

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

7:00 P.M.

AUGUST 19, 2003

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

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**I. APPROVAL OF THE MINUTES**

June 17, 2003 Minutes - A motion was made and seconded to accept the minutes from the June 17, 2003 meeting and it was approved unanimously with a 7-0 vote.

June 24, 2003 Minutes -. A motion was made and seconded to accept the minutes from the June 24, 2003 meeting and it was approved unanimously with a 7-0 vote

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II. OLD BUSINESS

A) Petition of **Ocean National Bank, owner**, for property located at **325 State Street** wherein a Variance from Article XII, Section 10-1201(2) is requested to allow the creation of four additional parking spaces with an 18' travel way where 24' is required. Said property is shown on Assessor Plan 116 as Lots 1, 2 & 6 (to be combined) and lies within the Central Business B and Historic A districts. Case # 7-13

Mr. Berg stepped down from this petition.

A motion to take the petition off of the table was made and seconded and was passed unanimously.

Attorney Bernie Pelech appeared on behalf of Ocean National Bank and requested that this matter be tabled until the September meeting as they are presently before the Historic District Commission.

A motion to table was made and seconded and was passed unanimously.

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**I. PUBLIC HEARINGS**

1) Petition of **Alvin L. and Betty M. Lightner, owners**, for property located at **34 Mariette Drive** wherein a Variance from Article III, Section 10-302(A) is requested to allow an 8' x 10' shed creating 23.8% building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 292 as Lot 211 and lies within the Single Residence B district. Case # 8-1

**SPEAKING IN FAVOR OF THE PETITION:**

Alvin Lightner, of 34 Mariette Drive, indicated that he wanted to build a shed and had been refused. He is handicapped and has to store a barbecue grill, a lawn mover, lawn furniture in the basement. There are many other sheds in the neighborhood and he has spoken to Jason Page, the City Zoning Enforcement Officer, about them.

Chairman Le Blanc asked if the shed was going in the back of the house and whether it could be seen from the street? Mr. Lightner indicated that there was a 6' fence and it could not be seen from the street.

Martin Cameron, of Ocean Road, spoke on behalf of Mr. Lightner. He is also the President of the Ocean Road/Maple Haven Neighborhood Association. He indicated that Mr. Lightner was in bad physical shape and needed the shed.

Mr. Berg asked if the neighborhood association felt the shed would have any impact on the value of the neighborhood properties. Mr. Cameron indicated that, in speaking to the neighbors, no one was in opposition to it.

Chairman Le Blanc asked what the height of the shed was? Mr. Lightner indicated it was 7' manufactured shed.

**DECISION OF THE BOARD:**

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Berg seconded. Mr. Rogers felt that this variance was a small request. There were no setback problems. It is not contrary to the public interest to allow this shed as it cannot be seen from the street and the abutters do not seem to be concerned about it. The zoning restrictions in this case do interfere with the property owners reasonable use of the property, considering the environment and that there is a fence around the property. It will not interfere with anybody else's public or private rights. Mr. Rogers felt that the purpose of the Zoning Ordinance was not interfered with by granting the variance as it was quite minimal and the request is in the spirit of the ordinance. Substantial justice will be done by granting the variance because it is a very small request and the shed is not over 10' or over 100 sf in size. It doesn't diminish the value of anyone's property because no one can see it.

Mr. Berg agreed with Mr. Rogers. He indicated this allows the property owner to enjoy his property.

Vice Chairman Horrigan agreed with the Petitioner that there are many other sheds in the neighborhood and, in fact, that is one of the features of this neighborhood. Each house is separated by fences and vegetation and virtually every house has some sort of a shed. It would be very unreasonable to deny him a shed.

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

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Ms. Tillman made a request to take #12 out of order and be heard next so that the matter could be tabled. Mr. Parrott asked that the Chairman determine if any other abutters were present for the hearing and there were none.

12) Petition of **John W. Gray Revocable Trust and Bradford A. Gray Revocable Trust, owners, Redlon & Johnson, applicant**, for property located at **126 Bridge Street** wherein a Variance from Article II, Section 10-208 is requested to allow the outdoor storage of materials and products at the rear of the existing building. Said property is shown on Assessor Plan 125 as Lot 16 and lies within the Central Business B and Historic A districts. Case # 8-12

DECISION OF THE BOARD:

Mr. Parrott made a motion to take this petition out of order and Mr. Rogers seconded. The motion passed unanimously.

Mr. Rogers made a motion to table this matter until the September meeting and Mr. Witham seconded. The motion passed unanimously.

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2) Petition of **Gobbi Supply Corp., owner, Coast Pontiac-Cadillac-GMC, Inc., applicant**, for property located at **685 Islington Street** wherein a Special Exception as allowed in Article II, Section 10-208(36) is requested to allow an 1,850 sf building to be used for reconditioning of motor vehicles (cleaning and polishing). Said property is shown on Assessor Plan 164 as Lot 12 and lies within the Business district. Case # 8 -2

Chairman Le Blanc indicated that the Board had a letter from David Allen, the City Engineer, Director of Public Works, who confirmed that the property currently had a grit/oil/grease separator and it was in accordance with the Public Works regulations. The separator was suitable for the proposed use of this site.

Attorney Raymond Blanchard spoke on behalf of Coast Pontiac. He indicated that they were seeking a Special Exception to allow them to use the premises to wash, polish and vacuum, or essentially recondition, motor vehicles. It would not involve any mechanical work and no cars would be sold on the property. The building is equipped with a separator and the work will be done inside. He indicated that the site would be much cleaner than its past use as a Sunoco Gas Station. He felt they met all of the requirements for a Special Exception and required this location due to the crowded condition at their Cottage Street location.

Vice Chairman Horrigan asked what the hours of operation and where would the vehicles be kept as they arrive and are finished being reconditioned? Attorney Blanchard indicated that the vehicles would be parking in accordance with the map that they provided.

Joseph Yergeau, Vice President of Coast Pontiac, indicated that the rationale for acquiring this property to recondition automobiles is to alleviate the shop at their garage. By taking the reconditioning part of the business and relocating it they free up space to store cars while waiting for parts to come in. The hours of operation are from 8:00 a.m. to 5:00 p.m., sometimes on Saturdays until noontime. There would be between 2 –8 vehicles on the property, on a revolving cycle.

Mr. Jousse clarified that no repair work would be done on the motor vehicles? Mr. Yergeau confirmed that that was absolutely correct. Mr. Jousse asked where the soapy water was going from washing the vehicles? Mr. Yergeau indicated that there are drains that currently exist inside the building and none of the water will go into the drainage system of the city? Mr. Yergeau indicated that it would all be contained inside. Mr. Jousse asked what they do with the pollutants that are left over? Mr. Yergeau indicated that they would remove them and bring them to the main garage and put them with the other disposable items that they deal with.

Mr. Witham asked about signage and Mr. Yergeau indicated that no signs would be put up whatsoever.

Chairman Le Blanc asked about the shed to the right side of the property and Mr. Yergeau indicated that they had no knowledge of a shed and would not be using it.

Attorney Bernard Pelech spoke on behalf of Joe Gobbi, the owner of the property. Attorney Pelech indicated that the shed was used for storage by Mr. Gobbi. His house is right behind the property. Attorney Pelech indicated that this use was much less intensive than the previous use. There will be no signs, a limited number of cars on the premises per day and the drainage has been approved by Dave Allen of the Public Works Department. There will be less traffic than the past use and there will not be any excessive demands on city resources. He felt that it met all of the Special Exception criteria.

Steve Miller of 38 Thornton Street spoke on behalf of the Advocates of the North Mill Pond. They are currently 2/3 through a watershed study that they have been working on for the North Mill Pond. This property is in the watershed for the North Mill Pond and the property has some difficulties in terms of runoff. Everything outside the building slopes to the street and goes to a stormdrain that flows directly to the North Mill Pond or the brook. He thinks its great to see this property being used but he had received several calls about cars being washed

outside the building and soapy water was draining right into the pond. He spoke with George Carlson of the Waste Water Department at DES to find out some information about the regulations and he indicated that it would not be legal to discharge the surface water without a permit. So, he felt the site had some issues with any outside work but he was all for the inside work.

**DECISION OF THE BOARD:**

Mr. Rogers made a motion to grant the petition as presented and advertised with the stipulations that: 1) vehicles are prohibited from being displayed "For Sale" or sold from the property; 2) that all work shall take place within the building and no washing of vehicles shall take place outside the building; and 3) hours of operation will be limited to 8:00 a.m. – 5:00 p.m., Monday through Friday and up until noontime on Saturday. Mr. Berg seconded. Mr. Rogers indicated that this was a less intense use than the previous use or even what future uses could be. There is no customer service so people will not be coming and going. He did not feel that it was a hazard to the public or adjacent properties due to fire or the release of toxic materials. It is not detrimental to the values of the properties in the surrounding area as most properties are commercial. He did not feel it created a safety or traffic hazard and would be a lot less than the past use as employees will be driving the vehicles in and out of the lot rather than independent individuals. It will not have any more demand on municipal services, such as water, sewer or waste, than it is already. If they are going to be using the building and working inside, there is a separator inside so there will not be any run-off. He could not see any additional noise than what had been there in the past. The intersection itself is very noisy. Mr. Rogers did not feel that there was anything to disallow them to grant the Special Exception.

Mr. Berg agreed with Mr. Rogers.

Vice-Chairman Horrigan indicated that he felt the protection of the North Mill Pond was a very important issue and the stipulations should be quite clear about any run-off into the pond. He wanted it to be very clear that there would be no surface water discharges outside the building.

Mr. Witham wanted to be clear to the applicant that the first stipulation does prohibit the sale of vehicles and also prohibits them from being displayed on the property.

The motion to grant with the 3 stipulations passed unanimously with a 7-0 vote.

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3) Petition of **HCA Health Services, Inc., owner, Independent Wireless One Corp., applicant**, for property located at **333 Borthwick Avenue** wherein a Variance from Article II, Section 10-209 is requested to allow the addition of PCS antennas and related base station equipment to the Portsmouth Hospital rooftop where such use is not allowed. Said property is shown on Assessor Plan 240 as Lot 2-1 and lies within the Office Research district. Case # 8-3

SPEAKING IN FAVOR OF THE PETITION:

Adam Brooks, of Independent Wireless One, was present, along with Attorney Jonathan Springer of Portsmouth, They were requesting a variance for the installation of six PCS (Personal Communication Services) antennas on the hospital rooftop. Independent Wireless One is the Sprint PCS network provider for the State of New Hampshire. Over the past several years they have been active expanding the Sprint Wireless Network throughout the state and also in the City of Portsmouth. They currently have installations on Harbour Place and the Public Works facility. Unfortunately the combination of those two sites leaves them with a fairly significant gap in coverage in the general vicinity of Portsmouth. They always look to existing structures to close their coverage gap rather than building a tower facility. They identified Portsmouth Hospital as a facility that had adequate height and was located in a central location where they would be able close their gap in service and increase their liability. Specifically, their proposal was to install 6 panel style antennas, painted to match the

building façade around the northerly roof edge not to exceed the height of the building. The antennas will not be visible from the street. The hospital property currently has three users on the roof. Their proposal is very similar to the other three. There are no water or sewer requirements but do require telephone and power service. Construction will last between 30 – 45 days. Subsequent visits to the property would be limited to one per month. They addressed the specific Special Exception criteria in their original application submission so he did not speak to those specifically.

Mr. Berg asked how many antennas were up there now? Mr. Brooks indicated that he felt there were probably up to 12 antennas there now and they want to add 6 more. Mr. Berg asked if the other applicants had come before the Board. Ms. Tillman confirmed that they had.

Mr. Witham asked if they would exceed the roofline? Mr. Brooks indicated that they would be flush mounted to the sides and would not exceed the roofline except for the 6" GES antenna.

Mr. Parrott asked what the service life of the installation would be? Mr. Brooks that their lease with the hospital is for 25 years and they hope to get at least that out of it but with technology changing he couldn't guarantee that. They may need to replace the mechanics of the panel style antennas.

Attorney Jonathan Springer, of Shaines & McEachern of Portsmouth, addressed the Special Exception criteria very briefly. This will not diminish surrounding property values. Given the nature of the facility and the area that consists of a number of commercial uses, they did not believe that this would effect surrounding property values. They did not believe that this would be contrary to public interest as it was well known in this day and age that cell phones and personal wireless communication is very popular. There are other carriers on the hospital so it will be in the public interest to allow them additional coverage for their company. Attorney Springer referred to the Simplex case and whether the zoning restriction as applied to the property interferes with the applicants reasonable use of the property, considering the unique setting of the property. He felt that the hospital is uniquely situated and there are other carriers out there. It is a big building behind Interstate 95 so there is a lot of traffic. They have a great way to hide the antennas. They feel that because the Zoning Ordinance does not allow these type facilities they do believe that a reasonable use of the property is being denied. Attorney Springer went on to address the second Simplex criteria of whether a fair and substantial relationship exists between the general purposes of the Zoning Ordinance and the specific restriction on the property. They believe that one of the intents of the Zoning Ordinance is to conform with Federal law and 1996 Telecommunications Act which allows each federally licensed carrier to provide coverage to the area. They do not believe that the ordinance allows for coverage to be brought to the area. The third Simplex criteria was that it could not injure the public or private rights of others. This is a very passive use, there is no smoke, noise or fumes. There will be very, very little traffic. Granting the variance will result in substantial justice, again, because the Telecommunications Act means that they should have a reasonable opportunity to site the antennas so that they will have reasonable coverage in the city. They felt that the granting of the variance would result in substantial justice by allowing them to receive coverage in that area. Finally, the variance will not be contrary to the spirit and intent of the ordinance. The intent of the ordinance is to avoid tall towers and this installation will not even be seen.

DECISION OF THE BOARD:

Mr. Berg made a motion to grant the Special Exception as presented and advertised. Mr. Parrott seconded. As there are already other antennas on the roof, this will not be contrary to public interest. We are a much more technologic society and we felt it would more appropriate to have these antennas installed on the hospital roof than on big giant poles. Special conditions exist simply because the antennas are prohibited in the first place. They established that it was a reasonable use of the property in that the owner of the building has already allowed three other companies to do this and the Board has allowed those 3 other companies to have a variance. No fair and substantial relationship exists between the general purpose of the Zoning Ordinance and the specific restrictions on the property. Mr. Berg felt that as the antennas will actually be attached to the side of the building and probably not even noticed by most people. The variance would not injure the public or private

rights of others. The variance could be consistent with the spirit of the ordinance as was previously addressed. Substantial justice will be done by granting the variance as there will be public benefit from the availability of wireless services. It will also allow the property owners to use their building in an innocuous way. This is an industrial district with a highway next to it so there is no way that something like this would impact surrounding properties so there would be no diminution in values.

Mr. Parrott agreed with Mr. Berg and added this was a very logical auxiliary use for this building and would be in the general public interest.

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



4) Petition of **David J. Desfosses, owner**, for property located at **137 Cabot Street** wherein Variances from Article II, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow a 4' x 20' addition to the front of the existing garage creating 38% building coverage where 35% is the maximum allowed. Said property is shown on Assessor Plan 145 as Lot 89 and lies within the Apartment district. Case # 8-4

David Desfosses addressed his petition. He recently purchased a new full size pick-up truck and it does not fit in his existing garage. He replaced an existing garage four years ago and it is no longer big enough. He addressed the five criteria. He did not believe the addition would be contrary to the public interest as he didn't feel that the public actually had an interest in it as it was in the back of his property and they could only see the front of the building. Special conditions exists on his property. When he built the garage four years ago, his neighbors specifically asked that he built the garage the same height as it was a shield for the residents of Winter Street from the Cabot Street Store. His lot coverage will only be 3% over and it is a small lot, which was made to specifically accommodate the store at one point. The variance would not injure the public or private rights of others. The requested variance is consistent with the spirit of the ordinance as the spirit of the ordinance is to restrict excessive lot coverage and he did not believe that this would be excessive by any stretch of the imagination. He is particular about his tenants parking in the parking lot, rather than on the street. Substantial justice will be done in allowing him to park his truck inside the garage in the wintertime. Granting the variance will not diminish surrounding property values. The garage is a very nice building and the addition will also be nice.

Chairman Le Blanc asked if the 4' addition would block the 3rd garage at all? Mr. Desfosses indicated that it would not.

Vice-Chairman Horrigan asked if the boat would be stored in one of the new bays? Mr. Desfosses indicated that it was not, but he still had the three required parking spaces for his tenants and they will continue to park on the property.

Chairman Le Blanc asked what his existing lot coverage was. Mr. Desfosses indicated that it was 36 ½% now, which is 1 ½% over. It would be 38% with the new addition. He is looking for an increase of 1 ½%.

DECISION OF THE BOARD:

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Witham seconded. Mr. Rogers felt that the request for building coverage which was very minor. The applicant is attempting to remedy a problem and to do so he is moving the addition to the front of the garage so he does not need any rear setback relief, so it is a hardship for him in that respect. He needs the parking spaces and substantial justice will be done by granting the variance to allow him to park his vehicle inside which will allow his tenants to park their vehicles on the property and to increase the depth of the garage by 4'. Mr. Rogers did not feel that the Zoning Ordinance was specifically meant to stop someone from doing this. The Zoning Ordinance is more concerned with large lot coverage and congestion. There is not any relationship between the purpose of the Zoning

Ordinance and the restriction on this property. He is requesting a variance to correct a small error in the depth of the garage. It will not injure the public or private rights of others because it is actually blocking the residents from Winter Street from the views on the opposite street and it sets back on the property far enough so no one would even notice that he has added this addition. Therefore, substantial justice would be done by granting the variance. There would be no diminution of value as none of the abutters have come forward to speak against it. Mr. Rogers felt that the Board could grant the variance in good conscience.

Mr. Witham agreed with Mr. Rogers and felt that it was a very reasonable use of one's property to have a standard size garage. What he has now is not standard. The request is for lot coverage which is intended to control density. Looking at where this increase will take place, it is very centralized on the property so no density is being added and will have the least impact on surrounding properties. It will be reasonable because he will have the use of the garage and it doesn't effect the neighbors with increased density.

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

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5) Petition of **Glenn E. Smith, Trustee for Glenn E. Smith Revocable Trust, owner**, for property located at **64 Austin Street** wherein an Appeal from the Decision of the Code Official is requested concerning the requirement of a 24' maneuvering aisle to access parking spaces in the rear of an existing 4 unit apartment building.

Notwithstanding the above, if the Appeal from the Decision of the Code Official is denied, a Variance from Article XII, Section 10-1201(A)(2) is requested to allow a 14' accessway for 5 parking spaces (6<sup>th</sup> located at side of building) for an existing 4 unit apartment building where 24' is the minimum width required. Said property is shown on Assessor Plan 136 as Lot 2 and lies within the Apartment district. Case # 8-5

Mr. Witham excused himself from the hearing, leaving 6 members on the Board.

Chairman Le Blanc indicated that the Board would deal with the Appeal from the Decision of the Code Official.

**SPEAKING IN FAVOR OF THE PETITION:**

Daryl Kent, of K & S Contracting, owners of the building, addressed the Board. He spoke with members of the Planning Department and indicated that they wanted to put in a 14' driveway and they were told that they needed a variance. His interpretation was that as they already had the curbcut and nearly 22' of access already. There was a garage that had room for two cars which has since been demolished so they potentially already had the right to go up that property and park there. He felt that there was access in place and parking in place in the rear to the building so they should be able to go forward as is.

Chairman Le Blanc asked what the length of the curbcut to the left of the building was. Mr. Kent indicated that it was roughly 22' on the road, then it narrows down to about 21' on the average. Since their original request they modified their plan and were actually asking for less relief. They had the potential for 21' where they need 24'.

Mr. Berg asked if tenants currently park on the street? Mr. Kent indicated that the building was currently empty but it will be two units with two bedrooms and two units with one bedroom. They will be providing five spaces in back.

Mr. Rogers asked Ms. Tillman about the administrative appeal. Ms. Tillman indicated that he had the curbcut for the driveway but it cannot be used to go back to create a new parking lot in the backyard. All of the parking from the old garage to the back is all new and was grass. The garage was recently demolished and the pavement stopped at the front of the garage.

Mr. Parrott asked why the plan was drawn to show the accessway not contiguous with the property line? Mr. Kent indicated that was to keep a green buffer between the two properties.

Mr. Parrott asked to hear the City's position on the matter. Ms. Tillman explained the Planning Department Memo that was prepared for the Board.

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

Mr. Berg made a motion to overturn the decision of the Code Official. There was no second.

Mr. Rogers made a motion to uphold the decision of the Code Official. Mr. Jousse seconded. Mr. Rogers felt that this had been a regulation since 1995 and he did not feel that the Code Official was incorrect in his determination of that zoning regulation. Mr. Rogers felt that he was correct that this particular parking area does require that he uphold the standards that are set forth in the Zoning Ordinance regarding the width of the driveway. He also felt the Board should uphold his decision because there were not any extenuating circumstances.

Mr. Jousse agreed with Mr. Rogers and felt that upholding the Code Official's decision did not mean that the variance could not be granted. The Code Official's job is to enforce the code and the Board is to make exceptions to the code. His decision was correct and the Board should proceed on.

Vice-Chairman Horrigan agreed with the makers of the motion. He pointed out that they have had cases like this before and he doesn't understand what is unique about this one that might suggest that they should suddenly overturn the Code Official, who is merely enforcing the dimensional requirements of the code. As Mr. Jousse pointed out, they have often granted relief through the variance process. If they do not support the Code Official, they are running the danger of creating a slippery slope and will be unable to deal with similar situations in the future involving apartment buildings and shopping centers. He is in favor of the motion.

Mr. Parrott concurred and stated that in this case the Code Official had a very clear requirement and if the process is done correctly, the Code Official needed to enforce the requirement as it is written.

The motion to uphold the Code Official's Decision passed unanimously with a 6 – 0 vote.

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

Mr. Kent then addressed his variance request. He indicated that it was a difficult situation as it is a 3-4 family house and they are putting them in a commercial situation because they have the same requirements. They originally approached the City for a 14' access driveway to the parking lot. Early last week he brought in a revised plan and they are now asking for 21' with the narrowest point being 18'. The 18' is really just because they want to maintain the 3' buffer between the properties. He felt that the requested variance is not contrary to the public interest because anytime someone has the opportunity to utilize off street parking it is in the best interest of the public. Conditions exist where they can accommodate parking but they can't quite meet the criteria for the access. The Ordinance is for the safe flow of traffic and when you are talking about 5 cars coming out on to the road in a private residence area it is not going to be a lot of traffic. He felt the variance was justifiable because there is adequate parking. He did not feel that there would be any diminution of property values because there is a good sized parking lot adjacent to the back fence of their property and there are other multi-family homes in the area. Wherever you can get cars off of the street, it benefits everyone else's property.

Mr. Parrott indicated that the plan shows a hole for electric wires next to one of the parking spots. Mr. Kent advised the Board that that had been removed. It was a security light that the previous owner had.



**DECISION OF THE BOARD:**

Vice Chairman Horrigan made a motion to grant the petition as presented and advertised. Mr. Rogers seconded. Vice-Chairman Horrigan indicated that this was a project was already in progress so they could see that very careful restoration work was going on, including the demolition of the garage and excavation for the driveway. In general, this restoration seems to be in the public interest by creating a four unit apartment building with off street parking and, as was pointed out, off street parking is a benefit in this neighborhood as Austin Street often has parking issues. Therefore, the public interest is very clear. The shape of the property is a hardship. If they want to encourage off street parking, they have no other place to enter the property other than where the owner wishes to put the driveway. As pointed out, it is a reasonable use and there are other similar uses in the neighborhood with off street parking. It is perfectly compatible with the neighborhood. There is no fair and substantial reason why the Board should deny it. The Zoning Ordinance was intended to encourage off street parking in a neighborhood of this type and it would not seem to injure the public or private rights of other and, in fact, it would enhance those rights by improving a currently existing situation in the neighborhood of a shortage of parking spaces. Those reasons add up to consistency with the Ordinance and the substantial justice is to allow the owner to proceed with the restoration and provide an apartment structure that will allow the tenants full benefit, including parking. This would not diminish the values of surrounding properties and, overall, it will probably improve the values of surrounding properties. The owner is also sensitive to the relationship of other properties and the reason for the narrowing down of the entrance to the rear is to provide a small green space buffer to the adjoining property. In general it looks like a very good project.

Mr. Rogers agreed with Vice Chairman Horrigan and added that the variance is a prerequisite to this type of entrance of 24' but the hardship is that very few residential properties have 24' to spare to allow two vehicles to pass each other side by side. That is a hardship in this case.

Mr. Berg stated that as this was a dense residential neighborhood that he would oppose 24' feet of concrete and a narrower driveway was a better idea. Mr. Berg measured his car tonight and indicated that three cars would fit in a 24' driveway. Therefore, he felt 21' was completely sufficient to allow cars to come and go at the same time.

Mr. Jousse indicated that he was on the site today and it appeared that the applicants are very conscientious about their project. It does not appear that there will be very much traffic going in and out on a regular basis so he felt that 18' was more than adequate for two cars to pass each other.

The motion to grant passes unanimously with a 6-0 vote.

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6) Petition of **William Kelly Davis, owner**, for property located at **495 Union Street, 485 Union Street and 28 Willow Lane** wherein Variances from Article III, Section 10-302(A) and Article III, Section 10-301(A)(4) are requested to recreate the original lot lines with: a) Lot 19 having 93' of street frontage, 5,930 sf of lot area, and two dwelling units, b) Lot 21 having 40' of street frontage, 3,113 sf of lot area, 52% building coverage, and two dwelling units; and, c) Lot 22 having 50' of street frontage, 3,696 sf of lot area, 45% building coverage, and one dwelling unit in a district where minimum frontage is 100', minimum lot area is 7,500 sf, maximum building coverage is 25%, and a minimum of 3,000 sf of lot area per dwelling unit is required of a conversion and all non-conforming yards. Said property is shown on Assessor Plan 133 as Lots 19, 21 &

SPEAKING IN FAVOR OF THE PETITION:

Kelly Davis, owner of the property and applicant, addressed the Board. He purchased the land and 3 buildings in 1995 as one lot but they have always been treated as separate lots. They have always had separate mortgages and separate water and sewer bills. It was the previous owners that he bought the property from that had consolidated the properties. They were not asking to change anything other than to reinstate the lot lines as

shown on the tax map. The lots in the Lincoln Avenue neighborhood are historically the same size as these three lots are. There is adequate parking on each lot. They would just like to have a little more flexibility in the future.

Mr. Berg asked when the garage, that was demolished in 1985, was built. Mr. Kelly thought that it was built around 1930.

Mr. Berg asked Ms. Tillman if this was a merger of contiguous adjacent properties? Ms. Tillman indicated that it would need approval from the Board of Adjustment and the Planning Board to separate them and then they would be dealt with separating from a zoning viewpoint.

Vice Chairman Horrigan asked how 495 and 485 Union Street will share a common parking lot? Mr. Kelly was not sure how to mark the parking areas that share a common driveway.

DECISION OF THE BOARD:

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Parrott seconded. Mr. Rogers stated that to grant the variance would not be contrary to the public interest as it has always appeared that there were three separate lots. The lots will conform very well to the adjacent lots so they are not making an extremely small lot for the neighborhood. In order to use the property as the owner would like to use the property, he needs to be able to subdivide it. The hardship is that these lots are continuous and have been combined and that is restricting the owners use. He doesn't have a reasonable use of the property. It will not injure any public or private rights of others because the properties have houses on them. They are not vacant lots where they want to build something new. The lots have been there and they have not interfered with the neighbors. It would be in the spirit of the ordinance to allow him to use this property in that way. Substantial justice would be done because they are attached to each other and there is no way they can be sold independently and it appears that the owner is aware that there will be restrictions regarding setbacks, etc. on the property. There is no diminution of value of the property because no one has come forward to complain about this subdivision and these buildings have been there since the 1930's.

Mr. Parrott agreed with Mr. Rogers and added that it is the owner's desire to subdivision the lots and this is the logical way to do it.

Chairman Le Blanc felt that the fact that was most telling for him was that he gets three tax bills and the city is saying that these are three separate lots already even though they are contiguous and are owned by one person. They are just granting the right to separate and use them independently.

Mr. Berg stated that he was a big supporter of property rights and he was not a fan of the Portsmouth Zoning Ordinance. He recognizes that one of the purposes of zoning is to move away from non-conformity. This is one of the few property seizure ordinances that he supports so he cannot support the creation of three non-conforming lots simply because they are not going to get built upon. Mr. Rogers mentioned that this doesn't happen very often but Mr. Berg feels that there are hundreds of occurrences where lots have been combined. Typically one or more of the lots are vacant but he doesn't see that as being an issue. So many of the Zoning Ordinances attribute to non-conforming building, not the lot. In this instance the lots are non conforming and he could not support the variance.

Vice-Chairman Horrigan indicated that he had the same concerns as Mr. Berg and he could not support the creation of three non-confirming lots.

Mr. Witham said it was easy to say that they would be creating three non-conforming lots because they had it right in front of them. But, he guessed that the list of non-conformities as it exists now would be just as long if not longer than the list of non-conformities if they were separated. Therefore, they would be moving towards a greater conformity which is one of the purposes of the ordinance. They have dealt with this issue before with

combining lots with developments. This is simply recognizing lines that have existed and they would not be creating any greater non-conformity or any greater impact that isn't already felt.

Mr. Jousse indicated that he was a strong advocate of not creating non-conformity lots. He believes in this case that they were not creating non-conforming lots. The city has already recognized that these are three individual lots and the owner is being sent three individual tax bills. It just happens that those three lots are owned by the same individual. They are not making three lots but they are there already and the Board was just going back in time and re-establishing the boundary lines.

The motion to grant passed with a 5-2 vote, with Vice-Chairman Horrigan and Mr. Berg voting in the negative.

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7) Petition of **Kathleen M. Beauchamp, owner**, for property located at **21 Blossom Street** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow: a) a 16' x 22.5' 1 ½ story garage with a 2'± right side yard where 10' is the minimum required and a 4.25+' rear yard where 25' is the minimum required, b) an irregular shaped 182 sf addition with a 4.25'± rear yard where 25' is the minimum required; and, c) 46.1% building coverage for the above and including a 5.25' x 11' porch where 30% is the maximum allowed. Said property is shown on Assessor Plan 110 as Lot 3 and lies within the General Residence B and Historic A districts. Case # 8-03

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

Anne Whitney, architect for the project, spoke on behalf of Ms. Beauchamp. She first distributed letters in support from abutters. Ms. Whitney indicated that the hardship was that Ms. Beauchamp's fiance was handicapped. They were trying to create a slightly bigger garage so that it was wider so that a car could be pulled in and someone could get out of the car. The connector is so that there would be interior access to the residence, which requires going up a half level. The stairs were made wide enough to accommodate a chair lift at some point in time. That is the basic concept that is driving this design. Because this property is in the historic district, she was trying to accomplish this within the building and also with compatible architecture. The existing one story garage sits right on the property line and is a very small structure. The proposed structure will pull that back 2' from the side property line and go just a little bit further in length, about 1 ½', so that will allow an offset garage door and allow room for someone to get out of the car. Part of the square footage includes a covered porch. Ms. Whitney indicated that she could fit the connector without the covered porch but then all of the rainwater that comes up to the house would still be coming right at the front door. This is a very old building, as reflected in the photographs. The porch will overlap the front door so that someone would be undercover as they go into the front door. The additional floor space, beside access, would be very useful for the house. With all of the proposed additions, the house would still be under 1,700 s.f., even including the half story space over the garage. They tried to keep the pitches as minimal as possible and the garage is no higher than the existing house. It is 20.5' to the peak and the ordinance looks at it to the mid-point of 17' high. The connector pitch is much lower than the existing pitch of the house to minimize the impact. She wanted to maintain, on the rear of the property, ample space to construct this but also to get yard equipment into the little bit of the back yard that they still have on this property. This will maintain the existing parking space and there will still be room for a second car off the road on the brick, as they have now. This is an extremely small lot. Although they are asking for an increase in lot coverage, the end product in square footage is very modest. They were trying to improve the side lot line with the garage.

Chairman Le Blanc asked how high the garage was going to be from the current grade? Mr. Whitney indicated that from the current grade to the peak of the roof, in the worse case on the downhill side, is 20 ½ '. The code measures the height of the building to the mid point of the gable and that would be right around 17'.

Joseph Almeida, of 33 Blossom Street, spoke. He encouraged the Board to look at this application not only in plan only as the numbers might raise a concern, but to look at it in 3-dimensions. The house is tiny and unusually small. All of the abutting properties tower over this building. Her chimney is at his second floor window. He also appreciated the fact that she is improving the setback of the existing garage. She is not looking to change the use in any way, doesn't require parking, and for those reasons he believed this was a reasonable request and as a direct abutter he supports this addition.

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

Joyce Zabarsky, of 161 South Street, spoke at a direct abutter in the rear. The proposed addition would be 4 ¼' from their property line. They are also abutters across the street where they own rental property at 28 Blossom Street. She wanted to speak to the proposal because she and her husband have great concerns. They have lived in their house for 34 years. They have limited light in their back yard and it's difficult to have a garden. This building proposal is virtually the whole length of Mr. Beauchamp's property and it is 4 ½' from the southwestern side of the Zabarsky's garden. She sympathizes with the applicant and her reasons for doing this, however, the Zabarskys are concerned that it is going to look like a long ranch house with the side of her present house and the connector and then the enlarged and heightened garage. They are also concerned that it is going to block light and air circulation and having a building that close to their property line will result in a great deal of loss of privacy. The grade of Ms. Beauchamp's land is a couple of feet higher than hers and as this is the only long distance view that they have, that will be completely blocked off. When you put all of these things together, they are very concerned that this will reduce the value of their property and their personal enjoyment of it.

Mr. Jousse asked Mrs. Zabarsky to show them on the tax map where her property was located and it was identified as Lot 5.

#### **SPEAKING IN REBUTTAL:**

Anne Whitney spoke in rebuttal. She stated that the issue of the Zabarskys property came up early in the planning process. Originally they were thinking of doing a two story garage but they dropped that. She didn't think it would read as much as a ranch as it will a very traditional gable with a connector. They tried to make this the minimum to make it work.

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

Melvin Zabarsky, of 161 South Street, indicated that what had been neglected in the discussions was the fact that where the garage was going to be set upwards 22 ½', there was a massive ancient oak tree right at the corner where the present garage is. So there is a visual wall that is going to go up 50', which is how high the oak is.

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

Mr. Witham made a motion to grant the petition as presented and advertised. Mr. Berg seconded the motion. Mr. Witham stated that he has adamantly opposed many garage enlargement plans over the last few years in the city. He believed that this was an example of how to do it right. His concerns in the past have been scale and over-intensifying a lot. This lot is very small and the garage itself is 16' x 22 ½'. Looking at the building sitting on the lot it does look very intense but when he looks at the scale of the property it looks very appropriate and reasonable. The abutters have expressed some concerns and are concerns that Mr. Witham has raised on previous garage proposals that he opposed. One of the concerns was that it would look ranch-like and Mr. Witham felt that if you looked at the rear elevation it was very tastefully done and very traditional in nature. It appeared to be very well thought out. Regarding the loss of sunlight and the wall that is 4 ½' from the Zabarsky's property line, the garage is already there and there is an additional 12' of structure that's being built along the property line but this is an abutter that probably has 200' around the perimeter of their back yard.

Therefore Mr. Witham did not feel that this connector would really have much of an adverse effect on their property. Because of the scale that's being presented, it is very appropriate and, looking at the size of the property in question, the request is reasonable even though the numbers look quite large.

With regard to the five criteria for granting the variance, Mr. Witham did not feel that this would be contrary to the public interest. He felt it would be tastefully done and, with the exception of one neighbor, everyone else appears to support it. It moves an existing garage that is on the property line 2' away. This doesn't meet the requirements but it does move towards a greater conformity. The special conditions that exist which result in a hardship have to do with the shape of the lot and the size of the lot, which interfere with the reasonable use. Mr. Witham felt it was reasonable to have a small garage with a connector to the house. The way this is laid out is reasonable and has the least minimal effect that probably could have been designed. A lot of the square footage is done just to hold a car and stairs because they are changing the grade, which is again a unique part of the property. He did not believe that the variance would injure the public or private rights of others. Not to disregard what the Zabarskys said, but he does not agree that all of a sudden there is not going to be a spot to grow the tomatoes because this is being built. The Zabarskys have a large back yard and must enjoy a very reasonable use on such a large property and this continuation of a structure along that line is not going to result in an adverse effect. The granting of the variance would be consistent with the spirit of the ordinance because he felt it was reasonable. There are a number of variances being requested but they are driven by the shape of the lot and existing conditions. Substantial justice is done by allowing her to have a simple garage connected to the house for somebody who obviously has some type of condition where this is needed for him to enjoy and use the property. Lastly, Mr. Witham did not believe the addition would diminish the value of surrounding properties. Abutters have written saying that it will improve the value and someone in the back has indicated that their value will drop due to lack of sunlight, however, Mr. Witham feels that due to the shape of the roof and the design of the building it will not diminish the value to the people in the rear.

Mr. Berg agreed with Mr. Witham and added that it's a nicely designed use of this space. He indicated that he was not an architect but he was enjoying the plan and appreciating how a difficult situation was dealt with. Not to take anything away from the neighbor's concerns but Mr. Berg felt that once this is built, the neighbor will appreciate what an attractive house this will be.

Vice-Chairman Horrigan indicated that he would not be supporting the motion. The Planning Department indicated in their memo that the proposal appears to be an over-intensification of the lot and that is his impression also. It is a small lot and this proposal will result in 46% building coverage from what is currently 33%. That is quite a large increase and Vice-Chairman Horrigan felt that that over-intensification creates other conditions, some of which the direct abutter has spoken to. He did not feel that the Board could dismiss their concerns about the value of their property by talking about design or connecting garages. Just the general issue of over-intensification is going to lower the value of their property. He could not think of a rational argument that it would have no impact or raise the value of their property. Therefore, he felt the petition failed on criteria #5. As well designed as it is, it is still going to have an impact on the immediate abutter with regard to their property value.

Mr. Rogers indicated that he would also not be supporting the variance for many of the same reasons. He indicated that Mr. Witham felt that one aspect was that the neighbor's property was large and didn't feel that it will effect their value or their use of the property. The abutters do not necessarily need to prove to us one way or the other whether it will or won't effect their property but rather it is for the person asking for the variance to prove that it won't. Perhaps they may want their garden in that particular location and Mr. Rogers felt that it was an over-intensification going to a 4 1/2' minimum setback in the rear. He could see that they could make it smaller by moving the garage closer to the house and that would eliminate the need for the sideyard variance so he believed it is an over-intensification of the property and they have already used up a great deal across the front of the property. By adding a second floor it would create a wall which would disallow the property ventilation and light coming through the abutters property.

Mr. Jousse agreed with Mr. Rogers that if the garage were moved closer to the house it would reduce the lot coverage and still accomplish what the applicant is trying to do. For that reason, he would not be supporting the motion.

The motion to grant failed with a 3-4 vote with Mr. Jousse, Mr. Rogers, Vice-Chairman Horrigan and Chairman Le Blanc voting in the negative.

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8) Petition of **Tina Gleisner and Ted Blank, owners**, for property located at **238 Highland Street** wherein a Variance from Article II, Section 10-206 and Article XII, Section 10-1201(A)(3)(a)(3&4) and (b)(1) are requested to allow a Home Occupation II with one parking space in the driveway that backs out onto the street and is closer than 10' to the right property line and no screening is provided. Said property is shown on Assessor Plan 130 as Lot 37 and lies within the General Residence A district. Case # 8-8

SPEAKING IN FAVOR OF THE PETITION:

Tina Gleisner spoke on behalf of her petition. She reviewed the five criteria with the Board. They did not believe that the granting of the variance would be contrary to the public interest due to the impact of an additional parked car during business hours. They believe the narrow setback on the west side of the house and the physical inability to create any type of turn around is a special condition that would constitute an interference with their ability to make reasonable use of the property if the variance were not granted. Otherwise, for her start up business she would have to rent space for a year at considerable expense. They believe the variance is consistent with the spirit of the ordinance since their home based business will be of minimal impact. Substantial justice will be done by granting the variance as without the variance the potentially permitted use of the property would not be allowed. The chances of their business being successful would be significantly reduced due to the increased cost. Finally, they did not believe the granting of the variance to allow the parking of an additional car would diminish the values of surrounding properties. They had a petition signed by several of their neighbors expressing their approval for the variance. In the past few days they have had discussions with their neighbors who originally opposed their request, Joanne Holman and Lance Hellman. She advised them that she planned to move her business out of the house after one year, or by January 31, 2005. With the understanding of their concerns and in consideration of that, she requested that her variance request be limited in time from the present to no later than January 31, 2005. Their lawyer reviewed the ability for the Board to put a time limitation on the variance it was his opinion that it could be done and a letter was submitted addressing that issue.

Mr. Berg asked if the Board agreed to put an expiration date on the variance, could a future owner of this home be allowed to operate a similar business or would they be precluded from doing so? Ms. Tillman could not answer that. Chairman Le Blanc indicated that, from a practical point of view, if they sold the property before January 31, 2005 the next person could do exactly what they are doing now. However, on that date the variance would expire and they would have to come back to the board to renew that home occupation.

Mr. Rogers asked Ms. Tillman exactly what type of home application is was? Ms. Tillman indicated that the homeowner would like to hire a customer service rep to handle the phones and dispatch handyman techs to residential homes and businesses.

Chairman Le Blanc asked if handymen would be coming to their house, storing equipment in their yard or using their residence as a meeting point? Ms. Gleisner indicated that they would not.

Vice chairman Horrigan asked about the parking space, which is the actual variance. On the plan that they submitted it looked like they had drawn in 4 ½ parking spaces? Ms. Gleisner indicated that it is a two family unit and they have a tenant on the third floor and they use the parking on the left side of the house. They use the parking on the right side of the house. They will stack their cars one behind the other. For snow removal, they

purchased a snow blower that several neighbors chipped in and purchased. They were able to pile all of the snow to the back of the driveway, in the backyard.

Attorney Sanford Roberts spoke as a neighbor as he lives across the street. This is a fairly wide street with very little traffic. He did not believe that one extra car would cause any problems with safety. He urged the Board to approve the variance.

Lance Hallman spoke to the Board. He and his wife, Joanne Holman, were opposed to this variance when they first heard about it. Since the Applicants have changed the primary aspect of the proposal and they arrived at the date of January 31, 2005 to cease using their property for this business, they are now in favor of it. Therefore he asked the Board to disregard the letter that they had previously filed with the Planning Department.

Vice Chairman Horrigan wanted to confirm that if a time limit was imposed, their concerns would vanish. Mr. Hallman indicated that their concern was if the business was successful and there would be more activity in the future. This would assure them that this would not happen.

Mr. Witham had a concern that he asked the Applicant to address. He could foresee four handyman logo vans outside of the house at 7:00 a.m. as it appears that this is the headquarters. Ms. Gleisner explained that she provides the vans and they will be garaged at their homes. Because Rockingham County is so large, they want their technicians to be distributed across the county. She conducted her interviews with technicians at local restaurants and plans to hold monthly meetings in restaurants as well.

DECISION OF THE BOARD:

Mr. Parrott made a motion to grant the variance as presented and advertised, with the stipulation that the Home Occupation II Handi Man business use cease at this property no later than January 31, 2005. Vice Chairman Horrigan seconded. Mr. Parrott did not feel that the requested variance would be contrary to the public interest, which in this case would be the neighborhood. The only neighbor who had any concerns has withdrawn their concern. Special conditions exist with respect to the property for which the variance is sought such that literal enforcement of the ordinance would create a hardship. In this case the applicants want to use their property for a specific purpose for a limited period of time and this is a reasonable use of their property. No fair and substantial relationship exists between the general purpose of the Zoning Ordinance as the general purpose of the Zoning Ordinance is to regulate over-intensification of and are and other various other obvious concerns. In this particular case, those concerns have been addressed to his satisfaction. The variance would not injure the public or private rights of others as there was only one couple who expressed concerns and the property owner immediately dealt with that to the satisfaction of the neighbors. The requested variance is consistent with the spirit of the ordinance, which does specifically allow Home Occupation with one employee in this particular zone, so he believed it was consistent. Substantial justice will be done by granting the variance as the applicants have been very forthcoming as to why they want the variance and it appears to be for a limited duration and scope. Granting the variance will not diminish the values of surrounding properties, which was addressed by the description of the nature of the business. No trucks will be parked at the residence which is the only obvious concern.

Vice Chairman Horrigan concurred with Mr. Parrott. He felt the proposal was a well conceived business plan so it appears to be a reasonable use of the property. He felt the abutters raised some legitimate concerns so having the time limitation is an interesting variation on this kind of petition. It means that if this arrangement doesn't work, they will have to come back to the Board within 1 ½ years so this should be a fairly safe gamble. He felt the request could be granted and hoped that the business takes off.

Chairman Le Blanc stated that the one issue that was being over looked was the parking and that the parking space must back out onto the street and no screening is being provided. The immediate abutter to the right has indicated that they have no problem with this because there is a specific time limit being imposed. The other neighbor spoke and indicated that it is a fairly quiet street and there shouldn't be a safety issue with one car

backing out onto Highland Street. Chairman Le Blanc felt, with the other reasons that have been given, the Board can grant this variance.

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

9) Petition of **One Hundred Market Group, LLC, owner**, for property located at **100 Market Street** wherein an Appeal from the Decision of the Code Official is requested concerning the determination that internally-mounted window boxes are signs prohibited by Article X, Section 10-1012(A) and Article I, Section 10-102(A).

Notwithstanding the above, if the Appeal from the Decision of the Code Official is denied the following are requested: 1) Variances from Article X, Section 10-1012(A) and Article IX, Section 10-908 Table 14 to allow internally-illuminated window boxes in the Historic A and Central Business B districts where such use is not allowed, and 2) a Variance from Article IX, Section 10-908 Table 14 to allow: a) an additional 215 sf of attached signage where 60 sf is the maximum allowed and b) an aggregate of 307.2 sf of signage where 92.2 sf was previously granted and 75 sf is the maximum allowed. Said property is shown on Assessor Plan 118 as Lot 6 and lies within the Central Business B and Historic A districts. Case # 8-9

The Appeal from the Decision of the Code Official was addressed first.

SPEAKING IN FAVOR OF THE APPEAL:

Attorney Malcolm McNeill was present on behalf of the Applicant, Springer’s Jewelers. Also present from Springer’s Jeweler’s was Greg Bolduc, Randy Wright and Rick Beliveau as well as Lisa DeStefano who has assisted with some of the materials. Attorney McNeill asked how does a free standing windowbox become a sign and whether under the circumstances of this case it is a sign prescribed in the historic district. He distributed various photographs of Springer’s Jeweler’s, past and present, as well as other storefronts in downtown Portsmouth. Attorney McNeill indicated that the windowboxes were free standing boxes, not attached to the windows of the store, and are all self contained. Products offered by Springers are displayed on the inside of the boxes. They also serve an additional purpose of providing privacy and some reasonable illumination. The far end of the building is where their safe is so the windowboxes serve a security purpose. Attorney McNeill discussed photos of other stores with display items in their windows, some of which were lighted. Some windows had letters and some had photographs of humans displaying products that are sold in the store which they are assuming are not in violation of the Portsmouth Zoning Ordinance.

Attorney McNeill stated that Springer’s had been at their present location for approximately 3 years and consisted of approximately 1,000 sf. The building is on two streets and is a very large building. The initial issue before the Board is whether free standing window display boxes are signs. One section of the Zoning Ordinance deals with the Historic District which says that illuminated signs are not permitted so they are seeking relief from that if they get to the variance argument. However, he indicated that they would not have to reach that if it was determined that the boxes were not signs. It is only when the boxes become signs that they would be prohibited under the HDC regulations. The city defines signs in various ways. The sign definition says “Any representation that is illuminated and consisting wholly or in part of written word or symbols shall be considered a sign.” The Ordinance then goes on to say, “Window displays comprising of merchandise, figurines, mannequins, decorations and other similar articles, arranged inside a building, shall not be considered a sign.” It is clear that the windowboxes are inside the building and they contain figures of humans and they do contain figures of products (Rolex watches, necklaces). If the watch were hanging separately in the window and it were lit up, there would be no violation. What makes the difference between the two to the extent that it is necessary to eliminate this particular use.

This matter came up because a new business was going into the building and made a request for a sign. The City looked at its records and indicated that the building signage was over the legal limit and previously the City had represented to Springer's concerns about the windowboxes. The City brought forward a Cease and Desist Order and Springer's responded to that immediately by taking the faces off of the windowboxes. There were not present to be disrespectful of the Code Official Officer but they have a legal right to differ with his conclusions. They felt that the windowboxes were not signs. They are turned off at the end of the business day. Only during the winter are the window boxes lit when it's dark, between 4:30 and 6:00 pm. Springer's could continue to have the blank faces on the outside There is an element of the jewelry business that requires that the boxes be tasteful. Taste and sophistication is the product that is being sold within the Springer's premises. It is in their best interest to make the windowboxes of the highest quality. In terms of an evaluation of the reasonableness of the definition they believed it was reasonable to come to the conclusion that the windowboxes were not a sign. They believed it was the intent of the Historic District Commission to avoid distasteful, neon, flashing signs and these windowboxes do not fit into that category. They therefore feel that there is a provision of the Zoning Ordinance that they can rely upon to exclude the free standing windowboxes from being characterized as signs and that is what they were asking the Board to do.

Chairman Le Blanc asked about the lettering that was on the windows and whether it was legal? Lisa DeStefano indicated that they did a Tenant Fit-Up application and spoke to city officials about putting lettering on the glass. They determined that there 20 other businesses with lettering on their windows so if they were going to require Springer's to get a sign permit it would open up a can of worms. Even in some of the businesses that they have referred to during the hearing are not permitted signs. Attorney McNeill indicated that the lettering on the windows is not an issue at this hearing. Ms. DeStefano indicated that the lettering was allowed per their discussions with Rick Hopley.

Mr. Witham felt they needed to clarify whether the windowboxes were a sign or a display. Mr. Witham asked Attorney McNeill to explain what he felt the difference was. Mr. McNeill indicated that because the windowboxes were illuminated, that may be been a significant issue but when you cut through it all, it is very difficult for him to distinguish the difference and how one can discriminate between one product or another. He asked the Board to look at the substance of what was there and then to look at the Zoning Ordinance definition of a sign. Mr. Witham stated that when he was in a gray area like this he would look to what the intent of the Zoning Ordinance was and to him he believed the intent was to avoid large illuminated faces.

Ms. DeStefano pointed out that when you apply for a sign permit there are three way that you can apply: flush attached, projecting and free standing, although free-standing are not allowed in the HDC. She did not feel that the windowboxes fit any of those 3 categories as it is on the inside of the store.

Mr. Parrott was having a hard time convincing himself that the display of an article, which is clearly allowed by the ordinance, was the same thing as the representation of the article on a flat surface, whether it was lighted or not, when it's 50 to 100 times bigger than the actual item. To say that the windowboxes are not a sign or a representation of the real thing is illogical to him. The test he used was whether the windowbox would make a nice billboard on the highway and then it would be sign. He does not buy the argument that the pictures or representations are not signs.

DECISION OF THE BOARD:

Mr. Parrott made a motion to uphold the decision of the Code Official. Mr. Rogers seconded. Mr. Parrott indicated that regardless of other businesses are going in downtown Portsmouth, which he felt was irrelevant, the applicant is putting pictures and representations in his windows with the idea to communicate to the public outside what is inside. Signs are flat or have very little depth as opposed to an article, which is the real thing. Due to the magnitude and scale of the windowboxes, which are illuminated in violation of the code, they cannot be considered the same thing as objects that are clearly allowed by the Zoning Ordinance. He felt the Code Official had no choice to rule as he did.

Mr. Rogers agreed with Mr. Parrott. He also felt that this particular administrative determination was based on two things. One was the historic district violation as far as the illuminated sign and also the fact that this item is a representation of an article with text on it or representation of a product that is for sale. Therefore, he felt they met the criteria of being signs.

Mr. Jousse was not supporting the motion. He felt that other businesses, such as the travel agency, have posters in their windows and they have never been considered signs. In this case they are displaying pictures of watches and jewelry. He does not consider the windowboxes as signs.

Chairman Le Blanc referred to the sign definition. He felt the problem was that a watch was very small and when you enlarge the watch in a picture it becomes a symbol. He agrees with Mr. Jousse and feels that these are window displays and, as such, he believes the Code Official was correct in calling these signs but if they look at them closely he believes they are dealing with the display of merchandise and he felt it should be treated as such. He is loath to turn over the decision of the Code Official as they work with this all of the time and they have to have some definite direction in interpretation from this Board and the other Boards in the City. He is leaning towards saying they are not signs and would not support the motion.

Mr. Witham indicated that he would be supporting the motion. When he first saw the windowboxes he did a double-take and wondered how they were allowed. The concept of display is not like they can walk into the store and indicate that you will take one. These are something that he would expect to see in the subway. They are a very effective way of communicating what you are trying to sell. They are very well done but he feels they are signs.

Mr. Rogers wanted to add to the sign definition by reading the sentence that indicates that "Any representation that is illuminated, and consisting wholly or in part, of written word or of symbols, shall be considered a sign." All of these have words on them such as Rolex or the name of the product. That right there tells him they are a symbol of the item and therefore a sign and also they are illuminated.

The motion to uphold the Code Official's decision passed with a vote of 5-2, with Mr. Jousse and Chairman Le Blanc voting in the negative.

SPEAKING IN FAVOR OF THE PETITION (VARIANCE REQUEST):

Attorney McNeill addressed the variance request for 215 s.f. interior windowbox which is now considered signs. There are unique characteristics of the building and this particular area. That is most apparent from the memo that was provided by the City. The Planning Department stated that this was a large building that faces two streets and the sign ordinance does not provide for sufficient signage for all of their tenants. The space occupied by Springer's is approximately 1,000 s.f. which is a relatively small place in a declining topographic area of the street. There is not enough room inside of the space to figurines, mannequins, or other type of displays. There is also a great deal of window frontage on the building. The ordinance provides for 75 s.f. total for this particular building. In the past, various projecting signs have been granted variances to permit 92.2 s.f. of signage on the building. In his view, that signage is not offensive in any fashion and does not consume the building. They are proposing to place images on the blank spaces that are currently in the windows. The signs provide a form of security for the store. The signs have been at the site for approximately 3 years and to their knowledge there have been no complaints about diminution in property values. The signs are very tastefully done. This is a commercial district and they are a tasteful utilization of window space. Therefore they do not believe there will be any diminution in property values.

Attorney McNeill did not feel that the variance would be contrary to the public interest. He felt it was reasonable for the public to see their products tastefully displayed in a commercial district. The lighting will not be on after dark except during daylight savings time from approximately 2 hours, from 4:00 – 6:00 pm. The signage is high quality and is clearly not offensive and, in their view, provides a reasonable image for the products being sold in the building. He felt the variance was consistent with the spirit and intent of the

ordinance because this is such a large building, most of which is not covered by signage, the ordinance clearly permits signage but just not in this volume. The signage will be located completely inside the building. The unique characteristic of the site is the nature of the store itself as well as the building that they occupy, as well as the area that it occupies. The building is long and narrow, covered by glass that in an area that is commercially zoned. The limitation of 75 s.f. of signage for the entire building is totally unrealistic. They believe it is reasonable in this building to utilize this form of signage. The public and private rights of others are not being adversely affected as there is no complaint that they are aware of regarding this particular type of signage. Substantial justice would be done by granting the variance. It would provide a reasonable commercial message in a commercial environment. Attorney McNeill asked that the Board consider a condition that the illumination stop when the store is closed and it would not be utilized at night. Similarly, referring to the pictures of the windows provided, if they come to the conclusion that it is reasonable for Springer's to have additional signage but don't feel that it is reasonable that they have 215 s.f. of signage, they would understand the ability of the Board to customize a final result. He would submit that there are portions of signage that are more important than others. The lower level signage is most important (B,D,F H & I). Of lesser importance to the applicants are the higher levels of signage (A,C,D, & G). If those were to be eliminated, that would eliminate 60 s.f. of signage.

Mr. Rogers asked what the linear footage of the two sides of the building was? Attorney McNeill guessed that it was between 250' – 300'.

Greg Bolduc, Manager of Springer's, addressed the Board and identified the security areas that are most important for signage. Those areas are identified as H & F are the diamond display areas and they like to give a sense of privacy to their customers. Sections B & D are where the safe is stored.

Rick Beliveau, of Springer's, indicated that they came to Portsmouth in 1971 and brought the best of the old together with the new. These signs are part of that vision.

DECISION OF THE BOARD:

Mr. Berg made a motion to grant the variance as presented and advertised with the stipulations that signage be granted for windows B, D, F, H, & I and denied for windows A,C,D, & G, that the signs be advertisements for jewelry only and that they only be illuminated be turned off when the store is closed. Mr. Parrott seconded. Mr. Berg understood the problem with so much window, leaving them with almost no interior wall space. They are tastefully trying to block off some of the window space. In this case, this particular tenant wants some privacy for their work area and their safe area and another in an area where customers desire privacy. If a clothing store was there they would want to block off the windows where the changing rooms would be. The hardship in the ordinance is that this Board has determined that the windowboxes are signs so the literal enforcement of the Zoning Ordinance results in an unnecessary hardship. The Zoning Ordinance is interfering with a reasonable use which is tenants who simply do not desire as much window exposure and want to block some of that off. This is not contrary to the public interest. By adding the stipulation that they could not be lit during the hours they are closed, reducing the amount of window that is covered and trying to make sure the signs stay tasteful and oriented to this business, there should be no harm to the public interest. Substantial justice would be done by allowing a business to prosper and continue to operate in the same way that it has for the past 3 years. Granting the variance will not diminish the values of surrounding properties as these signs have been there for three years and it does not appear that anyone has complained.

Mr. Parrott felt that Mr. Berg was correct in attempting to compromise. Given the size of the building and the need for more square footage of signage, it has to go somewhere. This seems to be a workable compromise for those that agree that more signage is appropriate.

Mr. Rogers will not be supporting the motion. He felt that illuminated signs tends to be increasing in the city and they are trying to get rid of tacky and illuminated signs. They are not allowed in the Ordinance and he does not feel that they are appropriate. He also does not agree that a Zoning Ordinance should be considered a hardship.

They are saying that, because the signs do not meet the Zoning Ordinance, that is a hardship. A hardship should have to do with the property or the way the building should be used, but not that it doesn't meet zoning requirements. Also, financial consideration should not come into the decision in determining a variance. They should not base their decision on whether a company can prosper or not prosper.

Vice Chairman Horrigan will support the motion because the ordinance does make a distinction between signs and displaying merchandise. He felt that distinction was important. In this case they had a business that was caught in the middle. They also have a security issue. He feels that the Zoning Ordinance has created an unreasonable difficulty for this type of business. He felt what the Board was granting was a very reasonable compromise and he felt that the spirit of the ordinance was to allow jewelry stores to thrive in the community. He also felt that the signs that are currently displayed are much nicer looking than the curtains that will have to be put up instead.

Mr. Witham indicated that he wholeheartedly supported the business but he refused to get lulled into a compromise. It seemed that they are saying that their space doesn't work because there is too much glass. There are ways to address that and the ideal way for any retailer is to fill it with signage but there are other ways to do it. He agreed that 75 s.f. is far too small for this building but to allow a business to get five sheets of plywood, put signage on it and hang them in their windows is what this amounts to. He could not find where that would meet the five criteria for a variance. He does not see that in terms of the relationship between the Zoning Ordinance and the specific restrictions. The restriction is on signage and there is a direct correlation there. To get in the position of compromise and allowing this much excessive signage, he just doesn't see it, especially when there are so many other jewelry stores who have successfully operated. And to say that they can also have 155 s.f. of illuminated sign too is inappropriate in an historic district. That would not be the intent and spirit of the ordinance which is to promote our historic character and to allow 155 s.f. of illuminated signage because they have too much glass is a huge gift to the applicant and he doesn't understand why the Board is compromising. The City has rules and there are reasons for those rules. They do allow extra signage when need be and this is probably a good candidate for extra signage but 155 s.f. is very excessive and there is no way he would support it.

Chairman Le Blanc agreed with Mr. Witham. The problem with the building is its size and to use that as the excuse why they should grant three times as much signage as they currently have is way out of proportion to what they are trying to do in the city to keep signs at a minimum. The purpose is to see the buildings that are there rather than the signs.

The motion to grant with three stipulations failed on a 2-5 vote, with Mr. Jousse, Mr. Rogers, Mr. Witham, Mr. Parrott and Chairman Le Blanc voting in the negative.

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10) Petition of **Linda Rioux, owner, Brian Whitworth, applicant**, for property located at **86 Islington Street** wherein a Variance from Article XII, Section 10-1201(A)(2) is requested to allow an entrance driveway 10.8' wide and travel aisle behind one parking space is 22' wide where 24' is the minimum required for both. Said property is shown on Assessor Plan 126 as Lot 25 and lies within the Central Business B and Historic A di

**SPEAKING IN FAVOR OF THE PETITION:**

Attorney Malcolm McNeill addressed the Board on behalf of the owners and applicants. Brian Whitworth was also present. Attorney McNeill indicated that the only reason that they were there was because of the improvements that were being proposed for the building. The building has been in existence for over 150 years. This section of the city is very compact with very limited driveways. The major item that they wanted to bring forward was that they propose to create 6 one-bedroom condominiums in this building. The amount of parking remains the same, the driveway doesn't change in any fashion and the building itself would have to go before site review. A small portion of the building to the rear is being squared off to make all of the internal units

conforming and to provide appropriate fire escapes and decks to the rear of the building. Attorney McNeill provided photographs to the Board. One set of photographs showed pictures of the building, the second set of photographs showed the exit area from the driveway and the third set reflect other driveways in the vicinity of 86 Islington Street. The house is currently being used for an 11 room rooming house and has been referred to as the Bachelor's Quarters. All of the new parking spaces comply with existing regulations except for the turning area in the rear where they now only need a variance for 23'. They are enlarging the open space to the rear. The other relief is for the entryway into the site. This is something that they are stuck with. They have 10.8' of driveway that has historically been there. There is another small adjoining area owned by the American Legion Post so from a practical prospective they have a bit more space although they don't have an easement over it. Under the ordinance they require 24' but only have 10.8'. There are no alternatives as far as where the applicant go for access. There is no other way to accommodate the same use that has been there historically. The up side of the case is the improvements that are going to be made as a result of the modifications to the condominiums. There are other similar driveways along Islington Street.

Attorney McNeill addressed the five criteria. He stated that this would not result in diminution of property values. The driveway has been there for a number of years, probably 50 – 100 years. Their proposal is to dramatically improve the building and bring it up to 2003 standards, subject to the HDC review which is already in the process. The variance will not be contrary to the public interest. There will not be any significant increase in traffic. There is only a nominal increase in this building for the purpose of squaring off the building and providing life safety improvements to the rear of the building. There are absolutely no other options available to the applicant to make the driveway comply. Special conditions exist that the literal enforcement of the ordinance would result in an unnecessary hardship to the applicant. The applicant should not be required to tear down this 150 year old building to comply with a 2003 standard because he is improving the building. There is a very small change in this building that activates site review. It would be unreasonable for this accessway to be strictly and literally enforced both in context of this lot and in the context of the neighborhood. They believe the passageway has been adequate for 50 –100 years and they are only servicing 9 spaces. Attorney McNeill mentioned a previous hearing where the Board discussed the neighborhood, safety, the lack of intensive traffic and the conditions which existed with regards to the site. He felt that was exactly the case here. No substantial relationship exists between the general purposes of the ordinance and its specific restriction on this property. This is not being rebuilt and this is not a creation of a hardship. This is a hardship that classically exists. The variance is consistent with the spirit and intent of the ordinance as the ordinance presumes reasonable use of the property. The fact that the building has been there as long as it has, that the entryway has been there in its present form and that it is reasonable to consider that this is adequate because of the historic use they felt was consistent with the spirit and intent of the ordinance. Substantial justice will clearly be done for both the city and the applicant. The City will acquire a new, very desirable building with all of the improvements, subject to the protection of the HDC's review, as well as the Planning Board review. The building will be completely remodeled and improved and an 11-room rooming house with a unique history will be changed into a new, modern building without any significant increase in utilization and structure. The parking will be adequate and complies and the building will be improved and there will be no adverse effect on the neighborhood. Attorney McNeill felt that they have met the Simplex criteria.

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

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Parrott seconded. Mr. Rogers indicated that they were correcting the width of the travel aisle behind one parking space to 23' where 24' is required and the entrance to the driveway is 10' 8". Mr. Rogers felt that granting the variance would not be contrary to the public interest and there is no way that they can change the driveway itself without tearing down the building. That is part of the hardship. There is no literal enforcement of the ordinance that would change that particular reasoning. The width of the driveway cannot be changed. He felt they were doing an excellent job by taking a building that is in disrepair and making it into an asset to the community. The purpose of the Zoning Ordinance is to allow safety in traffic traveling back and forth and there are only going to be a few parking spaces out back so he did not feel there would be any difficulty with traffic coming in and out. It is not going to injure the public or the rights of others in the area because the building has been there for many years

and the driveway has been more intensely used than it will be now. Substantial justice will be done as we are always looking to improve properties and make them as conforming as possible. By squaring off the building and putting in fire escapes will make the building safer. This will not only not diminish the values of surrounding properties but will in all likelihood increase the values of those properties.

Mr. Parrott had nothing to add.

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

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11) Petition of **Carl A. Deck , owner**, for property located at **151 Eastwood Drive** wherein a Variance from Article XV, Section 10-1502(D)(1)(c) is requested to allow a 6' x 22' addition to the existing garage within 50' of the side property line of the entire development where the external dimensional side yard requirement is 50'. Said property is shown on Assessor Plan 288 as Lot 3-14 and lies within the Single Residence B district. Case # 8-11

Mr. Witham excused himself from this hearing.

After discussion with Carl Deck, it was determined that his site plan was outdated and inaccurate.

DECISION OF THE BOARD:

A motion to table the petition until next month was made and seconded and passed unanimously with a 7-0 vote.

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**III. ADJOURNMENT**

There being no further business to come before the Board, the Board acted unanimously to adjourn at midnight and meet at the next scheduled meeting on September 16, 2003 at 7:00 p.m. in the City Council Chambers.

Respectfully submitted,

Jane M. Shouse  
Secretary

/jms