

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

7:00 P.M.

CITY COUNCIL CHAMBERS

February 17, 2004

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

MEMBERS EXCUSED: Chris Rogers (resignation effective February 17, 2004)

ALSO PRESENT: Lucy Tillman, Planner

I. APPROVAL OF MINUTES

Reconvened Meeting of November 25, 2003. The minutes were approved as presented.

II. OLD BUSINESS

A) Petition of **Public Service Company of New Hampshire, owner**, for property located at **400 Gosling Road** wherein Variances from Article III, Section 10-305(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow the following a) a wood fired boiler, air emission control device and ductwork not to exceed 125' in height, b) a stack not to exceed 350' in height, c) a wood conveyor not to exceed 100' in height constructed over the existing coal conveyor, extending from Lot 1 over the railroad parcel to Lot 2A; and, d) a wood fired boiler, ductwork, stack, wood conveyor and fireside wash recycle basin located within the required side yards. All construction being in a district where the maximum height is 45' and the minimum required side yards are 50'. Said property is shown on Assessor Plan 214 as Lots 1 & 2 and lie within the Waterfront Industrial district. Case # 12-4

On motion made and seconded, it was unanimously voted to table this petition until March 30, 2004.

III. PUBLIC HEARINGS

1) Petition of **Richard P. Fecteau, owner**, for property located at **120 Spaulding Turnpike** wherein a Variance from Article IX, Section 10-908 Table 14 was requested to allow: a) a 155.25 SF free-standing sign 37.5' in height where a 150 SF of free-standing signage is the maximum allowed and the maximum height is 20', b) four 13 SF directional signs totaling 52 SF where 1.5 SF per sign is allowed; and, c) an aggregate of 350.79 SF of signage where 200 SF is the maximum aggregate allowed. Said property is shown on Assessor Plan 236 as Lot 33 and lies within the General Business district. Case # 11-2

SPEAKING IN FAVOR OF THE PETITION

Mr. Peter Loughlin, representing Richard Fecteau, owner, addressed the Board. Mr. Loughlin said that Mr. Fecteau was also present tonight, and he thanked the Board for granting the motion for a re-hearing. He said there had been a great deal of confusion at the last meeting. It was not caused by the Board but by the petitioner and by the sign company. He said he hoped to clarify the application and come to a better result.

He said the property was a 9-acre lot with almost 500 feet of frontage on the Spaulding Turnpike. An automobile dealership had been at that location since the 1970's. There was various attached signage on the garage, and there were two fully permitted signs. The height requirement of 20 feet was out of a 1995 zoning change. When the garage started, a 30' high signage was allowed. There are two signs there. One is a free-standing sign approximately 30 feet in height, and it is approximately 100 square feet. When that permit was applied for, attached to it was a breakdown of the signs that Nissan had available at that time. One was a 100-square-foot sign, which went up, and one was a 60-square-foot sign, which also went up. So there was a total of 160 square feet, slightly more than what the application was for. He did not know who filled out the application. The two signs had been there for quite some time and were fully permitted.

When the sign company was there on behalf of Mr. Fecteau and Nissan in December, they asked for a variance to increase the aggregate on all the signage at the site. They asked for a variance on the directional signs. They asked for a variance for the size of free-standing signage. The ordinance allows 150 square feet, and they were asking for 155 square feet. They asked for a variance of 37½ square-foot sign where 20 feet is required. That is what was advertised for tonight's meeting, and that is what the original hearing was.

Mr. Loughlin told the Board they could disregard much of what that legal ad before them requested. He said tonight they were not requesting any aggregate increase in the amount of signage. They were happy to live with the amount they had as a result of prior approvals. They were not asking for any relief in terms of directional signage. They were not requesting any relief in terms of the square footage of the free-standing sign. 150 square feet of signage is permitted, and they are seeking to erect a 100-square-foot sign, which is one third smaller than the application that was before the Board.

The only variance relief they are seeking is approval to put the new sign up at the same height as the existing sign. That is the same height that has been there for three decades. The only difference is the new sign is more attractive. It will be square as opposed to rectangular. It will be less signage closer to the 30-foot height as opposed to the sign that is there. Most of the signage is all above 26 feet. In short, they are seeking approval to remove two permitted signs. They would not put one of them back up, and they would replace the 30-foot, 100-square-foot sign with a new 30-foot, 100-square-foot sign.

Mr. Loughlin said he thought the sign was vested and they could just put it up, but the building inspector did not see it the same way. Therefore, Mr. Loughlin said they came back to the Board. He said he thought all the conditions for the granting of the variance were satisfied.

He did not see any diminution in value. The property is out on the Spaulding Turnpike in a business zone. The sign is being upgraded. Granting of the variance will not be against the public interest. In fact, it will eliminate one non-conforming sign and put up another sign that is for better identification of the business. This dealership is not just competing with other Nissan dealerships but with every other auto dealership. Denial of the variance would result in unnecessary hardship. Under the Bacon v. Enfield test, this property definitely qualified. The property is unique. There are two signs there now that can stay forever. The area where the sign is located is down below the road. It is shielded somewhat by trees. It is on a highway where cars move at fast pace. This sign is one of the few signs that is not on the property line. The Mazda sign is on the property line and is

the same size as the one that they are seeking approval for tonight. It is a reasonable use and is the same use that has been there for 30 years. The sign they seek to put up is away from the highway, back from the property line, and very modest in size. There were no private or public rights affected. Granting the variance will not violate the spirit of the ordinance.

Mr. Bernie Pelech of 175 Thaxter Road addressed the Board. He wondered what the aggregate signage on the site was going to be. It was advertised as 350.79 square feet, and Mr. Loughlin indicated it was going to stay the same. Mr. Loughlin said it would be reduced to 263 square feet as a result of a variance granted in 1992. He said the request for the 350.79 square feet had been withdrawn.

Mr. Pelech said the Board would be doing a great disservice to these businesses, which were zoned in a general business district set back from the highway and have existing signage, if they do not grant reasonable variances such as this to allow these businesses to remain competitive. He said what is being asked is not excessive. He said the way the ordinance is written, Home Depot is allowed 500 square feet of signage, and Walmart is allowed 500 square feet of signage. These happen to be smaller car dealerships, they need signage, and it is very important to them. He said the variance should be granted.

SPEAKING IN OPPOSITION

Jeanette MacDonald of Farm Lane addressed the Board. She said Farm Lane came right up next to the Nissan garage. She said there are zoning laws for a reason. The property would have a 30-foot sign but that precedent was set way back then. New zoning laws set height at 20 feet. The aggregate size is also over. The dealership has existed for over 30 years. Everyone knows it is there. When someone drives by, it can be seen on 9 acres. If the Board approves this variance, it would be setting a precedent like back in 1992. She said she thought the current zoning law should be observed. The next time they come back and want to expand or make a bigger sign, the Board can look back and see that it stuck with the zoning laws.

Tammy Traux of Farm Lane addressed the Board. She said she bought her property there a few months ago and paid an enormous amount of money. She said her expectation as a property owner is that the zoning ordinances would be enforced the way they are written and any non-conforming standards would be corrected by this Board.

Mr. Witham asked Ms. Traux if the new sign would adversely affect her more than what already existed. She said it would if it were out of conformance with the ordinances that she trusted to be reasonable as they stood now.

The public hearing was closed.

DECISION OF THE BOARD

Mr. Parrott asked Chairman LeBlanc to clarify what the Board was voting on. Chairman LeBlanc said that items a, b, and c were all gone. The issue was a 100-square-foot freestanding sign 30 feet in height.

Mr. Parrott said the Board was correct to grant the re-hearing. However, he had not changed his mind from the previous action. He moved that the petition as presented be denied. Mr. Holloway seconded the motion.

Mr. Parrott said his concern was that in any developed area one of the first things that people notice is the signage. Signs are a very important aspect of the overall appearance as presented with respect to the community. He said in this particular case, there is not much to compete with the eye. He said he thought that was the first business to be seen as cars pass through the 35 mph zone. It is not

a secret that the business is there. It has prospered for 30 years. He did not know of any other Nissan dealers close by. He thought most of the traffic going there was a destination type. They were interested in changing the signage fully aware that the ordinances have been changed since the original sign was put there. They were entitled to leave their existing sign there as is. It seemed to him that if the variance is granted, it will be very difficult to deny the next applicant's sign which may be in an even less desirable position with regard to adjacent properties.

Mr. Holloway said he only seconded the motion for discussion.

Chairman LeBlanc said he could not support the motion. What was presented was a reasonable accommodation to the ordinance. They were removing one of the signs that is on the highway. The proposed sign is less obtrusive than the one that is there. It does not stick out as far. The aggregate sign is staying just as is. Chairman LeBlanc said he felt it was a positive move toward a more conforming presentation of this dealership.

Mr. Witham said he would not support the motion. He said he agreed with Chairman LeBlanc. He said it is a unique property in that it is one of the small percentages of businesses that relies on a highway for its visual impact and its size to be seen. He felt the size of the sign was appropriate for its location. He understood the neighbors' concern, but he saw a reduction in signage, a smaller sign, and one less sign. He felt the impact on the neighborhood would be lessened. By looking at the Mazda sign, he felt it would replicate that. He did not feel the Mazda sign overwhelmed the area, and the Nissan sign would set back even further on the site. Considering the large size of the lot and the proximity to a major roadway, the signage fit.

Mr. Jousse said he would not support the motion. As Mr. Witham mentioned, the primary access to this particular business is from the highway. The sign would be lower than the present one. In reviewing the photo, he said the sign would actually be hidden by the trees more than the present one, although someone travelling 35 mph, which is the speed limit, should be able to see the dealership without problem. The sign is 10 feet higher than what the zoning requires, but the location of the property and business warrants a sign of that height.

As a result of such consideration, the motion to deny failed by a vote of 1-6 with Mr. Parrott voting in the affirmative.

Mr. Witham made a motion to grant the petition as presented and advertised. Mr. Horrigan seconded the motion and said he wished to add a stipulation. Mr. Horrigan said he wished to stipulate that no temporary signage be attached to the base of the sign or pylons. Mr. Witham was agreeable.

Mr. Witham addressed criteria. The variance would not be contrary to the public interest. In fact, the change in signage allowed by the variance would move the property toward more conformity than currently existed. This variance would allow the owner reasonable use of the property because it is a unique setting considering its proximity to a highway, the size of the lot, the existing signs on that property, and the fact there is another dealership just two blocks away. He said what is on the proper now has not been a problem, and he felt that having less would not be a problem. He could not see it injuring the public or private rights of others. Some of the abutters spoke against it, but by allowing this variance, there will one less sign. It is reasonable to allow a dealership to stay with the times. He said he was sure Nissan required all their dealerships to move toward this type of sign. He did not think it made sense to have them stay with an outdated sign just because the Board did not think the height worked in that area. He did not see any diminution of property values by surrounding properties when what is being allowed would have less impact than what currently existed.

Mr. Horrigan agreed with Mr. Witham. He commented on the property's uniqueness. The entrance feeds off the Portsmouth Traffic Circle off the Spaulding Turnpike. By the time the motorists get to

the area of the dealership, they are accelerating into higher speeds. The dealership does need some type of visibility to catch the attention of the motorists who are looking for this particular dealership. It would be unrealistic of the Board to prohibit the dealership for having a sign that distinguishes them from the other dealerships up the road. Not granting the variance would do more damage to the dealership than would be gained in benefits to the public at large.

Chairman LeBlanc said that one fact that he would like to point out was that the dealership had 484 feet of frontage on the turnpike, and 228 feet on Farm Lane. They were not proposing to put the sign on Farm Lane. They put it on the Spaulding where it would make a lot more sense. The density of signs would not be a problem because they have such a large footprint.

As a result of such consideration, it was voted 6-1 to grant the variance as advertised and presented with the stipulation that there be no temporary signage assigned to the pylon Mr. Parrott voted in the negative.

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2) Petition of **Brewster Street Properties, LLC, owner**, for property located at **98 Brewster Street** wherein a Variance from Article III, Section 10-303(A) was requested to allow a 22' x 34' three-story single-family dwelling with an attached 11.5' x 20' a garage including a second floor and attic space above with: a) a 2'± front yard where 5' is the minimum required, b) a 2'± left side yard where 10' is the minimum required; and, c) a 1.5'± x 6'± roof over the front steps with a 4'± front yard where 5' is the minimum required. Said property is shown on Assessor Plan 138 as Lot 56 and lies within the Mixed Residential Business district. Case # 2-1

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

Mr. Steven Bailey, manager of Brewster Properties. LLC, addressed the Board. He said the petition seeks to bring the property into less non-conformance than it has already been approved. The currently approved footprint allows the garage portion of the building to be built with 3" of the property line. They shifted the building away from the property line by about 2 feet and adjusted a couple of other dimensions on the main building to make it a bit more buildable. They made it 22 feet wide instead of 21 feet, and they stretched the building out a little bit and removed the second floor deck. Otherwise the basic dimensions and non-conformance of the property have not changed with the exception of the building away from the south property line.

Chairman LeBlanc asked why they moved the building back from the property line. Mr. Bailey said for constructability reasons and for property value reasons for this property and the abutting property.

Mr. Parrott inquired what was currently on the property. Mr. Bailey said it was currently vacant. Mr. Parrott asked if the water problems associated with that property and that area in general had been resolved. Mr. Bailey said he had spoken with one of the abutters, and she had not had any problems in her basement in the last 1½ year. Mr. Parrott asked Mr. Bailey if he was aware of the problem that existed with this property in which the City of Portsmouth had to condemn the property. Mr. Bailey said he was aware that there was a problem of high ground water or water running down the street. Mr. Bailey said he was not familiar with the previous house or what kind of foundation it had. Mr. Parrott strongly advised him that he become familiar with that history before he built there.

Mr. Horrigan said he was not present at the April 2003 hearing when a request was made to build the house. He had a question about the parking in the right of way. Mr. Bailey said they had no intention of parking in the right of way. He said they would put one vehicle in the garage. They were also considering putting a second garage door on the back of the garage so as to during snow emergencies they could get two vehicles off the street.

Mr. Marchewka asked if the only change was that he was further from the property line. He asked why a variance was needed. Ms. Tillman said they were adding a small roof over the front entry to keep water off the front step, and that was not on the previous plan. The dimensions of the building were slightly different.

The public hearing was closed.

**DECISION OF THE BOARD**

Mr. Horrigan said he thought it was in the public interest for this particular lot to be developed. In its current condition it is what he would describe as a “derelict” lot which sits at the end of a dead-end street which abuts the railroad. The lot itself is unique in that is small and has a right of way going through it to the northwest. Locating a reasonable size house on this lot is a problem because of the right of way, given the small size of the lot, and the need to allow for some off-street parking. It provides housing and cleans up a lot, which will improve the immediate neighborhood. What is proposed is reasonable, and it is more reasonable that what was granted in April 2003. It would be difficult to imagine any circumstances where anyone’s public or private rights would be injured. Putting up a new house on this lot will improve everyone’s property values.

Mr. Baily can build a house on that lot because the Board gave him approval to do so. The only difference between this request and the request that was already approved a year ago was that this house will be further from the east lot line. It is an improvement on what was approved. Mr. Marchewka said this can and should be granted.

As a result of such consideration, it was voted 6-1 to grant the petition as advertised and presented with Mr. Parrott voting in the negative.

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3) Petition of **James F. and Catherine Lamond, owners**, for property located at **84 Haven Road** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow the following: a) a 252 SF irregular shaped front porch and steps with a 7’± front yard where 30’ is the minimum required, b) a 7’ x 24’ one story addition to the left side of the existing dwelling with an 20.5’ front yard where 30’ is the minimum required; and, c) a 14.25’ x 24’ garage with living space on the second floor with an 8.8’ right side yard’ yard where 30’ is the minimum required. Said property is shown on Assessor Plan 206 as Lot 28 and lies within the Single Residence B district. Case # 2-3

SPEAKING IN FAVOR OF THE PETITION

Mr. Bernie Pelech, representing the Lamonds, addressed the Board. The Haven Road neighborhood is the result of a subdivision that occurred in the late 1940’s. When Haven Road was created there were 12 small lots ranging in size from 12,500 to 12,900 square feet. It is a beautiful, tree-lined street with very mature maple trees. There are sidewalks on both sides of the street. It is a typical 1950’s subdivision neighborhood and a wonderful place to live. When the homes were built, most were relatively small 1½ story capes. In today’s society it is a very small home, and the Lamonds have two young children.

There is a small, detached garage on the right of the property. That would be demolished. An attached garage with a room above would be constructed. That structure would be 8.8 feet from the property line where 10 feet is required.

The second part of the variance is the front porch. Right now there are front steps that are approximately 9 feet from the street right of way. What is proposed is a front porch that would move the steps out to approximately 7 feet from the street right of way where it is 9 feet now.

The third variance is the addition on the right-hand side of the building that would be some 20 feet away from Haven Road where 30 feet is required. It is 6 or 8 feet behind the face of the existing building, but it still requires a variance.

This sounds like a lot of relief that is requested, but it really is not. What you see on both sides of Haven Road, none of the properties comply with front and side yard setbacks. They all have some type of non-conformity. The average front yard along Haven Road is somewhere between 10 and 15 feet. What the applicants are asking for is not out of the ordinary. The side yard setback goes from a 5.5-foot to an 8-foot setback. The relief being requested is reasonable.

Turning to the 5 criteria, Mr. Pelech said he believed this request met the hardship test. The zoning ordinance interfered with the reasonable use of the property. This is a single-family residence. What is being proposed is an addition to the residence. A lot of the addition is porch and garage with some living space. It is a reasonable use of the property. Almost every home along Haven Road has been expanded, renovated, or had additions made to it over the years. Attached garages have been added, buildings have been bumped out in the rear, and 1-car garages have been made into 2-car garages. The neighborhood has grown, and the homes in the neighborhood have grown. Secondly, he did not believe there was a fair and substantial relationship given that it is not reflective at all. As the Court stated in the Simplex case, "municipalities must coordinate their zoning ordinances to reflect the current character of the neighborhoods."

There are no homes that comply with the 30-foot front yard setback, and there are no yards that comply with the 10-foot side yard setback. Mr. Pelech said the private and public rights of others were not being affected. Granting the variance would not diminish values of surrounding properties. It is a neighborhood that has been upgraded considerably over the years. This is one of the few homes that remain in its original 1949 condition. The detached garage that is there is 12 feet wide with an 8-foot garage door. It does not go with today's SUV's. A 12' by 8' garage is pretty non-functional.

What is being proposed by the architect is in keeping with the character of the neighborhood. It is not out of scale. Aesthetically it would be an improvement to the neighborhood. There would be no diminution of surrounding properties. The property would be upgraded to more fully comply with codes. Mr. Pelech read two letters from abutters, Brad and Christyn Lown and Nancy and John Anderson, which he submitted to the Board and asked that they be made part of the record.

Mr. Brad Lown, 45 Brackett Road, said he wished to speak in favor of the petition. He referred to the Simplex case and the unique setting of the property. The neighborhood is full of non-conforming structures, and many of those structures have been enlarged over the years. Including the house directly across from the Lamonds and the one across from him, which increased substantially in size. He did not think the ordinance required that a 1949 home be frozen in time.

He said he thought the ordinance contemplates upgrading these older structures to be more in conformance with today's standards. What is requested is very minimal. The Lamonds could not go back into the lot because they would lose their entire small yard and they could not build on low-lying area behind their house and Clough Drive. He said he and his wife thought it was a good thing for the neighborhood and was representative of what was happening in the city, where older homes are being upgraded modestly to conform with current standards. He said he was certain it would help property values.

SPEAKING IN OPPOSITION TO THE PETITION

Jean Treacy of 80 Haven Road, neighbor on the north side of Lamond property, addressed the Board. She said she had photographs taken mostly from the inside of her house looking out. She also made a 3-dimensional model using a copy of the Lamonds' architectural plans to try to see how it would look from her property. She shared these with the Board.

Paul Treacy, Jean Treacy's husband, also addressed the Board. He said he disagreed strongly with most of the points that Mr. Pelech made. In contrast to what Mr. Lown said, it is not a small back yard. Mr. Treacy said it was unfortunate the Lamonds proceeded with their renovation plans without input from the abutters before their final design was completed. In all their presentations to the neighbors, there was only one design. If they had conversed with them early on, they could have discussed the location of their shared property line and issues of mutual concern because there was a dispute over the property line, which had been cleared up. Mr. Treacy said since this was not done, their project has been delayed and they are now seeking two variances. He said they have had several lengthy discussions with the Lamonds about their concerns. He said they invited the Lamonds into their home to look out the windows and see for themselves how their renovation would affect their light and their air.

Mr. Treacy said the central issue appears to be the Lamonds' desire to keep the integrity of their original design. Mr. Treacy said he believed that design would very negatively affect his enjoyment of the neighborhood and his living space. He thought it would diminish the value of his property. He said he understood the renovation would increase their available living space by opening up the Lamonds' house to the south for sea breezes and for views. Unfortunately, this particular design would take those very elements away from him and his wife. Mr. Treacy said his wife worked at home, and daytime light and air flow are very important to her. He said as the photos clearly indicate, their southern exposure now gives them unlimited winter sun that comes in directly through their glass door and windows on three floors. It floods their interior with direct winter sunlight. His open floor plan allows the sunlight from the sky reflects off the snow and the ice to give the inside of his house a good light effect. The Lamonds' design would replace the direct and indirect sunlight with a large structure that will cut off not only the direct winter sun during November and December, but most of the ambient light from the sky would no longer be visible from any of their windows or their living room. In addition to losing light and having the air currents deflected, they would have to replace an airy, suburban water and woodland view from their southern windows with an up front, too close garage and bedroom addition that is large enough to almost completely fill the view from his windows, sun porch, and brick patio. The scale of the addition, its height, its length as well as its size and sloping roof without windows command attention set so close to so much of his living space. He said he knew it would significantly affect the enjoyment of his home both inside and out. After speaking to several real estate agents, he felt

confident saying a structure of that size and scale would significantly diminish his home's monetary value.

Mr. Treacy said when he built his garage, he was very careful to remain a full 10' setback from his neighbors. This 1940's neighborhood is made up of identical capes and garrisons with identical front setbacks from the road and with charm and coherence of design scale. To give a property owner two variances, one to build a large 2-story structure and the other to build a porch on the front which will increase their living space, is to set an unfortunate precedent in his opinion. Porches, an enlarged garage, and additional living space can all be accommodated within proper setbacks in this case. Several property owners on the street have made significant additions and renovations with a keen eye on keeping the look and feel of the street as unchanged as possible. He said he was not referring to the Andersons who had received variances from this Board. He said there were several other properties that stayed within their setbacks. The Lamonds have a large lot with many renovation possibilities available to them.

Mr. Treacy read a letter in opposition to the petition from George Nowak, 15 Haven Road, and it was submitted to the Board as a part of the record.

Chairman LeBlanc asked the Treacys how far their house was from the property line. Mrs. Treacy said she walked it off, and it looked like it was 16 feet.

Mr. Jousse asked if Mrs. Treacy realized that if the edge of the garage were moved 1'4" away from the property line, the Lamonds would not need a variance and would not be at the meeting tonight.

Mrs. Treacy said she agreed. However, she said she really suffered because she liked the Lamonds and did not want to be negative. She said she discussed this option with Mr. Lamond, but he chose not to do it. She said she was certain there was a structural reason why he did not do it. She said if he had made that change, she would not be happy, but at least she would not have any control over it if it were within the ordinance. She said she felt strongly about how it would negatively impact her property. She said she felt the addition was way out of scale for the neighborhood. She said it could have been put behind their house.

Donna Saunders of 65 Brackett Road addressed the Board. She said she opposed the granting of any Variance at 84 Haven Road. She said the owners have the ability to increase the size of their home by expanding into their back yard without adversely affecting their neighbors. It is a cohesive and good neighborhood with modest homes on already small lots. Expanding on the front and sides of this house will unreasonably crowd their neighbors, block their view and light, and spoil the streetscape of the neighborhood. There have been several homes in the neighborhood that have been enlarged by expanding into their back yards. Out of deference to their neighbors, they have chosen not to expand the sides or fronts of their homes.

The public hearing was closed.

Mr. Marchewka said he was sitting out. Mr. Berg took his place.

DECISION OF THE BOARD

Chairman LeBlanc stated it had been suggested that the application be broken into three separate parts, or it could be addressed all at once. Discussion followed as to whether it should be three separate parts or if it would be possible to lump “a” and “b” into one.

Mr. Witham made a motion to combine variance parts “a” and “b” into one consideration and take part “c” separately. The motion was seconded by Mr. Parrott. The motion passed unanimously.

Mr. Horrigan moved that variance parts “a” and “b” of the petition be granted as advertised and presented. Mr. Jousse seconded the motion.

Mr. Horrigan said they had not heard any negative testimony about parts “a” and “b”, which would suggest that there is not a major public interest question in regard to the front porch and the one-story addition on the house. As far as the hardship was concerned a strict adherence to the front yard requirement for this particular property would single it out as the entire neighborhood had front yard problems. A front porch is a most reasonable use of property. It generates all kinds of community benefits not the least of which encourages neighbors to co-mingle with each other. He said he thought that the zoning ordinance implicitly favored this. Porches are well within the spirit of the ordinance. That porch with front yard setback would not harm any public right as it is a dead-end street. Mr. Horrigan said variance part a is consistent with ordinance. A porch would enhance the value of this house and also the surrounding properties.

Mr. Horrigan said he would make a similar argument for the left-hand side addition in variance part “b”. He said this was one of the smaller houses in the neighborhood, and an addition to their living space is a reasonable request. Given the nature of the street and the front yard set back, he said he could not see that this would raise any issues about public or private rights.

Mr. Horrigan said what was proposed seemed reasonable and commendable. He said variance parts “a” and “b” were very easy to grant.

Mr. Jousse said denying this Variance would not be in the public interest. He believed that granting variance parts “a” and “b” was consistent with the spirit of the ordinance. Looking at the streetscape, all of the houses in the neighborhood were built close to the property line. The setbacks were all different than now. He said he could not imagine someone building all those houses in violation of whatever zoning ordinances were at that time. Historically the houses met the zoning ordinance, but they do not now. It would not be practical for the Board to ask the owner to move the house back. A farmer’s porch is very attractive, and it would fit well within the neighborhood.

As a result of such consideration, it was voted 5-2 to grant variance parts “a” and “b” as advertised and presented. Chairman LeBlanc and Mr. Holloway voted in the negative.

Mr. Jousse moved that variance part “c” be denied. Mr. Holloway seconded the motion.

Mr. Jousse said hardship had not been demonstrated. It was quite apparent in looking at the plans that a garage and a structure can be built within the setback of that particular side of the building. There has been a convincing argument and opposition to have a building that close. There was already close proximity to the adjacent property. He said he believed variance part c should be denied.

Mr. Holloway agreed with Mr. Jousse.

As a result of such consideration, it was voted to deny the granting of variance part "c" as advertised and presented. Mr. Witham voted in the negative.

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4) Petition of **Robert L. Casella, LLC, owner, David Hodgdon, d/b/a PCG, option holder**, for property located at **30 Mirona Road Extension** wherein the following were requested: 1) Variances from Article III, Section 10-305(A) and Article IV and Section 10-401(A)(2)(c) to allow a 24' x 54' (1255 SF) irregular shaped one story addition to the right of the existing building with a 66.8' front yard where 70' is the minimum required, and 2) a Variance from Article XII, Section 10-1201(3)(f)(2) to allow parking 18' from the front property line where 50' is the minimum required setback. Said property is shown on Assessor Plan 253 as Lot 4 and lies within the Industrial district. Case # 2-4

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Bernard Pelech, representing the owner, addressed the Board. Mr. Pelech said that when you visit this site, it becomes apparent that there is an extreme hardship. Mr. Pelech said he had not been on Mirona Road Extension road for several years. He noted that businesses were no longer there and the road and parking lots were not plowed. He said it looked like a wasteland, and that end of Mirona Road Extension really needs something. He said hopefully Portsmouth Computer Group's proposal would be the first step in something happening down there. He said when he tried to go behind the building, he met a virtual precipice, a very steep embankment rising some 30 feet up to Peverly Hill Road. One third of the lot is totally unusable due to its topography. The building itself goes right up to that steep embankment. It is impossible to park behind the building. The existing parking is on the side and the front of the building. This is one of Portsmouth's very early industrial parks. One-acre lots were created along Mirona Road in the 1950's or 1960's. Baumann Tool, Brigham Tool, and a number of small, light industrial users were out there. Baumann Tool moved. Brigham Tool went out of business. These lots are now vacant, but they still have some viable users who could fit that niche of small, light industrial type user. Portsmouth Computer Group is more of a service-oriented business, but it could occupy a space of that size.

Two variances are requested. The first would be to allow parking within 18 feet of the front property line where required set back is 50 feet. This building and cliff existed long before the zoning ordinance. The second variance requested is for a new addition on the right-hand side to be 66 feet from the front property line where 70 feet is required. The building that is there now is 60 feet from the front property line. The right-hand addition is actually set back a little further than the front of the existing building. Both are very reasonable. There is no question this is a hardship. The property is unique. This is a reasonable use. The ordinance interferes with a reasonable use because you cannot park at the rear or the side. There is no diminution of surrounding properties. It needs to see vehicles. It will not diminish property values. The property across the road is vacant, and the property next door is an auto repair company. This is a neat, clean, not noisy, not dusty, not 15 18-wheelers coming and going. Substantial justice would be done. It would keep this business in the City of Portsmouth. The ordinance came about long after this building and this lot were established. There is only parking in the front yard so this would not be contrary to the intent of the ordinance. Mr. Pelech said this met all the requirements of the ordinance.

Mr. Pelech said Mr. Chagnon was present to answer any engineering questions, and Mr. Hodgdon, owner of the business, was here to answer any questions. PCG is an 8 to 5 business with 10 employees, 6 of which are on the road most of the time.

Chairman LeBlanc inquired about a burm area in the front. He said he did not recall any trees and wondered if the area was going to be landscaped. Mr. Pelech said there are a couple of trees there now, but Mr. Chagnon's plan showed 6 trees. Chairman LeBlanc asked if there would be curbing. Mr. Chagnon said there was one official entrance and unofficial entrance on the other side. The parking lot will be paved. It will be quite clear that there is only one entrance. There will be a delineation that is more clear than it is now. There will be 30 feet of green area between the road and the lot.

The public hearing was closed.

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

Mr. Berg moved that the petition be granted as presented and advertised. Mr. Parrott seconded the motion.

Mr. Berg referred to Mr. Pelech's comment about the precipice behind the building. For the record, Mr. Berg said the elevation change from Mirona Road to Peverly Hill Road is 32 feet, which eliminates the back third of the property. This is a good example of a hardship. Literal enforcement of the parking request would only allow the property to accommodate 5 parking spaces. The applicant is proposing to make the area look nice by paving and striping. As far as the building goes, the addition will be in the same setback as the rest of the building. It is no more non-conforming in that regard. The zoning restriction as applies to this specific property interferes with the property owner's reasonable use of the property considering the unique setting of the property and its environment. This is a topographically-challenged parcel. The restriction would permit adequate parking. Mr. Berg said he thought the zoning ordinances were not intended to be so strictly enforced as to block a reasonable use of the property or in this case, a reasonable improvement to the property. The variance would not injure the private or personal rights of others. There is no negative impact.

Mr. Parrott agreed with Mr. Berg's comments. He said this seemed to be an ideal use of this particular building. It is a light use that would not negatively affect any of the neighborhood and the improvements can only enhance the area. He supported the petition.

Mr. Horrigan said he supported the petition. He said the important thing to consider was that Mirona Road Extension is a very short dead end road. As far as parking is concerned in an industrial site, there should be a technical aesthetic ordinance for having the parking set back or in the rear, but in this case it cannot with any relevance. No views are being harmed by allowing parking in the front.

As a result of such consideration, it was unanimously voted to grant the petition as presented and advertised.

Mr. Marchewka resumed his seat. Mr. Berg stepped down.

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5) Petition of **Daryl K. and Maria A. Gregory, owners**, for property located at **85 Ocean Road** wherein Variances from Article II, Section 10-206 and Article III, Section 10-301(A)(2) was requested to allow two free-standing single family dwellings with attached garages and decks on a lot with an existing single family dwelling in a district where only one single family dwelling is allowed on a lot. Said property is shown on Assessor Plan 292 as Lot 154 and lies within the Single Residence B district. Case # 2-5

SPEAKING IN FAVOR OF THE PETITION

Attorney Charles Griffin, representing Maria Gregory, addressed the Board. He stated that even though the petition was advertised as Daryl K. and Maria A. Gregory, Mr. Gregory is deceased and Mrs. Gregory is a widow. Mr. Griffin passed out a packet containing exhibits and charts he would be referring to during the meeting.

Mrs. Gregory wanted to build two additional single-family residences with decks on her 38,500 square foot lot so that she, her sons and their families could live in close proximity to one another.

In terms of the requirements for the granting of the variance, Mr. Griffin stated that there would be no diminution in the surrounding properties. If two new single-family residences were to be constructed in accordance with the enclosed plans, the residences would be 1 ½ story capes that would be consistent with the style of houses in a Portsmouth neighborhood. In addition, they would have two-car garages with their fronts facing toward Ocean Road. If these houses were to be listed for sale to the public, they would be listed in the \$250,000 range. These houses would not be duplexes, but single-family residences, which is a permitted use in the district. He said he believed that constructing two, new additional single-family residences on a lot of this size in an area where single-family residences are permitted and abound would not result in devaluation of surrounding properties. He felt because the structures would be new construction and of the same use that exists in the neighborhood, they would enhance the value of surrounding properties.

Mr. Griffin stated that the proposal was in the public interest due to the fact that Mrs. Gregory wanted to build these homes so that her sons would have a home and so that she and they may live in close proximity to one another. It is in the public interest to enable families to live close together. Mr. Griffin pointed to the shortage of single-family dwellings in the Portsmouth. He referred to Exhibit 3 in the Board's packet that was an article from the Portsmouth Herald dated November 2001, which described the need for affordable work housing, and a recent article from the Portsmouth Herald to which stated that an affordable housing shortage could lead to a mass exodus of middle class workers and drain the economic lifeblood of the community. There would also be some increase in tax revenue to the City.

Mr. Griffin presented a petition signed by a number of Mrs. Gregory's neighbors and direct abutters, indicating that they did not object to the granting of these variances. That petition was included as Exhibit 4 in the packet.

He stated that the granting of the variance would be consistent with the spirit and intent of the ordinance, since the variance would allow 2 additional single-family dwellings to be built on a lot of 12,860 square feet which is approximately 50% larger than the square footage per dwelling unit of an abutting 1950's development.

Mr. Griffin commented on a Planning Department memorandum. The property is located in a Single Residence B district requiring 15,000 square feet per lot per Exhibit 4A, a dimensional table from the zoning ordinance. He said the limitation on one dwelling unit per lot should be viewed in

the context of the 15,000-square-foot requirement. He said if this proposal were a request to build two additional houses on a 15,000-square-foot lot, that would be a different case. However, in this case granting a variance to allow two additional single-family residences on a lot that contains 2½ times the minimum area violates the spirit and intent of the ordinance, and this was not accurate. The granting of these variances would not result in overcrowding because the houses would still meet the setback and open space requirements of the ordinance. Although it did not meet the current area requirements on a per lot basis, due to the fact that this lot adjoins the Maple Haven Subdivision which was laid out in the mid 1950's at a time when the area requirements were substantially less than they are today, the average lot area per dwelling would be 12,860 square feet. This would be 50% greater than the average size of those lots in the Maple Haven Subdivision that abut Mrs. Gregory's lot. Those lots have an average size of 8,380 square feet.

Mr. Griffin said that allowing two additional single-family dwellings on this lot would not injure anyone's health, safety or welfare, would not detract from adequate light or air and would result in overcrowding, congestion nor change the character of the neighborhood of single-family residences. He said when compared to the vast majority of lots in the neighborhood, there would be less density and more open space.

Mr. Griffin said the rationale behind limiting one house per lot in this zone was directly related to the 15,000-square-foot lot area requirement. When that requirement is substantially exceeded, as is the case here, allowing more than one single-family dwelling on this lot and in this neighborhood would not violate the spirit and intent of the ordinance.

Mr. Griffin maintained that denial of the variance would result in unnecessary hardship in accordance with Simplex, which was a use variance case. The ordinance would interfere with the reasonable use of the property, considering the unique setting of the property in its environment. The proposed use, a single-family residence, is a permitted use. The use proposed was reasonable. The issue was not the proposed use as a single-family residence but rather the limitation imposed by the ordinance that there could be only one single-family residence per lot in this district. The property was uniquely set in its environment. It contained 38,580 square feet, the largest parcel in the area. It had 100 feet of frontage that equaled or exceeded the frontage of most of the other lots in the area. Given the size of the lot, he maintained that two additional houses could be constructed while still meeting the setback and open space requirements and 86% of the area requirements of the ordinance. The environment was unique because of the shape and size of the lot. It was long and narrow and surrounded on two sides by six house lots on Winchester Street and across the street by one house lot, none of which meet the current area or average area requirements. All of these houses were closer together to one another than those proposed by Mrs. Gregory. Under the circumstances, Mr. Griffin said that requesting permission to build two single-family residences on this lot was a reasonable use of the property.

According to Simplex, no fair and substantial relationship existed between the general purpose of the zoning ordinance and the specific restriction on the property. Mr. Griffin said that the size of this lot would not result in increased density but could support the two additional single-family dwellings. The houses would meet the current front and rear setback requirements as well as the open space requirements. They would be more conforming to the present requirements of the zoning ordinance than many of the structures that exist in the immediate neighborhood.

He further stated that the variance would not injure the public or private rights of others as the setback and open space requirements would be met and the use would be the same as other uses in the neighborhood. Substantial justice would be done as the size of the lot would support the addition of two single-family dwelling units.

Mr. Griffin commented again on the Planning Department memo recommending denial of the variance. He felt that granting or denying was not a Planning Department decision but a Board decision, and that the Planning Department was overstepping their bounds and prejudiced this

matter. He said he recognized that the Board was an independent body, but he stated that it was highly improper for the Planning Department to indicate how the Board should vote. He stated that of the six petitions presented that night, none of them, with the exception of 85 Ocean Road, stated whether the Board should deny or approve the petition.

Mr. Jousse asked if the two house lots would be delineated in any way, and Mr. Griffin said there would be shrubbery and that there would be one driveway with a small cul-de-sac for turning around.

Mr. Horrigan asked what the rationale was for not subdividing the property. Mr. Griffin responded that there really wasn't enough land to meet subdivision and city requirements, and if the land were to be subdivided, the street would have to become a city street, which would create more traffic than simply adding an elongated driveway. Mr. Griffin added that the property owners would own as tenants in common with easements to use the common driveway. Mr. Horrigan inquired as to the division of property rights. Mr. Griffin said the deed would be redrawn to show them as tenants-in-common and to be divided into one-third interests in the entire parcel. There would be an easement to use this common driveway.

Chairman LeBlanc established that the proposed driveway would exceed the width required to accommodate emergency vehicles.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Ken Lurvey, an abutter, of 9 Winchester Street spoke in opposition to the petition. He presented a signed petition with 26 signatures for the record. He said it violates the one single dwelling per lot rule. It proposed two additional single-family dwellings on one lot. He stated his concerns about the length of the 387-foot driveway and it presented safety concerns in regard to emergency access. He was also concerned about the potential for the abutter at 65 Ocean Road requesting to build additional homes on that land and generating additional traffic. He also expressed some concern about sewer and water problems, which could occur due to the drop in elevation between Ocean Road and Winchester Street.

Jack Carter, the abutter at 65 Ocean Road, stated that he purchased his property because it offered a large parcel of land in Portsmouth, which is rare. He could not see how the addition of a driveway and two additional houses on the lot next to him increasing his property values. He felt that consideration should be given to the recommendation of the Planning Department.

Mr. Griffin presented a brief response to the comments of those opposing the granting of the variance.

The public hearing was closed.

DECISION OF THE BOARD

Mr. Witham made a motion to deny the petition as presented and advertised. The motion was seconded by Mr. Jousse.

Mr. Witham felt that it was contrary to the public interest to allow two more single-family residences on the lot. He felt it would have a major impact on homes on Winchester Street, whose back yards currently abutted the open land, adding to density and congestion.

Mr. Witham added that denying the variance would not take away reasonable use of the property and gave the example of the abutting neighbor who had a similar sized lot. He felt there was a

strong relationship between the ordinance and the use of the property. He stated his concerns regarding access, using one driveway for three houses and also stated that granting the variance would injure the public and private rights of the neighbors. He stated that if granted, it would not be consistent with the spirit of the ordinance because it was still a single lot that would be shared by three homes, and that if the variance were granted, it would diminish the value of the abutting properties.

Mr. Parrott stated that granting this variance would violate so many principles of sound planning by creating two more non-conforming dwellings. He added that the zoning ordinance indicates that in a single-resident zone, one house per lot, regardless of the size of the lot, is the norm established by the Planning Board and City Council. He felt that this has worked for a long time for this particular lot and the adjacent lots as well. This proposal was an example of poor planning to allow three single houses to be put on one lot.

As a result of such consideration, it was voted 5-2 to deny the petition as presented and advertised. Mr. Holloway and Mr. Jousse voted in the negative.

***Excerpt of Minutes 85 Ocean Road, as typed by Judith Claveau
Board of Adjustment
17 February 2004***

(Excerpt of Minutes approved at Board of Adjustment Meeting 3 March 2004)

5) *Petition of Daryl K. and Maria A. Gregory, owners, for property located at 85 Ocean Road wherein Variances from Article II, Section 10-206 and Article III, Section 10-301(A)(2) are requested to allow two free-standing single family dwellings with attached garages and decks on a lot with an existing single family dwelling in a district where only one single family dwelling is allowed on a lot. Said property is shown on Assessor Plan 292 as Lot 154 and lies within the Single Residence B district. Case # 2-5*

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*Attorney Griffin, Esq. addressed the Board on behalf of Maria Gregory, stating that even though the petition was advertised as Daryl K. and Maria A. Gregory, Mr. Gregory is deceased and Mrs. Gregory is a widow. Mrs. Gregory wants to build two additional single-family residences with decks on a 38,580 square foot lot, so that she, her sons and their families can live in close proximity to one another.*

*In terms of the requirements for the granting of the variance, Attorney Griffin stated that there would be no diminution to the surrounding properties. If two new single-family residences were to be constructed in accordance with enclosed plans, the residences will be 1 1/2 story capes that would be consistent with the style of houses in this Portsmouth neighborhood. In addition, they would have two-car garages with their fronts facing toward Lafayette Road. These houses will not be duplexes, but single-family residences, which are a permitted use in district.*

*Attorney Griffin stated that the proposal was in the public interest due to the fact that Mrs. Gregory wants to build these homes so that her sons will have a home and so that she and they may live in close proximity to one another. It is in the public interest to enable families to live close together. Attorney Griffin pointed to the shortage of single-family dwellings in the city and provided a brochure from November 2001, which described the need for affordable housing and a recent article from the Portsmouth Herald to substantiate his statements.*



*Attorney Griffin presented a petition signed by a number of Mrs. Gregory's neighbors and direct abutters, indicating that they did not object to the granting of the variances.*

*He stated that the granting of the variance would be consistent with the spirit and intent of the Ordinance, since the variance would allow 2 additional single-family dwellings to be built on a lot of 12,860 square feet which is approximately 50% larger than the square footage per dwelling-unit of an abutting 1950's development. Attorney Griffin maintained that allowing two additional single-family dwellings on this lot would not injure anyone's health, safety or welfare, would not detract from adequate light or air and not going to result in overcrowding, congestion nor change the character of the neighborhood.*

*Attorney Griffin maintained that denial of the Variance would result in unnecessary hardship. The Ordinance would interfere with the reasonable use of the property, considering the unique setting of the property. Given the size of the lot, he maintained that two additional houses could be constructed while still meeting the setback and open space requirements of the Ordinance.*

*According to Simplex, no fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific restriction on the property. Attorney Griffin said that the size of this lot would not result in increased density but can support the two additional dwellings.*

*He further stated that granting the variance would not injure the public or private rights of others as the setback and open space requirements would be met and the use would be the same as other uses in the neighborhood. Substantial justice would be done as the size of the lot would support the addition of two single-family dwelling units.*

*Attorney Griffin commented on the Planning Department memo recommending denial of the variance. He felt that granting or denying is not a Planning Department decision but a Board decision, and that the Planning Department was over-stepping their bounds. He stated that it was highly improper for the Planning Department to indicate how the Board should vote. He stated that of the six petitions presented that night, none of them, with the exception of 85 Ocean Road, state whether the Board should deny or approve the petition.*

*Mr. Jousse asked if the two house lots would be delineated in any way and Attorney Griffin said there would shrubbery and that there would be one driveway with a small cul de sac for turning around.*

*Vice-chair Horrigan asked what the rationale was for not subdividing the property. Attorney Griffin responded that there really wasn't enough land to meet sub-division and city requirements and if the land were to be sub-divided, the street would have to become a city street which would create more traffic than simply adding an elongated driveway. Attorney Griffin added that the property owners would own as tenants in common with easements to use the common driveway.*

*Chairman LeBlanc established that the proposed driveway would exceed the width required to accommodate emergency vehicles.*

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

*Mr. Ken Lurvey of 9 Winchester Street, spoke in opposition to the petition and presented a signed petition for the record. He stated his concerns about the length of the driveway (487') and emergency access as well the potential for the abutter at 65 Ocean Road to request to build additional homes on their land.*

*Jack Carter of 65 Ocean Road, stated that he does not want to look out at a driveway. He purchased his house because of the large lot of land which separated his home from the Gregory's home and he felt that consideration should be given to the recommendation of the Planning Department.*

*Attorney Griffin presented a brief response to the comments of those opposing the granting of the variance.*

*Mr. Witham made a motion to deny the petition as presented and advertised and it was seconded by Mr. Jousse.*

*Mr. Witham felt that it was contrary to the public interest to allow 2 more single-family residences on the lot. He felt it would have a major impact on homes on Winchester Street whose back yards abut the open land, adding to density and congestion.*

*Mr. Witham added that denying the variance would not take away reasonable use of the property and gave the example of the abutting neighbor who has a similar sized lot. He felt there was a strong relationship between the ordinance and the use of the property. He stated his concerns regarding access, using one driveway for three houses and also stated that granting the variance would injure the public and private rights of the neighbors. He stated that if granted, it would not be consistent with the spirit of the ordinance because it was still a single lot that would be shared by three homes and that if the variance were granted it would diminish the value of the abutting properties.*

*Mr. Parrott stated that granting this variance would violate many principles of sound planning by creating two more non-conforming dwellings. He added that the zoning ordinance indicates that in a single-residence zone, one house per lot, regardless of the size of the lot, is the norm established by the Planning Board and City Council. He felt that this has worked for a long time for this particular lot and the adjacent lots as well and that this proposal is an example of poor planning, to allow three single houses to be put on one lot.*

*Chair LeBlanc called for a vote to deny as presented and advertised. The application was denied with a 5 to 2 vote. Mr. Holloway and Mr. Jousse voted in the negative.*

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6) Petition of **Friends of The Music Hall, owner, Portsmouth Community Radio, applicant**, for property located at **28 Chestnut Street** wherein a Variance from Article III, Section 10-304(A) was requested to allow a 20' antenna where the maximum height allowed is 10' for roof appurtenances. Said property is shown on Assessor Plan 126 as Lot 7 and lies within the Central Business B and Historic A districts. Case # 2-6

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech, representing Portsmouth Community Radio, addressed the Board. He said that Portsmouth Community Radio had recently received a license from the FCC for a low power public FM radio station in the City of Portsmouth. Low power public radio stations serve a community interest. In the past they broadcast city council meetings, basketball games, election returns, broadcast public forums. The only successful operators of this type of radio are non-profits. Portsmouth Community Radio would be a non-profit organization.

Mr. Pelech said what they were proposing was a 3" pole and 20 feet in height to be installed on the top of the roof of The Music Hall. That is considered to be a roof appurtenance, and per zoning ordinance could be no more than 10 feet in height. However, a 30-foot whip antenna or a flagpole of unlimited height would both be allowed. Flagpoles are exempt. A satellite dish would be allowed as long as it was no more than 48 inches above the roof. He did not think the zoning ordinance intended roof appurtenances to apply to something like a 3" diameter 20-foot pole antenna. Roof appurtenances usually referred to elevator shafts, HVAC equipment, or large equipment that sit on top of a roof. They do not apply to flagpoles, chimneys or smokestacks, but it does apply to this antenna.

Portsmouth Community Radio is appearing before this Board to seek a variance to allow this antenna to be 20 feet where 10 feet is the maximum allowed. If this were a 10-foot antenna, the southern half of Portsmouth would not receive the community radio station. This would be the optimal location on the roof of The Music Hall, which is also a non-profit location. The Music Hall had very graciously allowed Portsmouth Community Radio to attempt to place this antenna on their roof. The Music Hall is a very tall building. It would allow broadcasts to reach the entire city. Other locations are not non-profits and are owned by corporations that have high tax bills and would want to be paid money to put an antenna on their roof by a lease or rental arrangement. There are not that many locations in Portsmouth with that high an altitude that would accommodate the broadcast signal as contemplated.

There is a hardship resulting from the ordinance interfering with the reasonable use of the property. The Music Hall is a performing arts center, and it is the intention of Portsmouth Community Radio to provide public radio to the City of Portsmouth from a location that would allow the broadcast signal to be heard throughout the City. The roof of The Music Hall provides a location where one beneficial non-profit organization could contribute to and benefit a second non-profit organization, which would also benefit the community. This would be a very reasonable use of the property, which unfortunately the zoning ordinance does not allow.

There would be no diminution of property values. There are abutters in opposition, and they would maintain that would somehow diminish their property values by virtue of the impact on their view. Mr. Pelech referenced the renderings and photographs that had been supplied to the Board that proved otherwise. He said they had attempted to work with abutters to establish a location for the antenna on the roof that would be satisfactory to all. Other than the residents of the Rockingham Condos, he said most of the abutters would not be able to see the antenna.

Substantial justice would be done by granting the variance in that the public would be able to access local governmental, cultural and educational events. It would provide a public forum and keep the

public more well informed. Granting the request would not be contrary to the spirit of the ordinance.

Mr. Pelech read a number of letters received in support of the proposal, which he submitted to the Board as part of the record.

Mr. Parrott recused himself from the meeting, and Mr. Berg sat in on this petition.

Mr. Pelech said Mr. Tim Stone, President of Portsmouth Community Radio, was present and could answer any technical questions the Board had. Mr. Berg asked if the antenna would be illuminated or reflective in any way. Mr. Stone said it was not illuminated, but it could be painted any color and whatever was necessary. Mr. Berg asked how often it had to be maintained. Mr. Stone said periodic maintenance was needed a half dozen times a year. Mr. Berg asked if the antenna would make any noise. Mr. Stone said it should not make any noise, but in very high wind it could whistle. In that event remedial measures would be taken. Mr. Berg inquired about renting out space on the antenna. Mr. Stone reiterated what Mr. Pelech said about this being a unique relationship between The Music Hall and Portsmouth Community Radio. Mr. Berg asked if Mr. Stone would be willing to make that a condition of the application, and Mr. Stone agreed.

Mr. Jousse referred to the photographs and asked what was on the roof. Mr. Berg said that was a photo simulation of where the antenna would appear on the rooftop of The Music Hall and what it would look like as viewed from the Rockingham Hotel rooftop. He said since that photo was taken, he had gone to the rooftop with a member of the Board of Trustees from the Rockingham and they had shifted antenna forward to align it with the large chimneys.

Chairman LeBlanc inquired about a letter received from Mr. Warren, who was concerned that the antenna would interfere with his reception from Maine broadcasting signals. Mr. Stone said the station is a 100-watt station and is limited to that. It was extremely unlikely that there would be any interference with anything else. If they cause interference to any other commercial radio, they need to correct the problem. That would apply to the public broadcasting stations from Maine. He also said television should not be affected.

Mr. Horrigan said he lived within eyesight of The Music Hall. He said currently because of another radio station in the city he could not listen to anything else in his house other than that station. He asked if Portsmouth Community Radio would generate any interference. Mr. Stone said that station broadcast at 50,000 watts as compared to 100 watts.

Mr. Jousse inquired how far away could Portsmouth Community Radio be received. Mr. Stone said it would be a 3- to 7-mile broadcast radius

Mr. Horrigan asked what the status of this proposal was with the Historic Commission. Mr. Stone said they went before the HDC for a work session, and the HDC was in favor of it. He said there would still be a public hearing with HDC. Mr. Horrigan asked about alternative sites being a hardship because of being on sites of for-profit entities. Mr. Stone said The Music Hall would provide the space for a nominal \$1 lease per year. When they submitted the permit three years ago, they did not know when the permit would be issued. They knew it would take a while and they needed to be aligned with an entity that would be there for a long time. They looked at other properties, but it was difficult to get a long-term commitment from anyone. If they change the

application and go elsewhere with the tower, then they would have to go back to the FCC for modification, and they would lose their frequency and would have to start the process all over again. He said they appreciated concern from residents of the Rockingham, and they have met with them to discuss. There had been discussion in regard to the potential health impact of the antenna. He said that the antenna would be 200 times below the safety margin.

Mr. Jousse asked if the antenna emitted any radiation and how it related to television at home or microwave. Mr. Stone said it was hard to make direct comparisons, but he said while using a cell phone, that is 2 to 5 watts next to your head. The transmission that nearby residents would actually be exposed to is .9 microwatts. The WHEB signal that penetrates through homes in town is twice what Portsmouth Community Radio would emit. He reiterated how small the station was at only 100 watts.

Mr. Larry Gillis from Rye addressed the Board. He said he had been to some of the programming meetings and very excited about the program. He said the broadcasting from this facility would have less wattage than a light bulb on his desk, and the antenna being proposed 3 inches wide and reached up 20 feet. It is a very minimal intrusion of any sort.

Mr. Stanley Longstaff of Eliot, Maine, said he hoped this would go on line as he would be within 3-5 miles. He said it was a positive aspect of the community to help bring the community together and provide emergency and cultural information.

Mr. John Licere of 159 Austin and owns a business in downtown Portsmouth. He spoke in favor of the radio station but also the tower. He said he on the Board of Directors for the radio station. He saw it as a gift to the community. The felt the radio station would add to the quality of life in Portsmouth.

Ms. Diane Bertrand agreed with the statements made about the antenna. She thought it would be of great benefit to the arts and culture of the community.

Mr. Bruce Morse, Director of Theater Operations at The Music Hall, said that they gave much thought to what effect placing the tower on their building would have. He felt from an engineering perspective that there would be no interference with any operations.

Ms. Catherine Keenan of 52 Prospect Street said she supported the radio station and cultural improvement in the community.

Mr. Dave Cohen of New Heights said he approves of the radio station's mission statement that included educational broadcasting and involvement with students. He said he would be meeting with an English teacher about students writing for radio shows.

Chairman LeBlanc read letters from W. D. Flierl and Gary Lowe, who were both in favor of the petition.

SPEAKING IN OPPOSITION

Ms. Audrey Kenneck, president of the Rockingham Condominium Association, addressed the Board. She said he was there to present a petition signed by 15 individual unit owners who live at

the Rockingham and to made a part of the record. She said they vehemently opposed the antenna. They asked that the antenna be placed in another location that would not interfere with their quality of life. Mr. Berg asked how the Association would feel if the antenna were only 10 feet tall. Ms. Kenneck said it would still be there and still be an obstruction of the view. Mr. Witham asked her if the view from the roof was 360 degree panoramic. Ms. Kenneck said it was 90 to 93 is full.

Mr. John Sullivan, a member of the Rockingham Condominium Association board, addressed the Board. Mr. Sullivan referred to the fact that guidelines were not going to be used. He said he lived on the fifth floor, which was parallel to the roof of The Music Hall, and the wind up there is excessive. He said the 20-foot antenna would start blowing and ultimately that would require guide wires. He said he fully supports the idea of the radio station, but he said all the people in favor of the radio station have not seen what the Rockingham residents see. The Historic Commission stated that they wanted to see The Music Hall as more of a landmark. Mr. Stone had said he was reluctant to find another location, but Mr. Sullivan pointed out that they have had 3 years and not once did Mr. Stone go to the Rockingham to consult with them. Mr. Sullivan said in consideration of the 3 to 7-mile radius, the radio station could certainly move the antenna around. There are already 4 antennas on top of city hall, so he wondered why it could not go there.

In rebuttal, Mr. Stone, President of the Board of Trustees, re-addressed the Board. Mr. Stone said they did appreciate the concern by the Rockingham residents. The view from the top of the Rockingham is quite limited because the view to the southwest is blocked by the Music Hall. Then there is a limited view to see the North Church. Then there is the wall of the Rockingham Hotel itself which block the entire view to the east/southeast. The tripod shown in the packet could withstand 100-mph winds, and the engineers have assured them that guide wires would not be needed. In consideration of other locations, Mr. Stone said they have had discussions with the City of Portsmouth in the past. As a Board, it was decided to remain independent from city government.

The public hearing was closed.

DECISION OF THE BOARD

Mr. Berg made a motion to grant the application as submitted and advertised. Mr. Witham seconded the motion.

Mr. Berg said it was certainly of public benefit for all the reasons that the applicant and their attorney enumerated earlier.

As far as hardship it does seem somewhat incongruous that a chimney, a flagpole, a smokestack could rise to the height of 20 feet, but an antenna cannot when the appurtenances that are allowed by right are more intrusive than what was requested here.

Mr. Berg said this instance was one of things that zoning ordinances just cannot foresee. He said that in allowing the whip antenna, which he could only assume was a 20' antenna that whipped and flailed wildly in the wind, it did not make sense that one that was stationery would not be permitted especially if a flagpole and a smokestack were permitted.

Mr. Berg said he could see no fair and substantial relationship existed, and the variance was consistent with the spirit of the ordinance. He said that allowing the 3" wide fixed post is consistent with the public benefit and outweighed any harm.

There was no diminution of public and private rights of others. There was very little impact, and the eye was not drawn to the antenna. In regard to concerns for the Rockingham residents, he said the applicant addressed their issues. He could not see any greater effect on a 20' antenna than there would be on a 10' antenna.

Mr. Witham said he agreed with Mr. Berg. The 10' allowance for roof appurtenances applied more to the case of elevator shafts or air conditioning units. A 20' antenna would not significantly impact the view when the view consisted of hundreds of feet of view.

Mr. Horrigan said he had a concern for the future about opening the door to requests for telecom devices. He was concerned that telecom companies would except the same exceptions. He suggested that conditions be added to this petition to restrict the use of this antenna to only Portsmouth Community Radio and that the antenna be removed when and if Portsmouth Community Radio ceased to exist. Mr. Berg and Mr. Witham were agreeable to those conditions be added.

As a result of such consideration, it was unanimously voted that the request be granted as advertised and presented with the following stipulations:

The use of the antenna not be extended to entities other than Portsmouth Community Radio.

The antenna be removed when/if Portsmouth Community Radio ceased to exist.

IV. ADJOURNMENT

Upon motion duly made and seconded, the meeting adjourned at 11:15 p.m.

Respectfully submitted,

Mary Ann Brown
Acting Secretary

These Minutes were approved as presented at the Board of Adjustment Meeting on February 15, 2005.

Mary E. Koepenick
Secretary