

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

**7:00 P.M.**

**JUNE 22, 2004**  
(Reconvened from  
June 15, 2004)

**MEMBERS PRESENT:** Chairman Charles LeBlanc; Vice-Chairman James Horrigan; Alain Jousse, Bob Marchewka, Nate Holloway, David Witham, Arthur Parrott, Alternate Steven Berg, Alternate Duncan MacCallum

**MEMBERS EXCUSED:** n/a

**ALSO PRESENT:** Lucy Tillman, Planner

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**I. PUBLIC HEARINGS**

10) Petition of **SGB & RGB Ventures LLC, owners**, for property located at **1800 Woodbury Avenue** wherein a Variance from Article III, Section 10-304(A) is requested to allow a 2,292 sf one story building with: a) a 4' left side yard where 30' is the minimum required and b) a 68' front yard where 70' is the minimum required. Said property is shown on Assessor Plan 239 as Lot 7-3 and lies within the General Business district. Case # 6-10

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech represented the owner/ applicant of the above property. He referred to the original subdivision in 1992, and a 1997 Variance for a building that was never constructed. He stated that on the evening they appeared before the Board of Adjustment, the applicant passed away. The Variance that was granted that evening was extended for one year; however, the addition was never built.

Mr. Pelech stated that when the 100' Inland Wetland Protection Buffer Zone was created in 1995, 90% of the lot became unbuildable. The building that presently exists is in the wetlands buffer zone that is roughly 90% of the lot that is unbuildable; and, 25% of the lot is wetlands. Additionally, one quarter to one third of the lot is within a setback from a residential district. He stated that the applicant has a one-acre parcel of land that is encumbered by special conditions.

He stated that they had appeared before the Conservation Commission and the Planning Board regarding a Conditional Use Permit to allow the construction of a second building on the lot. This permit was granted to allow it to be in this location. He said they received a favorable recommendation from the Conservation Commission as well as unanimous approval from the Planning Board.

Attorney Pelech referred to a typographical error in the memo he had submitted and added that it was not a 2,292 square foot building but a 2,092 square foot building. He stated that the lot was created as part of original Durgin Square Development in 1991.

Attorney Pelech stated that the area Variance was needed to enable the applicant's proposed use of the property, given the special conditions of the property. He stated that there were 3 factors that result in 90% of the lot being unbuildable: 1) the wetland setback buffer; 2) the 100' setback from a residential district; and, 3) the wetland itself. He stated that there was no place on the lot where the proposed

building could be built without one or more Variances being granted and without a Conditional Use being granted by the Planning Board. The Conditional Use Permit has been granted and they are seeking dimensional Variance for the front and side setbacks.

He felt that they met the first criteria of the Boccia hardship due to the above special conditions, and the proposed use does require an area Variance. He stated that this benefit could not be achieved by any other reasonable method. He stated that structural engineers had determined that erecting a second story would not be recommended due to the close proximity of the building to the wetlands. They felt that, if they were to do so, the existing building could sink. He stated that the area had been filled many years ago.

Attorney Pelech stated that granting the requested Variance would be consistent with the spirit of the ordinance as it would allow for adequate light and air and plenty of access for emergency vehicles. He stated that the abutting areas are comprised of open wetlands and a 300' parking lot; and he felt that granting the Variance would not create congestion. He stated that, other than the setback requirements, the building would meet parking, lot coverage and open space requirements of the Ordinance.

He stated that there would be no benefit to the public in denying the Variance; and, that substantial justice would be done by granting the Variance. He stated that it would not require an inordinate amount of City services; it would be a 9 a.m. - 5 p.m. office use; and, would add to the tax base for the City. He felt that the traffic generated by the 2,200 square foot office building would be negligible.

Attorney Pelech referred to his argument for both substantial justice and the spirit of the ordinance, and stated that it would not be contrary to the public interest, based on the same reasoning. He stated that granting the Variance would not result in diminution to abutting properties as the proposed building was surrounded by other commercial uses.

Mr. Jousse asked if the building could be moved back 2' to avoid the necessity for part of the Variance. Attorney Pelech responded that they could go back 2' but it would be tight as they are so close to the wetlands. He added that they could make it 2' narrower or knock out the corner off the building.

Mr. Berg asked if there was any deeded parking agreement or parking easement with the Circuit City property? Attorney Pelech was not certain. He added that they had adequate parking on-site but he did believe that there were actual cross-easements. He said they use the parking lots interchangeably.

Lucy Tillman stated that there were cross-easements for access but she was not clear on whether easements existed for parking.

Attorney Pelech agreed that the property had no access and the access was through the Circuit City parking lot.

Chairman LeBlanc asked about the purpose of the walkway and whether it could be eliminated to move the building back. The architect, Dan Belfour, stated that the walkway was 5' and was basically for aesthetic purposes. Attorney Pelech added that the purpose of the area was to allow for adequate light to the existing building.

Mr. Parrott asked for an explanation of the engineering work that which determined that it would be impossible to build up, because the existing building would collapse. He asked if test borings were taken to come to that conclusion.

Mr. Pelech stated that there were no test borings done and that owner had consulted with engineers regarding the fact that the structure is built on filled land and not intended to have a second story. He had no signed documentation from engineers; and, it was agreed that this finding was verbal evidence.

Mr. Parrott made a motion that the petition be denied. It was seconded by Mr. Witham.

Mr. Parrott stated his concerns regarding the fact that the building is being constructed entirely in the buffer zone when alternatives (to build up) have not been explored. He stated that there had been no engineering report, test borings or structural analyses. He stated that there was no firm basis on which to conclude that it would be impossible to build up. He stated that the proposed construction site was sensitive and undesirable and felt the owners could present a design that would be more in keeping with the Ordinance. He also stated concerns regarding the adjacent parking lot and future expansion, since they have no curb-cut off Woodbury Ave.

Mr. Witham agreed with Mr. Parrott. He stated that the wetlands buffer zone is there to protect the wetlands. He did not see the wetlands as posing a special condition in this situation. He agreed that the building would not overcrowd the area but it would over-intensify the lot. He felt they could still do an addition without a Variance even though it would not be quite as large as they would like. He felt the road network was near its maximum and to grant a Variance that may result in increased traffic, would not be in the public interest.

Mr. Jousse would not support the motion. He felt that there were many constraints on the area, which include the 100' setback from the residential area and the 100' setback from the wetlands. He was not concerned about the wetland setback because the applicant was proposing to put a building on an area that was an existing parking lot. He felt that the proposal could be approved.

Chairman LeBlanc called for a vote and the motion to deny failed by a 3 to 4 vote.

Vice-chair Horrigan made a motion to grant the petition as advertised and presented and the motion was seconded by Mr. Marchewka.

Mr. Horrigan stated that he agreed with Mr. Jousse regarding the fact that the wetlands are not an issue because the area is already paved over. He did not see a public interest issue in regards to the wetlands. He stated that he did see an issue in terms of where the addition would be sited. If it were sited northwest of the building, it would intrude on some fairly extensive, mature vegetation.

Mr. Horrigan stated that their plan made sense and noted that the side yard blended into an existing parking lot that they seem to have a right to use. He did not see why the Zoning Ordinance would require strict interpretation of the 30' side yard as it is a paved parking lot.

He felt that it was in the public interest and stated that an area Variance was needed given the constraints imposed upon the property by the buffer zone and other dimensional requirements. He stated that the applicant had no other reasonable place to expand. He said they could build up; however, he felt that the existing building was built on fill and that could pose a problem. He stated that it was difficult for them to reasonably pursue another way of expanding the use of the property without an area Variance.

He stated that the Ordinance does provide for the expansion of retail and office properties and what was being proposed would not dominate this area. He stated that he agreed with the petitioner regarding substantial justice; and, he felt that the value of the surrounding properties would not be an issue because they are all commercial/retail. He saw no grounds to deny the petition.

Chairman LeBlanc added that it is not allowed or required of the Board, to give Variances to properties that can be handled in other ways that will not require Variances. Just because they want to do it, doesn't mean they have a right, given the Zoning Ordinances, to do what they wish with their property. He stated that the Board was there to deal with the Variances before them; and he did not feel that the criteria had been met to allow the Variance to be granted.

Chairman LeBlanc called for the vote to grant as advertised and presented. The petition was granted 4 to 3. Chairman LeBlanc, Mr. Witham and Mr. Parrott voted in the negative.

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11) Petition of **David J. and Vasilia Tooley, owners**, for property located at **166 Newcastle Avenue** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow: a) a 3'10" x 17'6" covered entry with a 3'± right side yard where 10' is the minimum required, b) an irregular shaped 422 sf addition with a 3'± front yard where 30' is the minimum required and a 10' rear yard where 30' is the minimum required, c) 55% building coverage where 20% is the maximum allowed; and, d) 27% open space where 40% is the minimum required. Said property is shown on Assessor Plan 101 as Lot 24 and lies within the Single Residence B and Historic A districts. Case # 6-11

Chairman LeBlanc read a letter from the petitioner's attorney which stated that the application be withdrawn and that it be placed on the July 20,2004, Board of Adjustment agenda.

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12) Petition of **Boise Cascade, owner**, for property located at **100 Ranger Way** wherein the following are requested; 1) a Variance from Article III, Section 10-305(A) to allow a 44.31 x 23.88 sf modular building with a 55' front yard where 70' is the minimum required, and 2) a Variance from Article XII, Section 10-1201(A)(2) to allow a 14' one way access to 10' x 19' perpendicular parking spaces where an 18' access way is the minimum required. Said property is shown on Assessor Plan 211 as Lot 2 and lies within the Industrial district. Case # 6-12

Attorney Pelech represented Boise Cascade. He described the location of the property that sits under the ramp to Interstate 95 and is surrounded by heavy industrial uses. He said that the property is buffered by a berm, and a ledge outcrop that rises above the building, making it invisible from Ranger Way.

He stated that there were special conditions on the site, which include deafening noise and the fact that the 55' front yard goes to a huge storage area for the State Highway Department. He stated that the berm and ledge outcrop produce a grade increase as well.

Attorney Pelech stated that Boise Cascade acquired a modular office space and placed it on the site because they needed more office space; and if the Variance is not granted, the unit has to move or go away. He stated that the modular office was located so they would have some interconnectivity between the two offices. He added that there isn't a lot of space in which to place the modular office due to the surrounding industrial uses, such as lumber piles, a rail line, and access ways for 18-wheelers. He felt that the location of the modular on this site would be reasonable and would be difficult to locate elsewhere.

The second Variance that is being requested is to legitimize the 14' 3" access way to the parking space. It exists as a two-way access; however, the applicant would like it to become a one-way access which would be safer and more in keeping with the intent of the Ordinance. To widen would require the removal of ledge and the berm.

He stated that it would be impractical to locate the proposed one-story modular office in a different location given the existing structures, the rail lines, the access ways on the site as well as the changes in elevation at the front of the site. He stated that the modular units could not be stacked on one another; and the benefit sought by Boise Cascade could not be achieved by some other method reasonably feasible, other than the requested Variance.

He felt that granting the request would be consistent with the spirit and intent of the Ordinance. He stated that the office is 170' from Ranger Way because of the 100' under I-95; and that there is at least 200' between this building and the nearest structures at Falkland Place/Ranger Way site.

He said that traffic is presently two-way on the access way, and the applicant was proposing to create a one-way passage to serve the seven employee parking spaces.

He stated that substantial justice would be done in granting the requested Variance. He saw no benefit for the public in denying the Variance. He felt the City should encourage this type of use. He stated that this is not an optimal site for any type of use and Boise Cascade has managed to use it as a wholesale lumberyard and shipping terminal.

Granting the Variance would not result in diminution of property values for surrounding properties. The site is not visible from National Gypsum; and, the Irving Oil terminal, which is comprised of oil tanks and truck filling station, would not suffer diminution of value.

Chairman LeBlanc noted that the memo from the Planning Department stated that the purpose of the building was to add more employees.

**DECISION OF THE BOARD**

Vice Chair Horrigan made a motion to grant the petition as advertised and presented; and, the motion was seconded by Mr. Marchewka.

Mr. Horrigan stated that the nature of the site, backed up against I-95, surrounded by oil tanks and gypsum plant, and encumbered by ledge, make it difficult for the applicant to expand their use of this property. He stated that there appeared to be no other feasible way for them to expand other than positioning the unit in the proposed spot.

Attorney Pelech stated that since the road leads to the oil tanks and to Boise Cascade, he did not believe there would be any other traffic. He saw no urgency in protecting the 70' ROW in this instance. He stated that the parking lot/driveway is abutted by ledge and it would be pointless to dynamite to add a few feet for employee parking. He felt that what they were proposing was consistent with the spirit of the Ordinance. He saw no issue of substantial justice, since granting the Variance would not affect the use of the abutting properties; nor, would there be any impact on the value of surrounding properties which were all commercial/industrial uses. He stated that it would be in the public interest to allow the company to expand and hire more people.

Mr. Marchewka agreed with Mr. Horrigan. He stated that given the topography and the heavy industrial use of the area, and the fact that the structure is temporary, he felt that the request could be granted.

Chairman LeBlanc called for the vote to grant as advertised and presented; and, the Board voted unanimously to grant the request.

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13) Petition of **Samuel and Lucille McMaster, owners, Greenway North, LLC, applicant**, for property located at **383 – 385 Islington Street** wherein a Variance from Article II, Section 10-207(14) is requested to allow an existing building to be converted into four dwelling units with 1,362 sf of lot area per unit where 1,500 sf of lot area per unit is required. Said property is shown on Assessor Plan 144 as Lot 21 and lies within the Mixed Residential Business district. Case # 6-13

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech represented Greenway North, LLC, owner and applicant of the above property. He stated that the structure was a side-by-side duplex and had existed as residential for many years. He stated that in 1979, a Variance was granted to allow a law office to be installed. In 1995, the area was zoned MRB. He said that half of the building was vacant at the time of this meeting; and, half was being used by Salt River Counseling. He stated a parking lot with 7 or 8 spaces was located in the rear of the building; and, an accessway also existed from both Islington and Salem

Streets, into the parking lot. Much of the site is paved and the green space is at 14-15%. He stated that the applicant was proposing to remove the pavement between the proposed building and the Cloutier property and create additional green space in the rear of the property. Total green space to be created would be 660 square feet, and the open space would increase from 15% to 27%. He stated that parking and lot coverage would also meet the requirements of the Zoning Ordinance.

He stated that the only Variance required is to allow 91% of the lot area per dwelling unit. He did not agree with the Planning Department memo, and went on at length to outline his argument with the memo.

He stated that applicant could not enlarge the lot without buying additional property; therefore, the Variance is needed to enable the applicant's proposed use of the property, given the special conditions. He stated the special conditions as follows: it is a very small lot which doesn't meet the minimum lot size for the district, the frontage requirements, or the front or side setbacks on the lot. He felt that the size of the building was overly large for the lot.

He stated that the property abuts Islington and Salem Streets and has a large back yard. It also abutts a property with an equally large back yard. For this reason, Attorney Pelech felt that the proposal would be consistent with the spirit and intent of the ordinance in regard to light and air.

He stated that the benefit sought by the applicant cannot be achieved by any other method reasonably feasible for the applicant to pursue, other than the requested area Variance. He stated that the only other way to achieve this would be to buy additional land or make the building smaller and neither optional could be done. He stated that this was the only way the applicant could achieve the goal of creating four dwelling units.

He stated that it would not be an over-intensification of use and that there would be plenty of light, air and space around the building. He stated that they were proposing to create green space between their building and the Cloutier property to prohibit vehicles from driving between the two buildings. He added that there is access for emergency vehicles; so granting the Variance would not be inconsistent with the spirit and intent of the Ordinance. He stated that the four residential units would generate less traffic, congestion and need for parking than business use.

There would be no benefit to the public in denying the Variance. He felt that substantial justice would be done in granting the Variance for the following reasons: There would be no change in character to the area. It would reduce traffic and congestion and the building would be enhanced. There will be no substantial increase in water/sewer or number of school children. The proposed units would not result in any substantial increase in municipal services; and would increase the tax benefit. He added that all units would be brought into code with the proposed construction.

Attorney Pelech stated that granting the Variance would not result in diminution of surrounding property values. He felt that it would be more beneficial to reside next to a residential as opposed to a business use. The building will be enhanced both on the interior and exterior and the green space will be increased; therefore, it would not result in the diminution of surrounding property values.

Mr. MacCallum questioned Attorney Pelech as to why the building could not be three units as opposed to four, eliminating the need for a Variance.

He stated that if the Variance were denied, it would be three units.

Mr. Horrigan commented on the hardship presentation, stating the 1500 square feet is a minimum requirement, and he could not understand why they couldn't have three larger units as opposed to the four requested. He felt that the request indicated dissatisfaction with the Zoning Ordinance as opposed to presenting a special condition. He stated that there were no unique internal conditions that would prohibit dividing the building into three units.

Attorney Pelech responded with a lengthy argument in favor of the hardship. He stated that multi-family dwellings were the norm for the area.

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

Denise Greeley addressed the Board. She stated that her name was, "Greeley" and not "Cloutier" and that the property was "Greeley property".

She stated that her objection was that it was overcrowded and one of the parking spaces would be under her window. She stated that having all the vehicles in the rear would be a hardship for her as her back yard abuts their back yard. She also added that there was no way that a fire truck would be able to get to the back yard if they close off the driveway. She stated that Mr. Hanscom was also opposed but he was unable to attend the meeting that night.

### **DECISION OF THE BOARD**

Mr. Marchewka initiated a discussion among the Board members regarding the interpretation of the Boccia criteria as applied to this particular petition.

Mr. Parrott agreed with Mr. Marchewka and also felt that it was important to determine the nature of use of the building. He stated that it was being treated as a residential building, yet the only tenant in the building is a counseling service. He felt that given the fact that it was granted a Variance in 1979 for commercial use, and now is a counseling service, an argument could be made that it is being used non-residentially. In that case the 7,500 square foot per unit does apply. He stated that the Zoning Ordinance recognizes the value of open space in residential settings and there is an increased value to being able to use the green spaces on their own property. In this case, there is only 5,400 square feet of property, most of which is taken up by building, parking and paving. He stated that this does not leave much open space for 4 families. He stated that the 7,500 square foot requirement recognizes the value of open space in terms of the quality of life.

Mr. Jousse made a motion to deny the Variance, and it was seconded by Mr. Parrott.

Mr. Jousse stated that no hardship had been presented. There was no history of four dwelling units in this building. He felt that the applicant was attempting to shoehorn four units on to the lot. He stated that City Ordinances are guidelines and no special condition had been presented. He felt it was unreasonable to try and get four units into this property. He added that no case had been made regarding diminution to surrounding properties, and for these reasons, he believed that the Variance should be denied.

Mr. Parrott agreed with Mr. Jousse, and added that it was difficult to find a hardship inherent in the property as it exists, as it has been a successful commercial address for decades. Putting four residential units into the building with inadequate lot area, per Zoning Ordinance, is contrary to the spirit of the Ordinance. The spirit and intent of the Ordinance is not to create the absolute maximum number of dwelling units in each building, without respect to the area of the lot on which the building stands. He did not feel it would be in the public interest.

Mr. Witham was in agreement with the applicant and would not support the motion to deny. He felt the use was reasonable in that they presently meet 91% of the requirements of the Ordinance and they won't be overdeveloping the site. The new configuration is more green space, the traffic will be lessened from the change of use and there was minimal impact on the lot in going from three to four apartments.

Mr. Marchewka would not support the motion to deny. He stated that the use of the property as residential was a better use than commercial, which would generate more traffic. He stated that they have no inherent right to have four units with inadequate lot size; however, he felt that the difference

between having three or four units would not change the character of the building and the number of people would probably be about the same. He did not feel that it was an over-intensification of the building.

Mr. Horrigan stated that he would support the motion to deny. He stated that the Variance was requested for the building as well as the lot. He felt no special conditions/hardship had been presented that would demand that it be used for four units as opposed to three. He was concerned by the fact that there had been no plans submitted in terms of the interior of the building.

Chairman LeBlanc quoted the Ordinance regarding the "overcrowding of land". He stated that they were being asked to allow for the overcrowding of the land. He stated that any grandfathering had expired regarding the building as a four-unit building, especially since half of the building has been used for a business use. He noted that there were 550 square feet missing from the lot, and if it were a four-unit dwelling, it would necessitate that some of the cars be parked on the street.

Chairman LeBlanc called for the vote to deny; and the petition was denied by a vote of 5 – 2. Mr. Witham and Mr. Marchewka voted in the minority.

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14) Petition of **Joseph E. Welsh and Lauren Greenwald, owners**, for property located at **55 Lovell Street** wherein a Variance from Article III, Section 10-302 is requested to allow a 7'7 1/2" x 13'5" one story addition with a 2'7" left side yard where 10' is the minimum required. Said property is shown on Assessor Plan 146 as Lot 13 and lies within the Apartment district. Case # 6-14

**SPEAKING IN FAVOR OF THE PETITION**

Joseph Welsh presented a petition and letters signed in support of his request for a Variance. He stated that they were seeking relief to replace a room that was mistakenly torn down by the builder when they were doing their renovations. He stated that the room would occupy the exact same footprint as the room that was torn down.

He explained how these circumstances had transpired. He stated that they had always intended to renovate this room to bring it up to code, working within the zoning requirements.

He stated that his builder, Richard Goulet, advised them that a foundation would be required to do the job right. He was advised by the Inspection Department that a Variance would not be required to do the foundation. In removing the ceiling tiles, Mr. Goulet discovered that the frame of the roof was unsound. He proceeded to take both walls as well as the roof down without knowing that it would affect zoning requirements. It was confirmed by the Planning Department, that by taking the room down, they would need a Variance to reconstruct the room.

Mr. Welsh stated that the footprint was readily visible and it was their intention to put the same dimension room on that footprint.

He passed a petition signed by his neighbors, as well as letters, in support of his proposed addition.

Mr. Welsh did not feel that his request would be contrary to the public interest. The addition had existed in the same spot for 4 or 5 decades; and has now been gone for about a month due to an error. He stated that his intent was to improve the quality, use and safety of the room. He stated that the wiring was not up to code and the construction was of lesser quality than initially thought.

He stated that special conditions existed in the fact that the room was in existence at least 42 years and they had endured a loss of a piece of their home, which was a part of an integrated building plan. Mr. Welsh stated that the three couples who would be most affected by the addition have signed the petition and submitted letters in support of the construction.



He felt there would be no injury to the rights of others as they have received nothing but positive support from abutters. He felt the request was consistent with the spirit as it asked for no further encroachment than what had been in existence for many decades; and the proposed construction would be safer and more code compliant. He felt substantial justice would be done in allowing them to remedy their builder's mistake by replacing the addition.

Vice-chair Horrigan made a motion to grant as advertised and presented. The motion was seconded by Mr. Jousse.

Mr. Horrigan felt that the public interest had been established through the signed petition and many letters of support from neighbors. It was noted that the abutter who would be most affected by the granting of the Variance was among those who had signed this petition.

Mr. Horrigan felt that establishing the hardship criteria was somewhat difficult, as the need for a Variance was the result of an honest mistake. They felt that special conditions were that the builder determined that the structure was not sound and needed to be replaced.

He felt that the homeowner did require an area Variance and that there was no other method by which the homeowner could retain this part of the house other than taking it down to replace it.

He stated that granting the Variance would be consistent with the spirit of the Ordinance, in that the home owners would be allowed to continue to use the property as they have been using it; and, substantial justice would be done in allowing them to replace the structure on the original footprint.

Mr. Horrigan stated that according to the work that had been done to date, the value of the house would be increased and therefore will enhance the values of surrounding properties as well.

Mr. Jousse agreed with Mr. Horrigan. He said it was a structure that was questionable and thus demolished. The applicant is asking to replace what already existed in a safer and more structurally sound manner and he could see no reason the request could not be granted.

Chairman LeBlanc called for the vote to grant the petition as advertised and presented. The petition was granted unanimously.

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15) Petition of **Jeff W. Ott, owner**, for property located at **85 Albany Street** wherein a Variance from Article II, Section 10-207 is requested to allow an existing office to be converted into a dwelling unit for a total of five dwelling units on the lot where the maximum allowed are four dwelling units. Said property is shown on Assessor Plan 146 as Lot 25 and lies within the Mixed Residential Business district. Case # 6-16

*Mr. Parrott stepped down for this petition and Alternate Steve Berg sat in.*

Jeff Ott stated that this property had burned to the ground 3.5 years ago and they were able to rebuild on the same foundation with the same square footage. The building was being used for antique and used furniture and for the operation of his tree care business at that time. He stated that the Board of Adjustment had approved a request for a Special Exception on April 16, 2002, to allow them to rebuild with four dwelling units and one office for the tree care business. He stated that, at that time, the Board felt that the request would be less intense than what was there previously and would be a better use of the property. Mr. Ott felt that his current request to change the business office into a dwelling unit would also continue the trend of having a less intense use of the property.

He stated that his property was actually 15,400 square feet. He stated that a hardship exists in the lack of accessibility to the property, and the fact that the building sits directly on the property line. He

added that part of the lot is comprised of the driveway that enters and exits on to Cass Street and it is the only access to the parking in the rear of the building. Mr. Ott described the large presence of residential units and single family dwellings that surround his property.

He felt that it would be a hardship for them to keep the commercial space as he is downsizing the tree care business and will have no use for the commercial space. He stated that in trying to sell or rent the property as a commercial site, they had run into difficulty with potential buyers/renters in that there was limited access to the property, there was no place a potential business could place a sign to advertise their business, and, deliveries to the site have been problematic. He felt that granting his request would create a less intense use of the property and reduce the impact to the neighborhood.

Mr. Ott felt that granting the request would be in the spirit of the Ordinance as it would create more open space due to a lesser parking requirement for dwelling units as opposed to commercial use. He felt that this would benefit the public. He stated that they would not be transforming the character of the neighborhood since it is predominantly residential. He stated that the required parking would go from 14 spaces to 8 if the request were granted.

Mr. Ott stated that there would be no increase in square footage and that they had a building permit for the four dwelling units and one office space, as well as a certificate of occupancy for the office space and the garage below. He said they were requesting a change of use to go from office use to dwelling use.

There was some clarification of the architectural drawings between Mr. Ott and Mr. Berg. Mr. Ott stated that the windows would not change as a result of his proposed change of use.

There was a discussion regarding the ROW. Mr. Ott stated that the deed now indicates that the driveway is part of his deeded property and there is no longer a ROW. After further discussion, Chairman LeBlanc read a letter from Mr. Wasson into the record.

Mr. Witham made a motion to grant the request as advertised and presented. Mr. Marchewka seconded the motion.

Mr. Witham stated that there were five units and the request was for a change of use for only one unit, from business to residential. He did not feel that this request would increase the intensification of the area due to the fact that the traffic would decrease if the Variance were granted. He stated that it was surrounded by residential uses and to grant this request would make it a more conforming use, creating uniformity in the building. He felt that the owner had tried to sell the unit as it currently exists unsuccessfully; and now he was asking for a change of one unit to make the sale.

Mr. Witham stated that granting the Variance would not be contrary to the public interest, as it would be a less intense use of the lot. He felt that it would be in the public interest to provide more housing.

He felt special conditions existed in that the unit already exists and because it is a very difficult space to advertise a business or office. He added that the surrounding uses were mixed but that the requested use would result in less traffic on to Cass Street. He felt that the zoning does interfere with the reasonable use of the property, since the request was simply to change the use of an existing unit resulting in a less intense use of the property.

Mr. Marchewka agreed with Mr. Witham. He felt that strict adherence to the zoning ordinance in this case would not be reasonable. He felt that the size of the lot was very large and allowed for ample parking and green space and a move toward less intensification. He felt that it was a request that would be better for the neighborhood and the community overall. He stated that granting the Variance would not be contrary to the public interest, and the residential use would be more in keeping with the neighborhood. He felt that changing the unit to residential would result in less traffic than the commercial use.

Mr. Berg and Mr. Horrigan agreed that the existing location was very challenging in terms of a business, and that a residential use would be more consistent with the spirit of the Ordinance in providing additional housing. They could find no issue of substantial justice being done and felt that the change of use of one unit would not change the overall use of the property.

Chairman LeBlanc called for the vote to grant as advertised and presented. The request was granted by a vote of 6 to 1. Chairman LeBlanc voted in opposition.

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16) Petition of **Robert Krieger, Trustee, Enzo Realty Trust, owners**, for property located at **211-225 Union Street** wherein the following are requested: 1) a Special Exception as allowed in Article II, Section 10-10-206(6) to allow the existing building to be converted into seven dwelling units where such use is allowed by Special Exception, and 2) a Variance from Article XII, Section 10-1201(A)(2) to allow: a) 3 of the required parking spaces to back out onto the street, and b) 2 of the parking spaces in the garage to have a 13'4" maneuvering aisle where 18' is the minimum required for a one way aisle. Said property is shown on Assessor Plan 135 as Lot 70 and lies within the Apartment district. Case # 6-17

Mr. Matt Moreland, Architectural Designer, represented Enzo Realty Trust. He explained plans for an interior parking garage as well as the request for a 13' 4" maneuvering isle and three parking spaces which would back out into the street. He felt that a hardship existed in fitting 7 units into the existing building; and that creating fewer units would result in a poor layout of the property. He stated that a survey had been done showing that there would be 17.6' for two parking spaces. He maintained that the junk cars that presently reside on the property would be removed; and two of the existing garage doors would be removed, creating a one-way flow of cars in and out of the garage.

Mr. Moreland stated that all the units would be two-story units. He stated that the proposed plan would meet the required 500 square foot gross floor area per dwelling unit as well as the 1,000 square foot per family per lot requirement. The only requirement missing would be the off-street parking. He stated that none of the vehicles would be parked on the street, but would be housed in the garage. He maintained that if the building were converted to all residential, there would be less noise than the former commercial uses.

Mr. Horrigan questioned the criteria for a Special Exception. He questioned whether there might be an increase in noise, heat and vibration as a result of multiple units having individual air-conditioning units. He questioned whether kitchen odors could be vented up. He also was concerned about glare from additional lighting.

**SPEAKING IN OPPOSITION TO THE PETITION**

Mr. Patrick Malloy of 233-35 Union Street, a direct abutter, stated that prior to January 1980, the existing structure was the Potato Salad Factory and the current structure was created from 1995 to 1997. He stated that in 1995, Terry Bennett was granted a Variance for this property to develop it as it currently stands and has lived in this property until this spring. In order to get the Variance for the structure as it now exists, Mr. Bennett pledged that he was developing a showpiece home and a licensed auto dealership with showings by appointment only, with no outside storage of vehicles.

Mr. Malloy described the amount of residential units that surround his duplex and stated his concern for the parking and traffic problems that would result by approving these additional units.

He stated that there would be no hardship for Terry Bennett and that he could move back or rent the property. He felt there would be overcrowding and traffic problems which would diminish the value of the surrounding properties. He felt that it was not consistent with the spirit of the Ordinance as it

would encourage overcrowding; and that there would be no benefit to the public in granting the request. He stated that his personal rights would be damaged as a result of granting this request.

Keith and Cindy Smith of 30 Coffin's Court, abutters to the subject property, passed photos to the Board members, depicting an unsightly fence and windows covered with plywood at the 211-225 Union Street address. Mr. Smith stated that when Mr. Bennett applied for a Variance to change the use of the building to add a single residence, the neighborhood was never notified that the property could be changed at a later date to multiple condo units. If they had known that, they would have opposed the change.

Meganne Fabrega of 20 Coffin's Court, has a view of the property from her home. She stated her concerns with traffic problems and speeding on Union Street. She also felt that the increased traffic on Union Street would result in more people using Coffin's Court as a cut-through. She added that she agreed with all the other concerns mentioned by abutters of the subject property.

Chris Spiller, 33 Cabot Street, stated that he has lived on Cabot Street since 1988. He felt that it was great that parking would be provided within the building. He commented on the history of sidewalk blockage by autos and offered a photo of a Jeep with flat tires that currently blocked the sidewalk. He stated that if the request were granted, that curb cuts be added to assist in regulating the manner in which cars are parked at the Union Street address. He voiced other concerns regarding screening, green space and ventilation for the units. He also added his concerns about providing affordable housing as a consideration of this project.

Chairman LeBlanc called for a motion for the Special Exception to allow seven dwelling units and a Variance with three parts.

Mr. Witham brought up the aforementioned stipulation that had been placed on the Variance granted in 1995. That stipulation stated that the use of the property remain the same. He felt compelled to uphold this stipulation.

Mr. Holloway and Chairman LeBlanc commented on the many violations that had occurred during the time the property was used as The Salad Factory as well as Dr. Bennett's commercial use. They felt that the stipulation was a way of controlling the violations. The stipulation was intended to keep an industrial use, similar to the Salad Factory, out of the area. Chairman LeBlanc added that the odors from the Salad Factory were offensive.

Vice-chair Horrigan made a motion to deny the petition as advertised and presented. Arthur Parrott seconded the motion for discussion.

Mr. Horrigan was reluctant to grant the right to have three parking spaces backing out on to the street. He referred to the tight parking conditions in the neighborhood and the difficulty in navigating the street in the winter. He felt that the 3 spaces backing out on to Union Street would have a significant impact on the street. He felt that if they had fewer units they would not have a need for the additional spaces that back out on to the road. He felt that they were creating a need for a Variance by the scope of their project as opposed to anything intrinsic to the property itself. He felt there were no legitimate hardship for the property or special conditions. Mr. Horrigan felt that it failed on the Variance criteria.

Mr. Horrigan stated that this use would not be consistent with the spirit of the Ordinance because parking and traffic are issues in this neighborhood. He felt that the Board needed to be wary of granting any use that would compound the already existing problems.

He stated that substantial justice would not be done due to the potential deterioration of traffic and parking in the neighborhood. He also felt that the applicant could come in with a proposal that is not quite as large.

Mr. Parrott agreed with Mr. Horrigan. He stated that parking is problematic in many parts of the city but is almost acute in this neighborhood. He felt that there was nothing that argues for seven units in that building over a smaller number that would better accommodate the parking concerns. He felt the city had granted numerous Variances over the years and photo evidence showed violation to this day, of some of the Variances, namely cars parked with flat tires. He felt that it would be unfair to impose added traffic on a street where parking is at a premium. He saw no reason why the building had to have so large a number of units. He felt that residential use would be desirable but that the plan could be re-engineered to be more attractive and more neighborhood friendly.

Mr. Marchewka stated that this is a property that everyone would like to see cleaned up for the sake of the neighborhood. He stated that it had been an abomination and pointed to the parking of derelict vehicles on the sidewalk. He felt a transformation to residential would be good for the neighborhood but that seven units would be too many. He felt there would still be an issue with parking. He felt that backing out into the street would not be wise due to the fact that there are many pedestrians, including children in the neighborhood.

Mr. Witham felt that the design was fairly well thought out and the units were spacious with no attempt to cram in tiny units. He felt access to the rear units could have an adverse affect on the rear abutter. He referred to the five points of entry and exit created by the two proposed garage entries and the three parking spaces outside the building. He stated his concern for safety of pedestrians with so many access points in a relatively short distance.

Chairman LeBlanc called for the vote to deny the request as advertised and presented. The Board voted unanimously to deny the request.

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**II. OLD BUSINESS**

Petition of **Henry S. Dutkowski, owner**, for property located at **806 US Route One By-Pass** wherein a Variance from Article XII, Section 10-1204 Table 15 is requested to allow 37 parking spaces to be provided where 58 parking spaces are required. Said property is shown on Assessor Plan 161 as Lot 43 and lies within the Business district. Case # 5-11

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Peter Loughlin represented Henry Dutkowski, owner and operator of Momma Di's and Butch Ricci, the proposed builder. He stated that they were seeking a Variance to allow a two-story addition of approximately 652 square feet on the front of the building. It would include a new entranceway, waiting room and the second floor would have office space and about 250 square feet of additional function space. He said that it would not add a great deal of square footage to the restaurant; but would address a problem of flow where people coming out of the kitchen run into people coming into the restaurant. He stated that the 500 square feet of additional restaurant space would translate into the need for seven additional parking spaces.

He felt that the special conditions exist with this property in that the property butts up against Stark Street and a large part of the lot is occupied by a hill that supports the roadway. The site is difficult to see and access, and it resides on a northbound lane on a one-way roadway. He stated that because of its location, it would never get the volume of business of a larger restaurant; but the relief they were seeking would make it more useable.

He stated that the site was self-contained by fencing and a large hill. Thus there would be no situation where parking and/or people would spill over into the adjacent neighborhood. He felt that if the parking lot were full, people would choose to go elsewhere.

Attorney Loughlin felt that there would be no diminution of value of surrounding properties. He stated that the residential properties would notice no difference if the Variance were granted. He said the gas station might see additional traffic; however, it was sold with the condition that traffic could come through the gas station to this site.

He felt that substantial justice would be served as there would be no benefit to the city which would be offset by the limits placed on the Dutkowski family and their ability to operate in a reasonable manner.

He stated that it would not be contrary to the public interest. The request for parking would be to ensure that no parking overflow would occur on Dennett Street or other abutting streets.

It would not be contrary to the spirit and intent of the ordinance as there is room at this site to accommodate the additional 7 parking spaces which would be required in conjunction with the request for 500 square feet of restaurant space.

Per Boccia criteria, Attorney Loughlin stated that relief is necessary to allow the addition and the benefit sought by the applicant could only be achieved using this method. He said that other considerations had been made regarding how to accomplish this expansion and this was the only reasonable way to proceed.

Mr. Henry Dutkowski explained that they were trying to increase internal flow inside the restaurant, spruce up the restaurant and clean up the front. He stated that he would be willing to work with anyone who might have suggestions regarding the parking situation.

Chairman LeBlanc clarified that they would be adding 7 tables in the restaurant. The seating capacity, per Mr. Dutkowski, is presently 102 and would be 130 with the proposed expansion. Mr. Dutkowski stated that he would like to repave and stripe the parking lot. He stated that the second floor would be for small parties. He stated that an average of 7 or 8 employees park on-site. He added that the present fence would be replaced.

Mr. Dutkowski stated that he had spoken with Harry, the operator of the Phillips gas station, and he said that there were occasional problems. Mr. Dutkowski said that he would be willing to take care of any problems that might arise from overflow parking. He offered to install signage. He added that there had been no discussion regarding an agreement relative to parking at this gas station.

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

Attorney Anthony Hartnett, representing Mr. Zoffoli, owner and lessor of the property and also the lessee, Alliance Energy Corporation. He submitted a memorandum and a letter from a local realtor pertaining to the property values, to the Board. He clarified that he was representing the abutting EXXON station owner on the northeast side of the restaurant.

Assuming that this is an expansion of a non-conforming use and there is a strict policy in the statutes of New Hampshire case law, as well as well as the ordinance itself, against expansion of non-conforming uses. He referred to Article IV, Section 10-401(A) and also Section (A)(2), Subdivision

(C). He stated that the Board needed to keep in mind, the strict disapproval of expansion of non-conforming uses.

Attorney Hartnett discussed the five criteria necessary to approve the Variance. He did not feel that there would be a benefit to the public in granting the Variance. He stated that there is an existing 3,000 square feet of space, and a request for 700 additional square feet of space. He stated that the applicant was trying to increase the present size of their restaurant by 21% with only 63% of the required parking. He stated that 58 spaces would be required under the ordinance and only 37 are being sought. He felt the public interest was not being served by permitting an already congested traffic and parking situation to be compounded.

He stated the ordinance does interfere with the unrestricted use of this property; however, it is not due to any uniqueness inherent in the property. He stated that it is on a limited access highway, as are many other properties. The fact that it is a relatively small lot for a large commercial enterprise is why the restriction applies, as it does for other properties.

He stated that there is a relationship between the Zoning Ordinance and the restriction placed on the property. He stated that it is designed to limit and control traffic and parking in the city of Portsmouth, especially in areas such as this that have a large volume of high-speed traffic. He stated that the second requirement of Simplex had not been met to grant a Variance under hardship.

He stated that granting the Variance would injure private and public rights because there is non-compliance with the ordinance and what it is designed to do to control traffic and parking issues. He stated it is also injurious to surrounding property owners due to congestion and parking. He could see nothing unique about this property that would take it outside the reasonable application of the restriction.

He stated that difficulty being seen and limited access had nothing to do with parking requirements. He referred to the Planning Department Memo and added that it is a substantial problem because there is no possibility of off-site parking, other than the Zoffoli property.

Attorney Hartnett stated that permitting this over expansion of an existing commercial use and the reduction from 58 to 37 parking spaces is against the spirit and intent of what the Ordinance is trying to do.

He stated that the injustice of requiring the applicant to maintain the status quo and preventing him to expand and already intense commercial use, does not outweigh the justice to the general public by enforcing the ordinance to control traffic, crowding and parking.

Referring to the plan that had been submitted, Attorney Hartnett stated that the applicant was proposing to increase the size of the building and not increasing the number of parking spaces, making a tight situation worse. He felt that that would adversely affect surrounding property values.

Attorney Hartnett referred to five parking spaces on the plan that he felt should not be counted, due to the fact that they do not meet the required 19' in length. He stated that these spaces encroach partially onto the Zoffoli property; and, Mr. Zoffoli is very concerned about this encroachment. He stated that the cars spill over on to the Zoffoli property and it is a matter of trespass that should be addressed. He maintained that enhancing the use of the restaurant would have a detrimental effect on the operation of the EXXON Station.

He referred to a conversation with Mark Greenwood of 475 Dennett Street, who was unable to be there to testify. He stated that he would speak in opposition due to the potential diminution of his property. Attorney Hartnett also referred to the testimony of Gene Fisk regarding diminution of abutting properties.

Attorney Hartnett referred to a certified letter sent to Mr. Zoffoli in 2003 from the New Hampshire Department of Transportation regarding a change to the limited access highway and construction on the overpasses. Mr. Zoffoli is concerned that there may be some eminent domain issues that might limit further the size of the lot.

It was suggested by a member of the Board that Attorney Loughlin be supplied with copies of everything that was presented to the Board by Attorney Hartnett. Attorney Hartnett replied that Attorney Loughlin supply him with the photos and information that he had presented to the Board as well.

Questions were posed from the Board for clarification by Attorney Hartnett. Lucy Tillman discussed the statement by Attorney Hartnett regarding a non-conforming use. She stated that the use as a restaurant is permitted and it was not advertised as a non-conforming use.

Mr. Parrott asked Attorney Hartnett if he had any photos that could substantiate the claim that cars park regularly on the abutter's property, and that the parking at the restaurant is often overflowing. He also asked why Attorney Hartnett believed people would park on Dennett Street and hike to the restaurant as opposed to going somewhere else to eat.

Attorney Hartnett did not have photographic evidence; however, he suggested that Mr. Zofolli and the representative from Alliance could speak directly to that claim.

Mr. Jousse asked if any signage had been placed at the gas station to indicate that the parking was private. He added that he had never seen any signs outlining parking for the gas station or the restaurant.

### **SPEAKING TO, FOR OR AGAINST THE PETITION**

Mr. Harry Rynard, Manager of the gas station, addressed the parking situation. He stated that during the summer, people come with campers and boats and they can't park at the restaurant and they park at the gas station. He said it creates a problem when for people who want to come in to buy gas. He said folks pull in, they go eat and return to buy cigarettes. When they have recreation vehicles, and especially on the weekend, it poses a problem.

### **DECISION OF THE BOARD**

Mr. Parrott made a motion to grant the request as advertised and presented. The motion was seconded by Mr. Holloway for discussion.

Mr. Parrott felt that discussion had indicated that it was a cooperative arrangement between businesses, and overflow parking goes both ways. He stated that there had been no effort on the part of the service station to protect their property from overflow parking. He stated that the property is somewhat protected from overflow parking on three sides by the fence, the ramp and embankment and Route



One. He felt that folks would not walk up from Dennett Street to access the restaurant. He felt that the argument that the lot at the restaurant was self-regulating had some validity, in that if there were no parking, people would opt to go to another restaurant in the city. He stated that there had been no evidence of overflow parking at the restaurant.

Mr. Holloway agreed with Mr. Parrott stating that he would support the motion.

Vice-chair Horrigan would not support the motion. He felt that there was a spillover effect if the parking demands cannot be met on the existing lot. He felt that the Board needed to accept the testimony of the abutters who are on-site every day of the week.

Mr. Witham would not support the motion. He felt that the photo, taken on a Thursday, looked very full, as opposed to the photos from Attorney Loughlin. He felt that there is a strong potential for parking problems. He stated that the property had been granted three Variances since 1990 for expansions and they continue to need them. He felt that they had had their chance, with the three Variances, to make the plan work, so he could not support the request.

Mr. Jousse stated that it appeared that there was available parking but it is on the neighbor's property; and the neighbor was not giving it his blessing. He felt that 21 spaces was a lot of relief and he would have to oppose the request.

Chairman LeBlanc called for the vote to grant the request as advertised and presented. The petition was granted by a 4 to 3 vote. Mr. Jousse, Mr. Horrigan and Mr. Witham voted in opposition.

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**I. ADJOURNMENT**

A motion was made and seconded and the meeting was adjourned at 12:15 a.m.

Respectfully submitted,

Judith A. Claveau  
Secretary, Board of Adjustment

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

Mary E. Koepenick  
Secretary