 2-story building with an apartment above. Realistically it was larger than the existing house. If they were simply replacing the existing cottage it would be one thing but this was almost a second house and the neighbors would see it as it was pretty good size.

Vice-Chairman Horrigan agreed with Mr. Witham and Mr. Rogers.

The motion to grant, with the stipulation, passed with a 4-3, with Mr. Rogers, Vice-Chairman Horrigan and Mr. Witham voting in the negative.

~~~~~

17) Petition of **George W. Williams Jr., owner**, for property located at **272 Highland Street** wherein an Appeal from the Decision of the Code Official is requested requiring Variances from Article III, Section 10-301(A)(2) and 10-302(A) for a second dwelling unit on the property.

Attorney Pelech addressed the Board on behalf of George Williams. He indicated that the more he read the Zoning Ordinance, the more he became confused. The Planning Department had taken the position that more than one free standing dwelling unit was not allowed by Article III, Section 10-301(A)(2). Attorney Pelech read that several times and he was confused by where it said, "or where otherwise allowed pursuant to other Articles". Attorney Pelech understood that to say that you couldn't have more than one free standing dwelling on any lot unless you are in an allowed district or unless it was otherwise allowed by some other Article. He referred to the General Residence A & B district and it said "What is an allowed use in the District: 2 family, 3 family, 4 family dwellings, up to four dwelling units per lot". Next, he looked at the definition of a dwelling unit. That was defined as "a building or portion thereof providing complete living facilities for one family, including sleeping, cooking and sanitary facilities". Four of those were allowed in the General Residence District. He read that to say that up to four free standing dwelling units per lot are allowed. It may not make sense but that was how Attorney Pelech interpreted it. To not interpret it that way was really stretching it. Attorney Pelech felt that when it said, "or otherwise allowed by other Articles", he maintained that a second free standing dwelling unit was in fact the way the ordinance was written and was allowed. That was the basis for the Administrative Appeal. Attorney Pelech indicated that the Planning Department had taken a different approach and their position was based on past practices of the Department. They indicated that they have always interpreted the Zoning Ordinance that way and that was the way it is.

Vice-Chairman Horrigan stated that it was clear that a building providing complete living facilities, or portion thereof is just referring to other possibilities, such as part of a building. He felt Attorney Pelech's argument was ridiculous.

Mr. Jousse indicated that the ordinance read "a building, or portion of that building", so someone could have up to four portions of that building housing four families. Attorney Pelech felt you could not only have four dwelling units in one building but could have four free standing dwelling units. Mr. Jousse indicated that the ordinance does not refer to multiple buildings.

Mr. Witham felt that when there were gray areas in the zoning ordinance, you needed to go back and analyze what the intent was. Mr. Witham asked if Attorney Pelech felt the intent was for General Residence A to allow four separate dwelling units on one property? Attorney Pelech indicated that he didn't know but suspected that it probably wasn't the intent. He could not put himself in the position of interpreting the intent. He thought it may have intended one thing but it said another.

Mr. Parrott had a lot to do with the writing of the zoning ordinance and felt he could speak to the intent. They spent hundreds of hours on the last Master Plan and revisions to the Ordinance and he assured them that there was never any understanding that a dwelling unit equals a building and to state that those were one in the same just stretches credulity beyond reason. Also, from his personal experience, a dwelling unit was a way of describing a subdivision of a building. Attorney Pelech may be confused but Mr. Parrot indicated that he was not.

Attorney Pelech indicated that he would not take pride in the ownership of the definition of a dwelling unit as it is written. He did not believe that was re-written in the last Zoning Ordinance but it will be re-written in the next Zoning Ordinance to correct the blatant ambiguity because it does say a dwelling unit can be a building.

Mr. Rogers questioned the wording of the ordinance as it refers to dwelling and dwelling unit and indicated that it was a matter of which came first.

Attorney Charles Griffin spoke on behalf of Carla Voigt, a direct abutter, who resides at 12C Miller Avenue. Attorney Griffin indicated that he had prepared a lengthy presentation but the Board had already said it all. Basically, the ordinance was supposed to make sense. The terms were not supposed to be interpreted in such a way that they conflict upon another, rather they are supposed to go together. The key was that you could have one free standing dwelling under Article III Section 10-301 and 302. Attorney Pelech talked about Article II, Section 10-206, that provision of the ordinance also says that you can have these things but subject to the provisions of Article III. Article III basically says one free-standing dwelling per lot. Attorney Griffin agreed with the comments that it is a dwelling or a portion thereof and he was not going to go over those points again. He urged the Board to deny the Administrative Appeal.

DECISION OF THE BOARD:

Mr. Rogers made a motion to deny the Administrative Appeal. Vice-Chairman Horrigan seconded. Mr. Rogers stated that the Code Enforcement Official was correct in their decision. Vice-Chairman Horrigan agreed that the language was somewhat ambiguous but they had the decision of the Planning Department Code Official who certainly knows the intent better than anyone else and they also had the testimony of Mr. Parrott who was involved in writing the Ordinance. Attorney Griffin also cleared it up for them.

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

Notwithstanding the above, if the Appeal from the Decision of the Code Official is denied the following are requested: 1) a Variance from Article III, Section 10-301(A)(2) to allow a second dwelling unit on a 9,807 sf lot where 7,500 sf of lot area is required per dwelling unit for a total of 15,000 sf of lot area for two dwelling units, and 2) a Variance from Article III, Section 10-302(A) to allow a 5' x 28' two story addition with a 5' right side where 10' is the minimum required. Said property is shown on Assessor Plan 130 as Lot 35 and lies within the General Residence A district. Case # 5-17

Chairman Le Blanc stated that they felt this was a Fisher v. Dover case and that they were being presented with the exact same proposal as two months ago, except that the addition was on the right side of the garage rather than the left. He felt they could simply deny it without a hearing.

Vice-Chairman Horrigan stepped down as he was not at the original hearing.

Mr. Rogers made a motion to not hear the petition under Fisher v. Dover. Mr. Witham seconded. Mr. Rogers indicated that the Petition was the same as last month. There was not enough of a change to warrant a new hearing.

Mr. Witham did not feel that he would hear anything that would make him view it differently than the first hearing. It was a two-part variance and the first part was identical to what was denied in April. He didn't see anything different about the new proposal.

Chairman Le Blanc indicated that the only difference was that the addition was moved from one side to the other but essentially was the same.

Mr. Berg indicated that the proposed garage was further from the abutting condominium unit and he felt it was extremely different. He did not feel it was whether they were going to allow the unit but rather whether it was

the same application that they heard last time. Mr. Berg stated the most strenuous objections came from the abutter and this proposal moved the proposed garage further from the abutter so he felt it was a materially different application.

Mr. Witham added that the first time the Board denied the Petition there wasn't any dimensional relief sought.

Mr. Parrott argued that the most important part of this request was the second dwelling unit on a small lot where one dwelling unit was allowed by the ordinance. The difference of moving the addition from the right side to the left side did not effect the distance off of the rear to the adjacent property which was a large concern last time.

The motion to deny to hear the Petition under Fisher v. Dover passed with a vote of 6-1, with Mr. Berg voting against the motion.

~~~~~

**IV. ADJOURNMENT**

There being no further business to come before the Board, the Board adjourned at 12:20 a.m.

Respectfully submitted,

Jane M. Shouse  
Secretary

/jms