

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

7:00 P.M.

CITY COUNCIL CHAMBERS

SEPTEMBER 16, 2003

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

MEMBERS EXCUSED: n/a

ALSO PRESENT: Lucy Tillman, Planner

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**I. APPROVAL OF THE MINUTES**

July 15, 2003 Minutes – A correction was requested on Page 5, changing amble to ample. A motion was made and seconded to accept the corrected minutes from the July 15, 2003 meeting and it was approved unanimously.

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

August 19, 2003 Minutes – A correction was requested on Page 10, changing if to is. A motion was made and seconded to accept the corrected minutes from the August 19, 2003 meeting and it was approved unanimously.

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II. OLD BUSINESS

A) Petition of **Patricia A. Butterworth, owner, Edward J. Rusher, applicant**, for property located at **61 Suzanne Drive** wherein a Special Exception as allowed in Article IV, Section 10-401(A)(1)(d) is requested to allow the former hair salon on the first floor to be converted to a chiropractic office with the apartment remaining on the second floor. Said property is shown on Assessor Plan 292 as Lot 30 and lies within the Single Residence B district. Case # 7-14

This petition was withdrawn and no further action was required.

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B) 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

This petition was withdrawn and no further action was required.  
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C) 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:

A request to table this petition until next month was made by the Applicant. A motion to table to the October 21, 2003 meeting was made and passed unanimously.

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**III. PUBLIC HEARINGS**

1) Petition of **James L. and Juliana Grant, owners**, for property located at **25 Wallis Road** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 10' x 12' bathroom addition with a 28' rear yard where 30' is the minimum required. Said property is shown on Assessor Plan 292 as Lot 72 and lies within the Single Residence B district. Case # 9-1

**DECISION OF THE BOARD:**

No one was present to address this petition. A motion to table the petition until the end of the evening's agenda was made and passed unanimously.

Mr. Grant appeared later in the evening and requested that the petition be withdrawn.

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2) Petition of **Robert C. & Debi L. Pekousky, owners**, for property located at **121 Aldrich Road** wherein a Variance from Article III, Section 10-302(A) is requested to allow the existing 98 sf irregular deck to be repaired and rebuilt and construct an additional 8' x 8' section both with an 8.5' right side yard where 10' is the minimum required. Said property is shown on Assessor Plan 153 as Lot 36 and lies within the Single Residence B district. Case # 9-2

SPEAKING IN FAVOR OF THE PETITION:

Bob and Debi Pekousky appeared and addressed the Board. They indicated that they had started this project during the summer and found that the cross boards were rotten and they also discovered carpenter ants. They decided to increase the deck.

Joan Clark, of 101 Aldrich Road, is an immediate abutter and indicated that she had measured and the new deck was only 6'2" from the property line, not the 8'5" that was advertised. She indicated that this was too close to her property.

Judith Evans, of 99 Aldrich Road, spoke in opposition and felt that the deck was too close to their property.

Mr. Pekousky indicated that he had taken his measurements from the City's plot plan and conceded that Mrs. Clark's measurements were probably accurate.

DECISION OF THE BOARD:

The Board determined that this matter would have to be readvertised due to the decreased setback request.

A motion to table this matter to the next scheduled meeting was made and seconded. The motion passed unanimously.

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3) Petition of **Michael R. Clark, owner**, for property known as **Belle Isle off Little Harbor Road** wherein the following are requested: 1) a Variance from Article III, Section 10-301(A)(7) to allow: a) a 6,536 sf 2 ½ story single family dwelling 50.7’ from mean high water/wetlands, b) a 33’ x 60’ two story garage 41.19’ from mean high water/wetlands; and c) a 40’ x 52’ two story pool building 73.35’ from mean high water/wetlands where all buildings shall be at least 100’ from mean high water/wetlands, and 2) a Special Exception as allowed in Article II, Section 10-206(22) to allow the keeping of up to five horses with associated 60’ x 120’ two story indoor riding arena and 40’ x 52’ two story horse barn where such use is allowed by Special Exception. Said property is shown on Assessor Plan 205 as Lot 2 and lies within the Rural district. Case # 9-3

**SPEAKING IN FAVOR OF THE PETITION:**

Attorney Bernard Pelech addressed the Board on behalf of Michael Clark. They were proposing the non-development of Belle Isle, also know as Lady Isle, off of Little Harbor Road. Previously the City granted approval for a 23 townhouse condominium project site but that project did not go forward. They are proposing a single family residence. There are currently 7 structures on the island and all 7 of the structures lie within the 100’ setback. They are proposing to demolish all of those structures , reduce the amount of buildings in the setback by 3,500 s.f. Attorney Pelech indicated that he did not understand the reasoning behind the Planning Department Memo. They met with representatives of the Planning Department on several occasions however until he read the memo that evening he did not know that they had such great concerns. He did not believe that the Planning Department fully understood what they were intending to do with it.

He briefly went through the proposal. Belle Isle is 15 acres and 2/3 of the island is undeveloped. They want to keep that portion undeveloped. The reason that they are proposing to keep everything on one end of the island is so they don’t have to disturb any of the natural features on site. They will be maintaining the current paved surface. Belle Isle is a pile of ledge and they do not want to do any blasting or cut any of the trees. They want to eliminate the 7 school buildings which are all in disrepair. The existing barn footprint will be used for a garage. The existing school building footprint will be used for a pool. There is no place to put a building that’s not within the 100’ setback without relocating the existing road. They would be reducing the amount of buildings that are currently in the 100’ setback by 3,500 s.f. The second part of the proposal is for the horse barn. The barn and the riding arena would be on the other end of the island in a clearing and very little cutting would be required for the construction of these structures.

Attorney Pelech felt that they had met the five criteria necessary to grant the variance. They were talking about a variance from Article III, Section 10-301(A)(7). There is no purpose delineated in the ordinance as to why we have the 100’ setback. Attorney Pelech’s take on this section is that it was intended to require a setback, however, when you apply a 100’ setback to a long skinny island it makes

a good portion of the island unbuildable. As the Planning Department memo indicated, they could certainly build the structure outside of the 100'. But, they would have to blast the ledge to put in water and sewer lines and defoliate that portion of the island. Rather than do that, Mr. Clark would like to use the end of the island that already has 7 structures on it, demolish those structures and replace them with 3 structures, and take 3,500 s.f. of building out of the 100' buffer. This is the best ecological proposal for the site. The existing structures have gutters and downspouts which run across the lawn and into Little Harbor. The proposed structures would not have gutters but rather would have crushed stone around the perimeter and would serve somewhat as a detention area for salt water run off from the roof. There would be a larger grassy swale between the proposed home than what exists presently.

Attorney Pelech felt that there was no question that this was a unique parcel of land. It is an island that has had some intense use in the past as well as some intense use approved in the past. Mr. Clark is proposing to use the 15 acres for his own home. There will be no horse shows or riding lessons. The plans show that the narrow end of the island has been very well developed and has all of the utilities which is why they are trying to develop that end. They do not believe that this will cause any diminution in value to surrounding properties. The buildings will face New Castle and the City owned conservation land and the other side of the island is heavily wooded. The use is not a very intense use with an average of six trip ends per day. Regarding the variance for the home to be within 100' of the high water mark, Mr. Clark has an absolute right to build a home where it is located which is the subject of the variance. Therefore, the location of the home should not result in any diminution of surrounding property values. They did not believe that there was any fair and substantial relationship between the intent of the ordinance, which nobody knows because it's not stated in the ordinance. They can only assume that the intent of the ordinance is much like the inland protection ordinance which is to make sure that there will not be any adverse environmental impact on Little Harbor. They do not believe that there will be any. If the variance were granted and the other building demolished, the effect on the waters of Little Harbor will be improved because the three dwellings that are within 100' are further away from the water than those that presently exist. There will be 3,500 s.f. less of building than there are now.

Attorney Pelech did not believe there were any public or private rights of anyone that would be interfered with. He felt that substantial justice would be done by granting the variance. Attorney Pelech disagrees with the Planning Department who does not believe it would be in the public interest to redevelop this property as a single family residence. Attorney Pelech felt that if they were going to attempt to maintain as much green space as possible, this was the way to go. He felt it was more in the public interest to have one family living out there with no increased demand on city services with an enhanced tax base. If the Board were to weigh that benefit or non-benefit to the general public against the hardship to Mr. Clark, it shows that Mr. Clark's hardship is not outweighed by any benefit to the general public in denying the variance. Mr. Clark is an individual who has attempted to work with the city over the past several months and they have had several meetings with the City Planning staff. They are willing to speak to the City about the transfer of future development rights, conservation easements, etc.

Attorney Pelech discussed the spirit and intent of the ordinance. He indicated that this is a section of the ordinance that has no purpose clause and states no intent. They can only assume what the intent of the ordinance is and why it is in there. His reading is to provide a 100 foot setback for the shoreline from WHEB, along Sagamore Creek, along Little Harbor and Newcastle Avenue. It also encompasses the islands of the city and this is the largest island in the city and the only one that is relatively undeveloped. When you put the 100' setback on the island, it devastates the end of the island that is already developed. He did not believe that their proposal is contrary to the spirit and intent of the

ordinance as the net gain is substantial. They are removing 7 buildings that are all within the 100' setback and they are replacing them with three structures that are partially within the 100' setback and none of them within 50'.

Attorney Pelech addressed the fifth criteria of whether the granting of the variance would be contrary to the public interest. He did not see this being contrary to the public interest. He thought it would be contrary to the public interest to allow 7 dilapidated buildings, all within the 100' buffer, to remain. This would be in the right direction.

Attorney Pelech indicated that the letter from the Fire Department did not have any bearing on this petition. He also indicated that this had gone before the Conservation Commission and they were not notified of that hearing.

Attorney Pelech then addressed the Special Exception. The Animal Control Officer wrote a letter and indicated that she had no problem with Mr. Clark keeping 5 horses on the property. Mr. Clark met with the Animal Control Officer, Attorney Pelech spoke with her and she visited the site. With regard to the other criteria required for the Board to grant the Special Exception, the keeping of the horses on the island will not result in any detriment to property values in the vicinity or change the characteristics of the area. The requirement is that it needs to be 100' away and this will be 1,000' away from the nearest residence. They have exceeded the manure management requirements. There will be no traffic safety hazard or the creation of odor, gas, dust or other pollutants. The horses will not require any excessive demand on municipal services nor are they going to change the stormwater runoff on the site. There is no potential for explosion, gas or fire. Attorney Pelech felt that they met all of the Special Exception requirements and believe the Special Exception should be granted.

Mr. Holloway asked what they intended to do about the gas tanks and gas pumps? Attorney Pelech indicated that they will be removed.

Vice-Chairman Horrigan indicated that they did not have any material from the Conservation Commission so he asked Attorney Pelech to expand on his remarks. Attorney Pelech indicated that the Planning Department called him and advised him that the matter had gone before the Conservation Commission and they were opposed to it.

Chairman Le Blanc asked what the elevation was where the main house was being proposed? Fred Sprague, of Millette, Sprague & Coldwell indicated that it was 21' above the mean high water.

Mr. Rogers asked how that elevation related to the existing manor house? Mr. Sprague indicated it was about the same.

Mr. Witham asked about the wooded area around the arena. Mr. Clark indicated that there is a fairly large area that had been cleared 30-50 years ago.

Mr. Marchewka asked about the old buildings in the wetland buffer and the new buildings that are being built, and what the impact would be on the wetlands. What would the alternatives be? Attorney Pelech indicated that one of the reasons that they plan to reuse two of the existing footprints is so they will reduce the necessary blasting and it is already surrounded by hot top. The existing barn that is in the buffer has hot top that goes right up to the barn. They will demolish the barn and construct a garage. This again will reduce the blasting and cutting of trees. They believe they have minimized the disturbance to the site. The existing structures have gutters and down spouts that concentrate and

direct the stormwater run off to Little Harbor. The new structures will not have any down spouts and will have crushed stone around the perimeter.

Chairman Le Blanc asked if there was ledge underneath where the horse barn was being proposed? Mr. Sprague indicated that they had not conducted tests in that location but they believed the ledge was close to the surface.

Daniel Bogannam, of 71 Baycliff Road, spoke in favor of the petition. He felt it would be a fine addition. They are moving further back from the wetland buffer which will help the surrounding neighborhood.

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

Alan Sturgis, Chairman of the Conservation Commission, addressed the Board. He indicated that at the end of last Wednesday's Conservation Commission, they had a brief opportunity to review the plans for this project. It was his understanding that this hearing is whether a variance from the 100' setback from tidal waters should be given. They did not concern themselves with the aesthetics of the building at all. The ordinance is very plain and says that no structure shall be built within 100' of the high water. This application involves the building of more than one structure within a tidal buffer zone and that is the matter which they addressed. Mr. Sturgis indicated that he could cross swords with Mr. Pelech on a number of issues but he will only mention one which is that this is not a unique site. Not very far away is Shapleigh Island and a very large and imposing building was built there, managing to stay completely out of the tidal buffer zone.

Mr. Witham asked if this was a matter that was voted on as an agenda item? Mr. Sturgis indicated that it was an informal discussion. There is nothing in the ordinance that requires the Conservation Commission to be consulted. They watch the buffer zone because it is their charge to protect the natural resources.

Ms. Tillman indicated for the record that she showed the plan to the Conservation Commission as the city's conservation land is an abutter. It was a FYI, informal discussion. It would be like any person coming in to look at the plan which is public record. It was not an agenda item and there was nothing to be voted on.

Vice Chairman Horrigan asked if the Conservation Commission went out to the site. Mr. Sturgis indicated that they did not go out to the site this time. He believed all of the members were familiar with it from a previous site walk for a previous application.

Mr. Ecker of 422 Banfield Road spoke in opposition. He felt the City should follow the Master Plan. He felt that they should be able to build outside of the buffer zone as the property is 15 acres. They need to follow the rules and regulations like everybody else.

Robin Najor, of 10 Martine Cottage Road, spoke. She indicated that she had heard tonight that the area in the buffer zone that was to be encroached on was already disturbed land so the act of encroachment will be negligible. Portsmouth is left with very little undisturbed land, especially along the water. The establishment of the 100' buffer zone was an attempt to protect the significant resource values of our waterways and surrounding lands. The 1993 Master Plan and other documents indicate that Portsmouth has instituted an aggressive program to preserve open spaces with significant resource values, i.e., the Great Bog, Packers Bog. The 1972 Open Space Plan identified the Sagamore Creek

area, including the inlands, salt marshes and woodlands in the Little Harbor Road area were specifically named as needing protection. Mr. Najor also pointed out that Mr. Clark also owns the adjoining piece of property off of Little Harbor Road which he could build on. She felt there was hardly a hardship to grant the variance.

Eva Powers, of 3 Curriers Cover, spoke in opposition. She requested that the Board stand firm on the land use regulations. Belle Isle is a treasure with exquisite birds. These birds cannot survive unless they have an environment that supports their needs, such as fish, frogs, insects and small mammals. Mr. Clark purchased this property in 1998 which was well after the ordinance was enacted.

Robert Najor, of 10 Martine Cottage Road, indicated that he was looking forward to the development of the property within the regulations of the City and the natural surroundings. There is a lot of wildlife along that shoreline. It is very unique and also abuts the city's conservation land. He thinks the City should very carefully review the plans and be familiar with all of the details and know exactly what they were talking about.

Attorney Ralph Woodman spoke on behalf of James and Eva Powers, of 3 Currier's Cove. He spoke about the legal requirements addressed. He discussed the necessary hardship and the 3 tests that are required. The first test deals with a reasonable hardship considering the unique setting of the property. Attorney Woodman pointed out that they had not discussed how many 1,000's of square feet there are on the property and that everything that wants to be developed could be done without a variance. The property is unique but after applying the 100' setback to the island there is still plenty of area to place the buildings. If the Board approves the plan as it was presented that evening, there would still be plenty of blasting for the new manor house, which would still be in the 100' setback. There is no reason, except for a person's individual preference, that the uses that are required couldn't be placed in an area that doesn't require a variance. It would be very easy to place the new manor house on the island where the proposed riding stables were going to be and have everything else go in that area as well. Attorney Woodman did not believe this proposal meets the legal requirements.

Peter Vandermark, of 86 Ridges Court, stated that he looked forward to having Michael Clark as a neighbor but he is concerned about the environmental impact of having horses on the island. He also feels that the law is the law and we should keep it that way.

Charlotte Fardelmann, of Little Harbor Road, felt that the environmental laws should be followed. If the City grants a variance in this case, how can they keep from doing it in other cases?

#### **DECISION OF THE BOARD (Special Exception):**

Mr. Jousse made a motion to grant the Special Exception. Mr. Rogers seconded. Mr. Jousse did not see where having up to 5 horses on the island would be a hazard to the public as they were going to be fenced in. They would not be seen or heard from adjacent properties and no offensive odor would be detected by the adjacent property owners. There would not be any traffic hazard, no demand on public services except for water. There is nothing that would warrant the Board to deny the request.

Mr. Rogers agreed with Mr. Jousse and also did not feel that there was any hazard to the public or adjacent properties from fire, explosion, toxic waste. The Animal Control Officer has given her blessing on the care and well-being of the horses and how they will be taken care of. They would not have to worry about any demand on the schools or police department. The island is well secured so there would not be any diminution of neighboring properties.

Vice Chairman Horrigan was in favor of keeping horses on the island and did not have any concerns about their care. However, he was concerned about the arena being used to host horse events, etc. Because Little Harbor Road and the bridge going onto the island are narrow they would want to be a little cautious about opening the door to events that might bring in 100 people and horse trailers.

A discussion followed about the possibility of adding a stipulation that no commercial events be held on the property, although events could get around that by being held by a non-profit club. It was decided that a stipulation was not necessary however their concerns were preserved on the record.

Mr. Witham indicated that he would not be supporting the motion. He did not believe that they had enough information to make a proper vote. They are going by what the Animal Control Officer has submitted and a lot of her report is based on a conversation with Mr. Clark and what Mr. Clark said he will do.

Mr. Rogers felt that the owner of the horses would take care of his horses and he believes that Mr. Clark would take proper care of them.

The motion to grant the Special Exception passed with a 6 – 1 vote, with Mr. Witham voting in the negative.

#### **DECISION OF THE BOARD (Variance):**

Mr. Marchewka asked Ms. Tillman if they normally see these petitions before or after the Conservation Commission as it seems like they have seen other petitions after the Conservation Commission. Ms. Tillman indicated that this application will require a State permit and the Conservation Commission will make a finding to the State and that is the extent that the Conservation Commission will be involved. Local approval is not required by the Conservation Commission but rather it is a State permit from the State Wetland Bureau.

Mr. Rogers made a motion to grant the variance as presented and advertised. Mr. Marchewka seconded. Mr. Rogers felt that people are over complicating the situation. He indicated that two buildings are being torn down and rebuilt at the same location. The Manor house is the only building that they are actually replacing in a different location. Mr. Rogers felt that this was in the public interest as they were encroaching less into the buffer zone. The Board was not saying that they could build on virgin property but rather they could rebuild what's already there with a nicer building. All of the current buildings are in disrepair and need to be renovated. He would be allowed to rebuild the ones that are there but he is not going to. In the public interest, he is eliminating some of the encroachment into the buffer zone. The horse barn is not in the buffer zone. He is cleaning up the property and making it better looking. The Fire Department sent a memo concerning the water line and the bridge but Mr. Rogers did not feel that was relevant. Special conditions exist with this property as it is a very long island. He could find another place in the center to locate his house but Mr. Rogers did not know what the problems might be to move the other two buildings back that he is planning to put on existing footprints. He is removing a gas pump and gas tank which could create toxic problems with the soil and with leakage into the water supply. Mr. Rogers felt that the zoning restrictions as applied to this property do interfere with his use of the property. Mr. Rogers did not feel that there was any diminution of property values to surrounding properties. Substantial justice will be served to allow him to make use of his property while at the same time improving the buffer zone.



Mr. Marchewka agreed with a lot of what Mr. Rogers said and, in response to some comments from the public, they are the Board of Adjustment and they are here to adjust the rules. Mr. Marchewka felt that they needed to look at the plan and make a determination of whether this plan was better for this site and for the city as a whole than a plan which forces the owner to abide strictly by the zoning rules. The Board members are not experts on wetlands or engineers but it appears that the potential exists for a better situation by executing this plan than by forcing the owner to abide by the 100' setback throughout the island. Clearly this is a better plan than what is existing. He can locate or relocate buildings within the buffer which would entail ripping out existing foundation or possibly leaving them. He felt this would just be creating or destroying more green space. Mr. Marchewka thought the plan was a good one, although not perfect, and probably better than what is existing, what could be built there or what has been planned in the past. He does not believe it would be a detriment to the area and the wetlands. There will be more green space to catch runoff and rainfall. He felt this was better than forcing the owner to relocate the existing foundations within the buffer zone.

Mr. Jousse indicated that he would not be supporting the motion. He could agree with the location of the barn as he is reusing the existing foundation and making use of the foundation of the schoolhouse. The old manor house is going to be torn down, the new one is going to replace it, mostly within the buffer zone in a virgin area. There is ample room to place the manor house outside of the buffer zone. As the other two buildings are already there, he would go along with those. It appears to be common sense to use the same foundations for new buildings. But the main house is going to be on a brand new foundation and that could be relocated within the area that is permitted and not within the 100' buffer zone. The applicant has not demonstrated a hardship.

Mr. Witham fully agreed with Mr. Jousse's comments. Reusing the foundations of the two buildings that exist makes a great deal of sense. Mr. Witham visited the site and the buildings are in rough condition and they need to be rebuilt. He has concerns about relocating the manor house. They were told that this location was so that they wouldn't have to blast ledge on the whole island. He did not believe they would have to blast for this area. Mr. Witham felt this location was selected merely because it offered the best view and for no other reason. The owner bought this property inherent of the grandfathered conditions of the buildings within the setbacks. Mr. Witham felt the manor house is an important part of Portsmouth historic culture and to come in with a bulldozer and level everything and then argue that they are going to re-use the footprints is asking for a lot. Mr. Witham used as an example a house on Shapleigh Island that met all of the requirements but had to appear before this Board because ¼ of their porch was in the 100' buffer zone and the Board denied that request. Now they are presented with a whole house. He doesn't have an issue with them using the existing footprints but he felt the manor house was an important structure and if he is going to tear it down he has to go by the rules. He doesn't see a hardship with the manor house as there is plenty of buildable area. The variance meets several of the criteria but it does not meet all of the criteria.

Vice-Chairman Horrigan is a firm believer in the 100' buffer requirement but they are not challenging the 100' buffer requirement but instead are saying that there are circumstances on the property where the 100' buffer requirement creates a hardship. He doesn't see this petition the same as previous ones with regard to the buffer zone. Also, there is the 100' buffer requirement in the Zoning Ordinance and they are the Board of Adjustment and are obliged to make a judgment. Vice-Chairman Horrigan had visited the site and it was his feeling that there was some hardship. The zoning restriction as applied to the specific property interferes with the owners reasonable use of the property. He felt the 100' buffer zone leaves them with an incredibly narrow strip of land in which they can erect a house and other structures. They have very little space to erect a house on this particular piece of land. That takes him to the second criteria of whether any fair and substantial relationship exists between the general

purpose of the Zoning Ordinance and the specific restriction on the property. This is where they get to the wetlands issue. The 100' buffer zone is to protect the surrounding shorelines and watersheds. This island is essentially a lawn with fairly steep slopes. They are not looking at a salt marsh or a beach. It has a stone retaining wall and it is essentially meadows. The one issue that is involved relative to the 100' buffer zone is protecting surrounding environments. The petitioner has shown a lot of sensitivity to that problem. They have designed the house with gravel infiltration areas for that very reason, to allow for a gradual infiltration of water into the surrounding meadow. He does not see a violation of the 100' buffer zone on the other side of the island so they are essentially talking about the southwest side of the island. Vice-Chairman Horrigan did not see a fair and substantial relationship and it seems to him that they are exercising all due regard for any possible problem they might have. They are also removing a very substantial and derelict building which sits right on the shoreline. They are reducing the square footage of the roof surface which means there are less water runoff problems after they have developed the new house, garage and swimming pool. Vice Chairman Horrigan see the environmental impact as much more benign than what exists there currently and he doesn't see the necessary demand for the 100' buffer on that side of the island. He feels they do pass the hardship requirements and it is a reasonable use. He also felt that the existing buildings are in very bad shape and just plain ugly so this would enhance the values of surrounding properties.

Mr. Witham stated that he was struggling with the idea that it's better than what is existing. By going in with a bulldozer and taking everything down, as far as he is concerned, is a clean slate. The argument that its better than what's existing is weak. The other idea that it is a unique setting is understandable but they have up to six acres of buildable area. He does not see any effort being made to get the manor house out of the buffer zone.

Vice Chairman Horrigan responded that there is an existing driveway and there is some public interest in not ripping the whole driveway up and putting in a whole new set of roads. Also, what they are planning preserves all of the mature trees on that part of the island which is no small matter. There are some other variables involved other than just moving the house around on the map.

Mr. Rogers responded to Mr. Witham's statement about starting with a clean slate and that this is under the assumption that they are not going to be using the other buildings. If this plan is not approved, they could take the buildings that are there and rebuild them and use them. Ms. Tillman indicated that they would still need a variance. Mr. Rogers stated that the buildings would be existing and they wouldn't have to rebuild them. The caretaker's house also seems to be part of the new site for their manor house so this is not totally undisturbed property.

Chairman Le Blanc stated that he could not support the motion. He felt there was room on the island where the buildings could be located and it all comes down to the fact that they are going to raize what is there. When you do that you are starting from square one and the current Zoning Ordinance and criteria come into play. They can site the building somewhere on the property outside of the 100' buffer so that the 100' buffer remains in tact.

Mr. Marchewka felt that it was important to keep the impervious surface to protect the wetlands and he felt this plan is very minimal when looking at the overall amount of land area and wetlands. There is much less impact than what is there currently or what could potentially be there. He felt overall this was a good plan and he supported it.

The motion to grant failed on a 3-4 vote, so it was denied, with Mr Jousse, Mr.Holloway, Mr. Witham and Chairman Le Blanc voting in the negative.

4) Petition of **Robert A. Ricci Sr. Rev. Trust, owner, Portsmouth Music and Arts Center, applicant**, for property located at **75 Albany Street** wherein a Variance from Article II, Section 10-207 is requested to allow the building and associated parking lot to be used for music and arts education in a district where such used is not allowed. Said property is shown on Assessor Plan 156 as Lot 26 and lies within the Mixed Residential Business district. Case # 9-4

Mr. Marchewka stepped down from this hearing.

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

Attorney Jack McGee spoke on behalf of Portsmouth Music and Arts Center as well as Robert Ricci Sr. & Jr. This is a new charitable organization whose purpose is to promote the arts and cultural events. The purpose and design of the center is to encourage the arts, particularly music, and to develop all aspects for the potential to promote cultural affairs. This particular property has proven to be the best available location for this purpose. They were seeking a use variance as the property is situate in a mixed residential area. Attorney McGee felt that they met the five criteria for a variance. The purpose of this type of district is to mix a difficult area where there are residences and there are businesses. Cass Street is a residential area for the most part and Albany Street, where this is located, is business. The idea is to meld and compliment. There are very few uses that could use this particular building and the Planning Department Memo also makes that point.

The first criteria for a variance is whether it could be contrary to the public interest. Certainly, the City has made it known that it wants organizations like this and encourages them and having a center such as this near a residential district would be in the public interest. The next criteria addresses hardship in a three part test. The first test is whether or not the owner has an opportunity to make reasonable use of his property. Given the nature of the property as it exists, Mr. Ricci does not have a reasonable opportunity because it is very limited as to what he can do with permitted uses. The second hardship test is whether or not there is a fair and substantial relationship between what is not allowed and what is being sought by the variance. Looking at the permitted uses themselves, it is interesting to note that there are a couple of uses that would be permitted by Special Exception such as a non-profit club where people could be brought together for entertainment type purposes. More appropriately, you could have a public, religious, sectarian, and private non-profit school as a Special Exception, which is something very close to the use they are seeking. Given those two examples and given the area that they are dealing with, they would content that there is a substantial relationship between this facility and what the ordinance would contemplate. Attorney McGee indicated that he felt that if the drafters of the ordinance had thought of this type of facility when they were drafting the ordinance, it would have been included as a use or at the very least as a Special Exception. The third hardship test is whether or not the use would hurt the public or private. This particular use not only doesn't do any harm but would be a positive influence on the neighborhood. This use would be preferable to a business use such as a plumbing shop or an all night grocery that had a potential for loitering. This type of facility would actually encourage the residents of Portsmouth to come to this area up until 9:00 pm so that they can promote cultural activities and bring a welcomed influence to the neighborhood. Attorney McGee suggested that the Cass Street neighborhood is very familiar with the procedure to object to a particular use in their neighborhood. No Cass Street residents were present to oppose this use and that's important and speaks very loudly.

Attorney McGee addressed whether or not this was in the spirit of the ordinance. For all of the reasons previously stated, this is the type of use that he believes the drafters of the ordinance would welcome in this district. Substantial justice was also covered with previously stated reasons. This is a use which is going to glue, helping to meld the two areas together between residential and business. Granting the variance will not diminish the values of surrounding properties. When there is a serious issue of property devaluation, people tend to speak out. No one has objected to this use at all. This is taking a very difficult piece of property to occupy and putting in a use that will be a betterment to the community, the land owner and the occupants.

Attorney McGee added that this is a concrete building and is well insulated and there would not be any noise that would effect the neighborhood. Music lessons would end by 9:00 pm. The Planning Department indicated that there are no parking variances needed.

Mr. Jousse asked about the use of the kitchen. Mr. Grazier indicated that the kitchen was very small and included a refrigerator and a sink and had been used in the past for a break room. It will be used for instructors to take a break and eat lunch. No cooking will be done.

Vice-Chairman Horrigan asked what type of musical instruments will be taught. Mr. Grazier indicated that they have left that open at this point. Primarily they will be limited to guitar, acoustic guitar, piano and string instruments. No amplified music.

Chairman Le Blanc asked if there would be recitals at the location. Mr. Grazier indicated that their recitals would be appropriate for that space. For example, if they have a student violin class of young children, they would have immediate family attending and they would set up chairs. If they had a larger group they would seek more appropriate space for larger concerts.

Chairman Le Blanc asked about their hours of operation? Mr. Grazier indicated they would begin no earlier than 9:00 a.m. and those morning classes would involve pre-schoolers. The primary staff would be operating between 2:00 pm to 8:00 pm, where after school lessons are the bulk of the one-on-one instruction.

David Choate, of Grubb & Ellis, indicated that they had been working with this group for many months trying to find a location that is appropriate. The problem they have with any performing arts group is the adjoining uses. They have to have a location in a building that is pretty much free-standing or a location that has uses that are complimentary to either side. This particular building does not have others in the same building that will be effected by any noise. A traditional office may have a problem being in the same building. Mr. Choate indicated that it is extremely difficult to find space for this type of organization. This area of Portsmouth is becoming more of a destination point for the performing arts. He urged the Board to vote for this variance.

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

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Parrott seconded. Mr. Rogers did not believe this variance was contrary to the public interest whatsoever as it was a very unique location that had special conditions that disallows the use for many things. The restrictions that are applied to this property do interfere with the property owners use of it. They are not looking at setback regulations or parking, but rather are simply looking at usage. He felt the use is appropriate as this area is very commercialized and not located adjacent to any residential property that would be effected by any potential noise. There is no fair and substantial relationship between the Zoning

Ordinance and the specific restrictions on this property. This is one of the only uses that the property can be used for. It is a well thought out use. It's been difficult for someone to use this property so the property owner has a hardship. This usage is well within the Board's perview to grant the variance and he does not believe it is against the spirit of the ordinance. He feels that substantial justice will be done by allowing them to use this property for this purpose. He felt it would make the area more attractive in value by using this property rather than having it sit vacant or use it for other less appropriate purposes.

Mr. Parrott added that the requested variance is very much consistent with the spirit of the ordinance which is to encourage various kinds of the arts in the City of Portsmouth. The hours of operation are very reasonable and it is unlikely that they will have any adverse effects on the neighborhood. It is a very good fit to the building and it is a peculiarity of Zoning Ordinance that it isn't allowed as a matter of right.

Vice Chairman Horrigan indicated that the Board had previously granted a Special Exception for a group day care facility or after school program for middle school children and it worked very well. What is being proposed is very similar to that operation so they already have experience showing that this is a good use for this particular location.

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

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5) Petition of **Lisa Hecker, owner**, for property located at **3 Marjorie Street** wherein a Variance from Article III, Section 10-302(A) is requested to allow 14' x 20'9" two story addition with a 27' front yard where 30' is the minimum required. Said property is shown on Assessor Plan 232 as Lot 30 and lies within the Single Residence B district. Case # 9-5

SPEAKING IN FAVOR OF THE PETITION:

Matt Turner addressed the Board and clarified that he and Lisa Hecker recently married so it is now Mr. & Mrs. Turner. They believed their request for a variance was very much in the spirit of the ordinance. They hope to move their addition 3' within the setback of 30' from the front of the property. The reason for this is because of the old structure of the house, the only access they have to the upstairs addition would be the top of their stairs. They would have to redo the only existing bathroom in the house to make an entryway into the upstairs or they could move the addition 3' closer to the front which would give them access.

Mr. Turner went through the analysis for variances. They believe they are in the spirit of the ordinance, it is not contrary to the public interest. It will not diminish the value of surrounding properties.

DECISION OF THE BOARD:

Vice Chairman Horrigan made a motion to grant the petition as presented and advertised. Mr. Rogers seconded. Vice-Chairman Horrigan did not believe this was contrary to the public interest because the addition to the house improves their enjoyment of the property. The only issue is whether or not the addition should be allowed to intrude on the front yard requirement and the have presented a reasonable rational for why it would be difficult and more costly for them to move it back to the 30'

requirement. He also pointed out that the house is currently about 8 ½' from the road front so it's a situation where just about any type of addition is going to run into a front setback problem. This strikes him as the hardship. By insisting on a strict adherence to a front yard setback they would deny them a reasonable use of the property. It is quite reasonable to add this addition. As far as the general purpose of the zoning ordinance and the specific restriction, the current front yard setback is there for traffic and safety reasons and certain aesthetic issues, but this house is really no different than other houses on the street. Marjorie Street is essentially a deadend street that runs off of Meadow Road and it's not likely to be expanded into a four-lane highway. Therefore, he did not see where the front yard setback should prevent them from adding additions to the house. No public or private interests would be effected as they are not intruding on the dimensional relationships to the abutting property. Substantial justice is done by granting the variance as it allows them to increase their enjoyment of the property and granting the variance would not decrease the values of surrounding properties. Given the plans that have been presented, it would strike Vice-Chairman Horrigan that this addition would make this house more valuable and undoubtedly increase the value of surrounding properties as well.

Mr. Rogers agreed with Vice-Chairman Horrigan. Mr. Rogers thought they had presented a good case as the existing house is non-conforming and the addition would be very difficult to set back an additional 3' in order to make it conforming due to the way the house is set up. It is not intruding any further than the house is now and it will not cause any loss of value to the neighbors houses. It meets all of the criteria.

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

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6) The Portsmouth Board of Adjustment, acting pursuant to NH RSA 12-G:13 and Chapter 300 of the Pease Development Authority Zoning Requirements, will review and make a recommendation to the Board of Directors of the Pease Development Authority regarding the following: Petition of **Pioneer Aviation, LLC, owner, TF Moran Inc., applicant**, for property located at **125 Aviation Avenue** wherein a Variance from the Pease Development Authority Zoning Ordinance Part 303.04 is requested to allow 2,000 sf of existing business office space to be used for an engineering office in a district where such use is not allowed. Said property is shown on Assessor Plan 311 as Lot 4 and lies within the Industrial district. Case # 9-6

Mr. Marchewka stepped down for this hearing.

Bob Duval, Chief Engineer for T. F. Moran, a civil engineering firm, addressed the Board. They were seeking a use variance. This zone permits business offices but does not permit professional offices. Being a consulting engineering firm they fall in the definition of a professional office. Others that fall into that category are doctors, lawyers, architects. Mr. Moran indicated that a consulting engineering firm really operates as a business office as they don't have a stream of customers coming to their door. They rarely have visitors. Occasionally one or two clients will come and meet with them. For the most part, the employees sit in their office and do their work.

Mr. Moran felt is was entirely consistent with the spirit of the ordinance being that a business office is permitted and their office as a consulting engineering firm was fundamentally equivalent. There would be no diminution in values because all business would be conducted in their office. Substantial justice would be done by following through with the variance. It is a reasonable use of the property that is consistent with the spirit of the ordinance. Similar variances have been granted by this Board in this area. The proposal is not really a use variance as their functionality is the same as permitted uses.

Mike Mumoso, an engineer from T.F. Moran was present as well as Rob Miller, of Shaheen & Phiney, who was representing the landlord Also Maria Stowell was present from PDA.

Vice Chairman Horrigan asked what type of clients consult with them? Mr. Duval indicated that generally their clients are businesses, mostly architects. Most of their contact with their clients is on the phone. There is very little face to face contact.

Vice-Chairman Horrigan asked if they spent a lot of time out on sites? Mr. Duval indicated that virtually all of the business is done at their desks and at their computer screens. Their work is civil and structural engineering.

Chairman Leblanc asked if there would be any testing of materials? Mr. Duval confirmed that they would not.

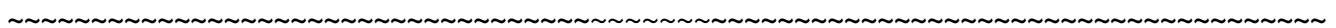
**DECISION OF THE BOARD:**

Mr. Rogers made a motion to recommend the approval of the petition by the Pease Development Authority as presented and advertised. Mr. Witham seconded. Mr. Rogers indicated that, regardless of the fact that this is in the regulations, he has always had a problem with the differentiation between professional and business offices. Professional offices seem to be that if you have a degree of 2 or more years then you are a professional, but if it's only a year you are a business. They are so similar that this is not contrary to the public interest to recommend the approval of this variance. There is a hardship in that this business is very similar to a business as opposed to a professional office. The Board has had this problem before. Mr. Rogers doesn't believe the parking would be any different from a business office and there would be no hardship to the surrounding area which is all commercial property. There is not a fair and substantial relationship between the general purpose of the Zoning Ordinance and the specific restriction on the property. The variance will not injure anyone's public or private rights. Mr. Rogers felt that substantial justice would be given to grant the variance. This would allow the individuals to run their business in this particular location. He also felt it was in the spirit of the ordinance to allow this variance to occur.

Mr. Witham agreed with Mr. Rogers and added that this part of the zoning is to maintain zones in the city – industrial, residential, commercial – is to keep a mix. There are always these areas where there is a fine line. Mr. Witham felt that this was a good fit for this zone. The unnecessary hardship is that the applicants are over-educated.

Vice-Chairman Horrigan indicated that on previous petitions he has expressed concern over intruding into the industrial zone because he has a belief that once you lose an industrial site it is very difficult to get it back. It strikes him that this civil engineering and consulting firm is very harmonious with other industrial uses and current uses in this building. He does not see any problem at all in granting this variance.

The motion to recommend the approval of the petition to the Pease Development Authority passed unanimously with a 7-0 vote.



7) Petition of **Ocean National Bank, owner**, for property located at **325 State Street** wherein a Variance from Article III, Section 10-304(B) is requested to allow an 18' x 28.5' one story addition 15'8" in height with a 6'6" L-shaped canopy on two sides and a 30' x 34' drive-thru canopy in a district where all buildings and structures shall be at least 20' in height. 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 # 9-7

Ms. Tillman advised the Board that the variance request for an 18' x 28.5' one story addition was no longer required and the Board only need to address the second part of the request. That is because, when you average the height of the building for building height, the average of that building will be greater than 20'.

Mr. Marchewka stepped down from this hearing.

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

Attorney Bernard Pelech addressed the Board on behalf of Ocean National Bank. Also present were Daniel Bryant and Chris Bishop, from Ocean National Bank. The reason they were present was because the ordinance requires all structures in the Central Business District to be a minimum of 20' in height and their drive thru window is 15' 8" in height. They did not believe the height would in any way diminish the surrounding property values. All banks in the downtown area have either walk-in ATM's or drive thru teller windows. It is an accessory to most bank uses. They are proposing what many banks have which is a 15'8" high canopy over the proposed drive thru teller windows. The site is a 31,000 s.f. lot, located in the Central Business District. The Zoning Ordinance interferes with the reasonable use of the property. To require the bank to put up a two story structure, 20' high, would serve no purpose. Attorney Pelech did not believe it was the intent of the ordinance to require all structures to be 2 stories high but rather to deal with the primary structure on the lot. The 15'8" canopy would be totally appropriate with the existing streetscape in today's society. There is a fair and substantial relationship between the intent of the ordinance as it applies to this particular proposal. The third part of the hardship has to do with the public or private rights of others and Attorney Pelech indicated that there were none in this case. Whether or not substantial justice will be done depends upon the weighing of the hardship on the owner if the variance were denied versus some perceived benefit to the public. Attorney Pelech did not see any benefit to the general public in denying the requested variance and experience has shown that drive-thru windows are in the public interest. based upon the utilization of these particular structures in other competitor sites. The fourth criteria is whether or not this is contrary to the spirit and intent of the ordinance and although the ordinance states that the structure must be 20' in height, the intent was not that all portions of all structures must be 20'. The overall intent was to require the predominant or primate structures on lots in the Central District to be 2 stories high and consistent with the urban streetscape. A situation such as this, with a large lot, is not going to be inconsistent. The final criteria is whether there would be a benefit to the general public in denying the variance and Attorney Pelech did not think that there would be any benefit to the general public in denying the variance but rather was consistent with the public interest. It is a needed resource and a needed facility for the general public. Attorney Pelech felt their request met the five criteria and would ask that the Board grant the variance.

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

Mr. Rogers made a motion to grant the petition as presented and advertised. Mr. Parrott seconded. Mr. Rogers felt that the request met all of the criteria. It is not contrary to the public interest as it is in



the middle of a parking lot and the standard for most drive-thrus are not 20'. It would look quite odd for it to be 20' in height. Special conditions do exist with this property that allow the Board to grant the variance because the literal enforcement of the ordinance would result in a very unnecessary hardship to the owner and create something that looked strange. The restrictions as applied to this particular property do interfere with their use of the property. There would be no injury to the public or private individuals as it's in the middle of a parking lot. It will not cause any diminution in value of surrounding properties and will look much more appropriate at the lower height. Substantial justice will be done in granting the petition. He feels it is consistent with the spirit of the ordinance to allow them to make this canopy lower in height than the ordinance requires.

Mr. Parrott agreed with Mr. Rogers and had nothing to add.

Vice-Chairman Horrigan, speaking as a pedestrian, doesn't buy the argument that it's in the public interest to add one more drive thru/teller set up with another curbcut on Porter Street. He understands that is not what they are voting on and are only voting on the height issue and the minimum of a 20' height was almost absurd so he agreed that it makes no sense to insist on literal enforcement of the ordinance.

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

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IV. ADJOURNMENT

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

Respectfully submitted,

Jane M. Shouse
Secretary

/jms