MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE

7:00 p.m. **CITY COUNCIL CHAMBERS** **December 20, 2005**

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice Chairman David Witham, Steven Berg, Nate Holloway, Robert Marchewka, Arthur Parrott, Alternate Duncan MacCallum

MEMBERS EXCUSED: Alain Jousse

ALSO PRESENT: Lucy Tillman, Chief Planner

I. PUBLIC HEARINGS:

1) Petition of **Mark H. Wentworth Home for Chronic Invalids, owner**, for property located at **346 Pleasant Street** wherein Variances from Article II, Section 10-206(18), Article III, Section 10-302(A) and Article IV, Section 10-401(A)(1)(c) were requested to allow two additions to the existing nursing home/assisted care facility as follows: a) demolition of existing glass side entrance portico and replacement with a 404 sf (13'x 26' plus 4' x 16'6") ADA compliant entranceway; and, b) construction of an 875.6 sf (8' x 75' plus 7'6" x 36'8") one story additions to the garden level nursing care area. Said property is shown on Assessor Plan 109 as Lot 10 and lies within the General Residence B and Historic A districts.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin stated that he was speaking on behalf of the Wentworth Home. They are trying to find ways to expand the parking lot. The residents in assisted living have cars. The maximum number of cars on the lot associated with the assisted living residents would be 2 cars. There is a bus services and people can walk, so one benefit is that they do not need a car. Most of this proposal does not need to come before the BOA. It deals with the interior. There are three parts to the building. There is the original building, the 1927 building and the 1985 building. The Court Street side is the entrance side. That is the area where they request an increase in the size of the footprint. Photo B shows the southwest portion of the building, and the area surrounding that. They want more emphasis on assisted living, less on personal care. Before, there was one parking space for every four beds. The home provides 26 spaces, as shown on the site plan. Most of their renovations can be completed without variances. They are there for lot coverage. They require a variance for that.

Attorney Loughlin stated that the Home now meets the requirements for lot coverage, and this application is also well under the requirements. They need approval for the new entranceway. This proposal is to bring out that entrance to meet ADA requirements and building codes, as well as to

improve interior use of the home. The first reason they need this is that now there is 400 sf of additional space, now closed in with the new doors. The second reason they need this is because of the ground level. The home would increase by 875 sf if the wall on the west was bumped out 10' for an additional 8 rooms. The conditions are satisfied in regards to lot coverage – this will be an area variance. There will be no diminution in value of surrounding properties. This will not be contrary to the public interest. Denial of this variance would result in unnecessary hardship on the applicant. The proposed use of the property is reasonable. They propose a modest 2% increase in square footage that does not adversely impact anyone. The general purpose of the ordinance is to separate uses and to provide reasonable open space. This home, with the gardens, provides as much open space as many lots in the south end. This will not injure the public or private rights of individuals. The existence of the home is a source of controversy at some times but the home is there and is going to remain there. He will attempt to address operational aspects, which is a byproduct of reducing the impact of the home. Substantial justice will be done by allowing the home a reasonable and efficient use of the property. It is not contrary to the spirit or intent of the ordinance, and as pointed out in the Chester case, it will provide an open space.

Mr. MacCallum asked what the legal coverage limit of the property was now.

Attorney Loughlin stated that it was about 42% to 44%.

Mr. MacCallum asked if the variance was granted, the property would then have 45% coverage.

Attorney Loughlin stated that that was about right.

Chairman LeBlanc stated that the information on the lot coverage did not show up in the legal announcement.

Ms. Tillman stated that she didn't see it anywhere in the documents. She doesn't see it in the building permit application either.

Chairman LeBlanc stated that the lot coverage was not advertised.

Mr. Witham stated that the section is advertised, but not the amount.

Ms. Tillman stated that they could go forward with all the parts but that and make it contingent.

Chairman LeBlanc stated that they could go forward with the rest of the application and come back next month for lot coverage.

Attorney Loughlin stated that the lot and section were advertised properly.

Chairman LeBlanc stated that there was no number given. They cannot grant relief because it is not advertised and the abutters and other interested parties do not know the amount of relief being sought.

Attorney Loughlin stated that in a letter submitted on October 26, they mentioned the 1985 addition. The maximum lot coverage of all the structures is now 30%, thus 400 sf for the entrance total, bringing the increase to 46.6%.

Chairman LeBlanc repeated that that figure had not been advertised.

Mr. Berg asked what the issue was besides that.

Ms. Tillman stated that it was to expand the facilities.

Mr. Marchewka asked if they were expanding or changing.

Chairman LeBlanc stated that they would be changing. The beds are actually being reduced.

Mr. Witham stated that one variance requests expanding the use into any other part of the property. It does not specifically state a number. The first request is a combination of the two. He sees it as an expansion of a nonconforming use. The middle is the lot coverage which wasn't specifically said.

Mr. Parrott stated that he wished to address the parking.

Chairman LeBlanc stated that they don't have to deal with that at the moment. The Board will go forward except for lot coverage.

Mr. Marchewka asked what they were going forward with if they were not decided on lot coverage.

Mr. Witham stated that it was expansion of use.

Ms. Tillman stated that they know what Mr. Loughlin told them, but they would have to advertise it formally. They have a lot of abutters who will need it to be advertised.

Mr. Witham noted that they could use Simplex this week and Boccia next month.

Mr. Parrott stated that the plan shows six parking spaces which are not dimensioned, although they should be. The letter stated that there are a total of 37 cars.

Attorney Loughlin stated that he didn't see that until just tonight. He's somewhat at a loss to see what the problem is. There is no question that they are way over the 26 space parking requirement.

Mr. Parrott stated that one of the legal issues is that they are not dimensioned. They are legal city sized lots, so why does it show 26 spaces if there are 33 legal spaces there?

Attorney Loughlin stated that his understanding is that the 26 space number goes back to the 1980's.

Mr. Parrott noted for the records that their requirements for parking spaces have to be dimensioned.

Attorney Loughlin stated that if they were coming in today, they would need a certain size that they did not have. It would be in issue then. But this lot predates the requirements for parking spaces. These were already in existence prior to the requirement.

Mr. Parrott stated that the 24' aisle was not mentioned as well.

Attorney Loughlin stated that it was his suspicion that it was a tight lot.

Mr. Parrott stated that it was a concern of some of the neighbors.

Attorney Loughlin stated that that was what was there and that anything they do now will de-intensify the need for parking.

Chairman LeBlanc stated that he had mentioned that by going from nursing to assisted living, they would be reducing staff. Does he have any idea of those numbers?

Ms. Mary Ellen Dunham, administrator, stated that because of the lower intensity of nursing care, the staff would be reduced from about 100 to 50. They have no intent to impose layoffs, but it will be reduced by attrition over a year.

Chairman LeBlanc asked if those in assisted living needed more guest parking.

Ms. Dunham said no, people there have a lot of guests now.

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Bernie Pelech, on behalf of Mr. and Mrs. Henkel, stated that they would submit that parking is a big problem. He submitted photos taken in the past few days. He referred the Board to Article XII, section 10-1201(A) of the ordinance which states that places could be provided with off-street parking in accordance with following specifications. He would say that none of the spaces meet the requirements. The travel aisle is 12' wide and the parking spaces are stacked three deep. Some spaces are 7' wide, and 13' deep. If they converted 65 nursing beds to 19 beds and increased the assisted living to 54, the parking requirement for 54 alone is 38 spaces. That number of 26 spaces is nowhere cast in stone. You heard that there are over 100 employees. No wonder they have a horrendous nightmare of a parking situation. There is no loading and the Board should note the loading berth requirements as well. If there is a change, it must comply with the loading berth.

Attorney Pelech stated this should be tabled not only for lot coverage, but there are numerous parking and circulation problems. This is an intensification of use. None of the spaces meet the requirements of size. If you look at the site plan, you will see that the new main entryway is again on the side of the building where they have an 18' paved accessway. You've seen photos of all the cars parked there. If you look at the other side of the building, see Melcher Street. Those properties are owned by the Wentworth Home. It would be ideal to have an entranceway there and go back out Melcher Street, but they are keeping the entranceway on the other side of the home. If the Board looks at those parking spaces and the plans, the travel aisles do not meet the requirements of the ordinance. It is not clear from Attorney Loughlin's letter, talking about a reduction from 69 presently existing beds to 19 and

the number of assisted living beds increasing from 35 to 54. Under the ordinance, the 69 nursing home beds and addition assisted living beds require 1.5 per each for additional spaces. 38 spaces for the 52 assisted living units plus 11 for the apartments owned, which brings the total to 60 spaces. That is a total of 70 new spaces required on site. In no way, what is being proposed is a solution to the parking problem. He contests that most people living in assisted living units do not have cars. Usually they have .5 or 1 car per unit.

Another statement in the presentation that was incorrect is that the conversion to assisted living does not require a variance. It does. Putting kitchens in these units intensifies the use, and is a change of use. Granted there will be 50 less nursing beds, but those beds do not require the amount of parking that assisted living requires. They need parking variances and it should be readvertised for lot coverage variances. He also submits that there would be a diminution in value of the surrounding properties because the parking need will stress the neighborhood more than ever. The intent of the zoning ordinance is to protect residential uses from non residential uses, and also to protect them from excessive light and noise and having to experience middle of the night shift changes during the continuous hours of operation. The conclusions that he has come to is that this should have to come back before the Board.

Mr. Witham asked if there is support for tabling. They could avoid a lot of redundancy by only having people speak just to come back again. Attorney Pelech brought up a good point with Article XII instead of piecemealing.

Ms. Tillman stated that they should give the applicant an opportunity to speak if they want to. They've made the effort for this meeting, so let them speak and continue the evidence until the next meeting. People made a lot of effort here.

Chairman LeBlanc asked if there was a reason why parking was not part of the advertised material.

Attorney Loughlin stated that it was not an issue and not required. They had a long talk with Lucy Tillman on this issue. This home is well in compliance with requirements and is providing a great deal of parking which improves the situation. Attorney Pelech wants to put a roadway on the other side and put in more impervious material. This proposal will markedly improve the situation.

Chairman LeBlanc asked him to comment on whether expanding the footprint will require more parking review.

Attorney Loughlin stated that they are not intensifying the use. The addition in front does not trigger any additional parking. That is tied to the number of beds, and they are not adding any more beds. They are reducing beds.

Mr. Berg stated that Attorney Pelech made an argument that because of the types of units added, although there is a net loss of beds, there is a net increase in more mobile tenants, therefore increasing the likelihood for more cars.

Attorney Loughlin stated that in all the years he has known people at the home, there were 2 or 3 who had cars. Most people are in a situation where they don't have or need cars. No matter how you run

the numbers, using the ordinance, it comes out with lesser parking requirements. It has a lesser impact using the space per bed.

Mr. MacCallum stated that he supported Mr. Witham's suggestion since they are going to come back, he thinks that they should table all of it. However, those who came to this meeting to speak should come down and have a chance to talk if they wish.

Mr. Marchewka stated that in regard to the existing parking, some questions appear as to whether that is adequate in terms of what are requirements are today. They show 26 spaces but it appears that there are more lined spaces than that. Is that a site review issue? Should they know exactly what is there in order to vote, and whether that is adequate?

Ms. Tillman stated that if there is a discrepancy between what is on the site and what is on the plan then that should be corrected. She cannot confirm if it is correct or not. She has not counted the spaces.

Mr. Marchewka asked if they should have done that before they voted.

Ms. Tillman stated that she agreed, but that the only question was whether or not the tabling would come after the people who have come have the opportunity to speak.

Mr. Marchewka stated that they would have the opportunity to speak again. They could tell them to come back and speak again.

Mr. Berg stated that different materials will be presented at the next meeting, so people will have to speak again.

Chairman LeBlanc stated that there was an argument for letting them speak. First of all, they came here. There may be issues that they do not know about. People in that area may have more intimate knowledge about the proposal.

Ms. Polly Henkel, of Wentworth Street, stated that they went out and counted the spaces and there are 33. The biggest inadequacy is the parking, the main entrance and the loading and unloading. When people move in and out, people park there and suppliers park their trucks. In the letter that the Home filed, by their own admission, they admit that the entrance is less than idea. When they first heard about improving the façade, they thought it would be a good improvement. She found an interesting letter in the file from 2001, accompanied by a petition signed by the abutters. A letter from John and Elizabeth Taber speaks of the lack of parking. The expansion will add to the parking problem. It is an intrusion in a neighborhood – this is from 10 years ago. She has a letter from 1975 that states that there is not sufficient parking and that the visitors do not differentiate parking from the street. It seems that as far back as 1975 there were inadequacies, so the ordinance was changes in 1995 because it is inadequate.

Ms. Davia Cherra, of 69 Wentworth, explained that if they expand, there will still be parking issues. Everytime someone comes down to load people on the special bus, they park in front of her driveway. People working for the home park between the two no parking signs. They have gone over the limit on

the site and they are parking on the street or halfway in or halfway out. All the parking spaces are always full, all 33 of them. Something needs to be done about this.

Mr. Bob Eagle thanked the Board for its dedication. They pushed through the expansion of the footprint. What had been parking congestion previously is a problem now. The Home has been expanded beyond a sustainable level for the surrounding community. Five years later, it received an approval for another expansion. Now it comes here again with proposes more health care for patients, which would mean more cars. They don't want another pinprick. Please do not allow the Home to overwhelm the neighborhood.

Greg Bale of 47 Wentworth stated that he lived next to the nursing home. His family has lived there for 3 generations. The main issue is parking. It has been a nightmare since the expansion of the home. He realized that the building is there but the parking is still the main issue and was never looked at properly when the large addition was allowed. Winter is even more of a problem with the issue of snow removal. He has no problem with them adding the new façade, but doesn't see how the entrance is going to help the issue of parking.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Johnson stated that he lived on Franklin Street and wanted good things to happen to the Home. His sense is that positive things have happened and felt that their reputation was a good one. Most people would like to see that continue. He has seen some changes – in the 1940's they used to play there in what is now the parking lot. From the other side it looks like a commercial building, and the Home is spreading itself out over time. Some of the expansion is unavoidable and some of it is good because it provides needed services. Some are bad because of the parking and other issues that arise.

With no one further rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Berg moved to table the petition until the applicant and departments address the question of parking – whether parking requirements apply and they readvertise it with proper lot coverage issues.

Chairman LeBlanc added that the also want the parking spaces to be delineated.

Mr. Berg added that.

Mr. Holloway seconded.

Chairman LeBlanc stated that it would be nice to see the numbers on the plan.

Mr. Marchewka asked what they would do if there was 26 spaces and 36 people parking there.

Chairman LeBlanc stated that it was not in their jurisdiction.

Mr. Witham stated that as he read it, parking is a nonissue. Usually, use variances are used for enlarged or altered for structures, and here the terms are flipped because of the one area of the ordinance where different words are used. He would like to see a little more clarification on Article XII.

Ms. Tillman stated that they would get that for him.

Mr. Berg stated that he would like some guidance and direction from the City Attorney.

The petition was tabled by a unanimous vote.

~~~~~~

2) Petition of **Bruce A. Clark, owner**, for property located at **893 Woodbury Avenue** wherein a Variance from Article III, Section 10-302(A) was requested to allow a 216 sf irregular shaped deck with a 24’3” rear yard where 30’ is the minimum required. Said property is shown on Assessor Plan 219 as Lot 36 and lies within the Single Residence B district.

SPEAKING IN FAVOR OF THE PETITION

Mr. Clark stated that he wanted to construct a deck on his house. The house is irregular, and the deck would be an irregular shape as well. The breezeway in back extends back a little further than the house and garage, and is set back. There are three abutters an done of their garages is adjacent to his garage. In back there is a 4’ chain link fence and a stockade fence along half of it. The owner has a large barn which buffers the view of his house and the remaining view is blocked by overgrown forsythia. On the remaining side, there is a 50’ vacant lot in between his property and the abutter. He recently put in some lilac bushes to cut the view of the property. The proposed deck encroaches into the setback and also has a height variation. He chose to have one step for more efficient use.

Mr. Marchewka asked what the reason was why it couldn’t be constructed in conformance with the 30’ setback. He could build a pretty substantial deck if he went the other way and made it wider rather than longer.

Mr. Clark stated that if they expanded sideways then they would be up against the garage on one side. At the present time, there are windows that go into the cellar on that side and a bulkhead that precludes them. There is also a clothesline there that would be closed off if they did that.

Mr. Marchewka suggested that they only go out to the garage.

Mr. Clark stated that 9’ was not enough room to maneuver.

Mr. Marchewka stated that they would otherwise have to relocate the bulkhead.

With no one further rising, the public hearing was closed.

DECISION OF THE BOARD
~~~~~~

Mr. Marchewka moved to approve the petition as presented and advertised, which was seconded by Mr. Parrott.

Mr. Marchewka stated that the applicant is allowed to put a deck on his property. The question was why he needed relief from the setback. He has demonstrated that a reasonable sized deck will need to go further back behind his property. He has looked at other options and nothing else is feasible. It is not contrary to the public interest – no one will see this except for the applicant. Special conditions exist such as this cannot be achieved by some other method reasonable feasible. He cannot go wider to fit within the setback. The special conditions of the property are limited by the existing building. This is a relatively small lot with predates the zoning, so the depth is not great. To do anything there is difficult. He is not asking for a lot of relief. The variance is consistent with the spirit and intent of the ordinance to allow the homeowner to improve his residence and expand to his benefit without affecting the public. Substantial justice is done by allowing this. The value of surrounding properties will not be diminished, and there is no evidence that putting that deck there will diminish property values.

Chairman LeBlanc asked if they could put something on there that would make the deck remain free and open to the sky.

Mr. Marchewka stated that he would add that. Mr. Parrott stated that he agreed as well.

The motion to grant the petition was passed by unanimous vote.

~~~~~~

3) "Rehearing per Order of the Rockingham County Superior Court in the matter of Michael Boccia, etal v. City of Portsmouth and Raymond Ramsey, Intervenor, 03-E-0087, dated October 4, 2004, for **property owned by Raymond A. Ramsey located off Kearsarge Way**, to determine whether construction of a 63-foot x 263-foot, 100-unit, five story hotel, with (1) a variance from Article III, Section 10-304(a)(10) to allow a 51-foot front yard where 70-feet is the minimum required, and a 30-foot rear yard where 50-feet is the minimum required, and (2) a variance from Article XII, Section 10-1201(A)(3)(e)(1) to allow off street parking to be located 15-feet from a residential district where a 100-foot setback is required, and Article XII, Section 10-1201A.3.(e)(2) to allow off street parking, maneuvering space, and traffic aisles within 15-feet of the front property line where a 40-foot vegetated buffer is required, constitutes a reasonably feasible alternative for the applicant to pursue under Boccia v. City of Portsmouth, 151 NH 85, (2004), from the variances granted on December 18, 2002, and clarified on November 15, 2005, from Article III, Section 10-304(a)(10) to allow a 51-foot building setback where a front setback of 70 feet is required; a 16-foot building setback where a side setback of 30-feet is required; a 30-foot building rear setback where 50-feet is required; (2) from Article III, Section 10-304(c)(2) to allow a building within 83 feet of property zoned residential where a 100-foot setback is required; (3) from Article XII, Section 10-1201A.3.(e)(1) to allow off street parking to be located 15-feet from a residential district where a 100-foot setback is required, and (4) from Article XII, Section 10-1201A.3.(e)(2) to allow off street parking, maneuvering space and traffic aisles within 15-feet of the front property line where a 40-foot vegetative buffer is required to permit construction of a 63' by 310' 100-unit four story hotel. Said property is shown on Assessors Plan 218 as Lots 22, 24, 25, 28, 29, 30, 32, 33, 34 and 39 (to be combined) a/k/a as Map 218 as Lot 22 and lies within the General Business district."

Messrs. Berg and MacCallum stepped down for this petition.

SPEAKING IN FAVOR OF THE PETITION
~~~~~~

Attorney Charles Griffin stated that he was representing the applicant. He stated that the Board was previously given a packet to which he will refer and passed out photos to which he will also refer. He is with Jay Bragg or Realty Advisors and John Destefano. This rehearing request arises from the new decision of the Supreme Court where they established a new test on unnecessary hardship for area variances. In October, the court remanded to this Board and stated that the scope should be limited to whether or not the applicant satisfies the second prong - which is whether or not a benefit is sought by the applicant and can be achieved by some other method considering all available alternatives. The only issue is whether a 100 unit hotel can be achieved by some other reasonable feasible alternative for the applicant to pursue. If the Board rules that it cannot, the variances stand. If the Board rules that they can, then they will have to rule on the alternative.

He outlined what happened in the Boccia case where the Supreme Court outlined four prongs. He stated that Mr. Ramsey had met these four and explained why they were going back for only one prong. Under the Boccia analysis, there is a new test for establishing unnecessary hardship. The Supreme Court concluded that the first part – regarding special conditions – had been met (on the wetlands in the narrow shape of the parcel). The Court also said that records supported the findings that variances were needed to have a 100 unit hotel. The Court mentioned other alternatives on page 95. Based on this ruling, Mr. Ramsey asked Ambit Engineering to prepare two alternatives. These options are included in the packet.

Plan C1 was approved in December of 2002. The plan includes 37 outside parking spaces and a three story above ground garage with 96 spaces. Chart C3 is for a five story 63 x 263 sf 100 room hotel with outside parking. The fourth plan is for a 63 x 300, five story 100 room hotel with 78 outside parking spaces and 48 underground parking spaces. He put together a chart to show how each impacts the variances and he outlined each variance. He pointed out the irregular shape of the lot on plan C3, and stated that this plan would take into consideration that the City wanted to have it built as far away as possible from the residents on Kearsarge. This plan would require only four variances instead of the six granted. Based on these, the architects prepared the plans included in the packet. Mr. Ramsey analyzed these plans and decided that C2 and C4 were not financially feasible. The increased costs would reduced the rate of return to an unattractive level and create a significant financial burden. Based on this analysis, only C3 would give the same rate of return as that previously advertised. Finally, a study made by Horizon Associates to determine any impact on the market value if the four story was modified concluded that there was a diminution in value with a five story instead of a four story. He referred to the photos submitted showing various other hotels and motels. The five story with outside parking would present an undue financial burden. Mr. Ramsey wanted to build a four story hotel as approved but has presented the Board with alternatives because the Supreme Court directed him to do so. Right now plan C3 seems to be the only reasonable choice. He asked the Board to determine if alternatives were reasonable.

Mr. Parrott stated that one of the reports said, in effect, that there would be no additional value gained by providing underground parking. Those seem to be desirable features and would generate more income so he was surprised to see that statement made.

Mr. Bragg stated that the Real Estate Advisors were the authors of that report. Having a portion of the proposal in a parking garage is not going to, in his opinion, create significant additional value. Income levels are not offset by the costs associated with the cost of the garage.

Mr. Parrott stated that there was no incremental value and that it said that it would not be offset. They can't have it both ways. Whoever wrote it made an error. It clearly states this.

Mr. Bragg stated that he may have misspoke. If there was any additional revenue from any parking garage, it would be offset by any operating costs. There is no significant difference in the occupancy rate due to covered parking. In a suburban environment, to have a car under cover would not have a significant impact on the occupancy rate.

Mr. Parrott asked if the ANA had tried to explore that particular point.

Mr. Bragg stated that they had not. One of the things that they looked at was getting views from various people in the industry. They had been asked if they were aware of other parking garages in suburban locations. The comments were that there was not enough additional benefit to offset the cost. He does not see how having a portion of parking under cover increases the income level.

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Thomas Keane stated that he was representing 1000 Market Street Corporation, which owns the property directly across the street. This property has a very long history. Back in 1985 when the City opposed rezoning of this property, and since then the applicant has been proposing a use greater than the property can accept. In 2001, his client proposed a 60' hotel that did not require any variances and since that time the Supreme Court has ruled on the Boccia case and made new laws. He is unsure how they apply to the Board. The applicant came forward with no profits or loss statements and no plans not requiring variances. Instead they had four proposals, all of which require variances, and the only financial information submitted is which one makes more money than the other. The applicant is not entitled to a variance simply because the proposal will make money. There are no property or law statements in any of the packets and no basis to determine whether one is better than another or more feasible. It is not the Board's job to pick out four alternatives – their job is to look at the alternatives and see which don't require variances and see if it is feasible. He submitted a letter to the Board containing a letter from the HDC. The construction costs of a hotel with underground parking of that height would be around $190,000.00. They do not qualify for a variance because one proposal costs more than another. Attorney Keane had provided a letter in response that evening. The site can accommodate a 60 unit hotel which could be successful, but they are trying to fit a 100 unit not consistent with the lot size. The applicant has not satisfied the requirements for a variance.

Chairman LeBlanc stated that he believed the court remand had said he was entitled to a 100 room hotel and he has presented configurations of a 100 room unit hotel.

Attorney Keane stated that the Supreme Court said that they wanted the applicant to present alternatives which obviated the need for the variances. The only other thing presented was the 60 unit hotel. They recognize that that was a reasonable alternative. This misconception about the100 room hotel is in the history of the case. In 2002, a court order never dictated it had to be a 100 hotel. The court order stated that they were just changing the zone to accommodate a hotel – it did not specify the number of rooms.

Mr. Samuel Beam, of 222 Kearsarge Way, stated he was a direct abutter. He is asking the Board to reject this proposal. First, there is no reasonable argument for hardship. There is no suffering or deprivation – the only thing that the applicant has shown the Board is a slightly diminished profit. A 60 unit hotel could be built with no need for a variance – the only argument against that is that it would be less profitable. This argument does not hold weight. The alternatives proposed tonight do not include a profit and loss analysis. They have to take on faith that certain alternatives are less financially feasible. As far as the franchise requirements, arguments only apply to the owner and it is not for the City to mitigate those problems. As for the shape and size, a 100 unit hotel is not appropriate for the area. It would be the largest building on that side of Portsmouth. This hotel would dominate the surroundings and make a more intensive use for Kearsarge Way.

Attorney Griffin had stated that the Court was limiting the rehearing to hardship, but he did include in the packet a question of diminution in value so we are invited to consider those points. He understands that no abutters spoke in 2002. If they are granted a zero buffer, they would put in landscaping to shield the hotel which would reduce the setback to zero in effect. That goes against the spirit and intent of the ordinance, which is to protect residential areas. There will be a diminution of value. A smaller hotel could be built. An increase in size results in an increase in noise and traffic. They already have trucks coming and going, so any addition to a lot is too much to ask of the residents. The intersection of Market and Kearsarge is already a source of traffic problems. With the widening of the intersection, it discourages buyers who might otherwise be interested in properties. The residential property is bordered by this lot. They are still talking about an 85% reduction in the buffer. He has letters to present from brokers and appraisers asking the Board to deny all the variances put forth. He mentioned a study submitted by Mr. Ramsey which he feels is incomplete and does not consider the impact of the five story vs. the four story hotel. He has letters on the abutters and traffic patterns.

Mr. Jay Linstrom of 260 Kearsarge Way stated that Mr. Beam had covered what he wanted to say. His concern is the parking situation and that his property would be decrease in value.

SPEAKING TO, FOR, OR AGAINST

Attorney Griffin stated that he would like to address Mr. Parrott's previous question. The Supreme Court specifically found that a 100 unit hotel was a reasonable use of the property. Anything less is not relevant. He mentioned that this was remanded twice to them, the first time being after Judge Abramson's order. In Boccia and Bacon vs. Enfield, financial impact on the landowner is indeed a consideration. In addition, eleven stipulations were attached to the variances approved here and then reviewed by a site review and traffic review. Mr. Ramsey was required to address specific traffic issues and invest $100K into the intersection. They are perfectly content to have a four story hotel instead of a five story hotel.

With no one further rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Witham made a motion that the application satisfied the second prong of the Boccia analysis.

Chairman LeBlanc stated that reaffirmed the original variances.

Mr. Holloway seconded the motion.

Mr. Witham stated that with all due respect to the abutters, the Court has decided the issues and that is not the issue before the Board tonight. The only question is if the benefit sought can be achieved by other methods reasonably feasible. He has struggled with the way Boccia is written, which starts off with the benefit sought by the applicant. This issue of a 60 unit hotel is moot because the Board has to deal with the benefit sought by the applicant which is a 100 unit hotel – not to find the magic number of rooms that works for all. Attorney Keane said that there were no profit or loss statements, but the information before the Board gave a very thorough outline of the rate of return, which he can use to determine the feasibility. They have looked at different scenarios. In the end, it was the impact on the neighbors that called for the new parking layout, and the other scenarios have the same impact on abutters, which doesn't change with the scenario. A five story hotel has a greater impact on the site, but he still thinks that the original proposal would be the most reasonable. The Court has already decided where the parking would be alright, which is based largely on wetland issues. The Court is asking the Board to find alternative ways that don't require a variance. With the shape of the lot, that seems impossible to find a layout that would require no variances. They've gone a long way to consider all the possibilities. He stands by his decision made before and the stipulations made before. Adding 2 million more dollars to the project is unreasonable. The rate of return on the two other scenarios dropped in percentage and he feel as though he can grant it in its entirety.

Chairman LeBlanc asked if he meant to include stipulations that they granted in September 17, 2002. There are 11 stipulations from that approval.

Mr. Witham stated that they were inherent but he will add them.

Chairman LeBlanc asked if it was alright with Mr. Holloway.

Mr. Holloway agreed.

Mr. Marchewka stated that the question he is dealing with regards the 100 rooms. He felt as though they were mandated to approve 100 rooms and wanted to know why that was the case.

Chairman LeBlanc stated that the applicant has asked for 100 and the Court stated that that was acceptable for him to ask for that and they have to deal with what he asked for. All of the dimensions of the lot are geared toward a 100 room hotel.

Mr. Marchewka asked where they came up with 100 rooms.

Attorney Griffin stated that it was requested by the applicant and the Supreme Court approved it.

Chairman LeBlanc stated that the 100 unit figure is based on criteria needed to be satisfied by the applicant in order to bring the project forward.

Mr. Marchewka stated that at one time this Board approved 100 rooms and decided that it was not unreasonable.

Chairman LeBlanc stated that it was still valid.

Mr. Parrott stated that the Court did not specifically say that they would not entertain anything other than 100 rooms. The Court could have granted it but instead they sent the whole thing back and 100 rooms is an arbitrary number. It has nothing to do with the land – the Court said to consider cost aspects and if the Court felt that 100 rooms was fiscally necessary, it would not say that. They have seen the relative expense of the other available alternatives. They've been given four alternatives with not too much difference. If the Court had thought this was an excellent proposal and this Board was being unreasonable, then they would have simply granted it and not remanded it. So they are not satisfied that they have done what the Court wanted them to do by looking at only four alternatives. They ask for any available alternatives and by reading page 93 and 95, he didn't get any different slant. He is not satisfied with what they have done.

Mr. Witham stated that one of the statements from the Court said that 100 unit is not unreasonable simply because other alternatives exist. He doesn't think that they need to get into a redesign. They started with the benefit sought, which regards the 100 rooms. If they look at the site, there is no other place to really put the building. At some point they will have to look at the alternatives presented to them. If 100 units is too big, then they do not want to have to say no.

Mr. Marchewka stated that at a previous board meeting, he felt a little pigeonholed into the 100 room size. In reading over the decision, it said that the previous Board decision felt that 100 rooms wasn't an unreasonable figure. That is not to say that they cannot look at it again. He would have liked to see a plan that didn't require a variance. If a 60 room hotel can fit there without a variance, he doesn't what issues that will have. Three is a lot of gray area in that court decision.

Mr. Parrott stated that they were getting down to parsing words because what is whether or not the benefit sought by the applicant can be achieved by some other method. They ask for any available alternatives. It doesn't say anything about the rate or return or what can be financed. They have the relative expense of the available alternatives. The argument tonight stated that there was a need of 18% and other just give 12%. The benefit sought by the applicant does not specify a 100 unit hotel. He is not comfortable with this request.

Mr. Witham stated that this is asking them to look for alternatives for a 100 room hotel.

Chairman LeBlanc stated that they had to look at this in totality. The other four conditions for the variance were upheld by the Court upheld and they were for a 100 room hotel. Since they have been given this set of circumstances, they have to deal with this as a whole and apply some stringent conditions. But they should allow this to be built. They addressed the issues of the neighborhood and the impact of the building on the neighborhood. Tonight they should say that they did a good job the last two times and he thinks that it is time to put this to bed and move it off the table.

Mr. Parrott read from T. Nadeau of the Superior Court and not the Supreme Court.

Chairman LeBlanc moved for a vote to rule on this with the stipulations.

The motion to grant the petition failed to pass by a vote of 3 to 2, with 4 votes needed to pass. Messrs. Marchewka and Parrott voted against the motion.

~~~~~~

4) Petition of **K & S Energy Group Inc., owner**, for property located at **1400 Lafayette Road** wherein Variances from Article III, Section 10-304(A) and Article IV, Section 10-401(A)(2)(c) were requested to construct a 9'8" x 43'8" one story addition to the rear of the existing convenience store with: a) a 30.1' rear yard where 50' is the minimum required, b) a 14.3' left side yard where 30' is the minimum required; and, c) a 15.1' right side yard where 30' is the minimum required. Said property is shown on Assessor Plan 252 as Lot 7 and lies within the General Business district.

SPEAKING IN FAVOR OF THE PETITION

Attorney Bernard Pelech stated that they were there seeking variances at add a one story addition to the rear of an existing convenience store. They seek a 30' rear yard setback where 50' is required, a 14.3' left side yard setback where 30' is the minimum and a 15' right side yard where 30' is the minimum. In May the Board granted essentially the same three variances now requested. There is no reasonably feasible alternative to this and it is consistent with the spirit and intent of the ordinance. There will be no diminution in value of surrounding properties. They have reduced the size of the building and reduced the parking requirement by one space. When they went to TAC, the members of TAC had issues with two of the parking spaces, so they eliminated one and relocated one. They were also able to eliminate another variance request. Substantial justice will be done. This meets the criteria and should be granted.

Mr. Marchewka asked if it was placed on a septic tank.

Attorney Pelech stated that this has no sewage system. The sewer line runs behind the old Yoken's site.

Mr. Marchewka asked if they were going to prohibit parking in the rear.

Attorney Pelech stated that they attempted to get an access easement from Yoken's, but they couldn't get it. They will have to go back and request another.

Mr. Marchewka asked if it was going to go to TAC again.

Ms. Tillman stated that it would.

Attorney Pelech stated that they've been to pre-TAC and they massaged what is before the Board.

With no one further rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Berg made a motion to grant the petition as presented and advertised, which was seconded by Mr. Parrott.
~~~~~~

Mr. Berg referenced the approval rationale and the letter sent to the applicant from the last meeting. The only change to it is that it has less non-conformity so he cannot deny it.

Chairman LeBlanc added the stipulation that this would have to be approved by the ADA.

The motion to grant the petition was passed by a vote of 5 to 2, with Messrs. MacCallum and Witham voting against the motion.

~~~~~~

5) Petition of **Portsmouth Farms LLC, owner, Starbucks Coffee Co., applicant**, for property located at **1855 Woodbury Avenue** wherein the following were requested: 1) a Variance from Article XII, Section 10-1204 Table 15 to allow 27 parking spaces to be provided where 34 parking spaces are required, 2) a Variance from Article XII, Section 10-1201(A)(3)(e)(2) to allow parking spaces and travel aisles within 40' of the front property line and said area to be landscaped; and 3) a Variance from Article III, Section 10-304(A) to allow a 4' x 9' drive-thru canopy with a 26' left side yard where 30' is the minimum required. Said property is shown on Assessor Plan 215 as Lot 11 and lies within the General Business district.

Chairman LeBlanc announced that the applicant had requested that this petition be tabled.

It was moved, seconded and passed to table this petition to the January 17, 2006 meeting.

~~~~~~

6) Petition of **Hill Hanover Group, LLC, owners**, for property located at **349-351 Hanover Street** wherein a Variance from Article III, Section 10-303(A) was requested to allow open space to be reduced by adding two nonconforming parking spaces from 29% to 22% where 25% is the minimum required. Said property is shown on Assessor Plan 138 as Lot 64 and lies within the Mixed Residential Office district.

Chairman LeBlanc announced that the applicant had requested that this petition be tabled.

It was moved, seconded and passed to table this petition to the January 17, 2006 meeting.

~~~~~~

7) Petition of **45 Pearl Street Properties, LLC, owner**, for property located at **45 Pearl Street** wherein the following were requested: 1) a Variance from Article II, Section 10-207 and Article IV, Section 10-401(A)(1)(b) to allow 3,200 sf of the existing building to be used as a function hall (Weddings, Wedding Receptions, Special Events{rental to local and non-profit ventures: auctions, family reunions, business meetings, etc}, Art Gallery {display, openings and sales of artist's work}; Live Performances of theater and music: rehearsal space, opening night galas and events); and Church services/bible study, all with amplified music and hours of operation daily til midnight and on New Years eve til 1 AM, and 2) a Variance from Article XII, Sections 10-1203 and 10-1204 to allow the facility to provide no conforming onsite parking or loading areas where 148 parking spaces are
~~~~~~

required and loading areas are required. Said property is shown on Assessor Plan 126 as Lot 30 and lies within the Mixed Residential Office district.

Mr. Berg stepped down for this petition.

SPEAKING IN FAVOR OF THE PETITION

Attorney Edmund Ford, on behalf of 45 Pearl Street Properties, stated that he handed out a petition that Mr. Dodds obtained. The Pearl Street Church is important because Martin Luther King, Jr. preached here at one time. It was entered into the state and national registers of historical significance in 2002 and 2003. What the applicant seeks is to use the facility as a cultural center. He wants it to be a church that gives some historical value to the people of Portsmouth. In the package, there is a letter about the need for amplified music for its use as a church. These variance requests are all designed around making this historical property feasible in its historic function. Secondly, they would like to modify the existing variances to allow amplified music and to slightly modify the hours of operation to expand to midnight on most days and 1:00 a.m.on New Years Eve. They want to make this available to the community while also making it economically feasible, which is one of the purposes of the zoning ordinances.

The applicant seeks to bring this facility closer to its historical origins. In a Mixed Residential Office zone, the use of this facility as a function facility includes churches by a variance in 1987. In order to make this facility available to the City of Portsmouth, it must be economically feasible and have people coming into it. He outlined the mezzanine level, and how a current apartment would be incorporated into a gathering area. For only 20 years it was used as a restaurant which was an unsuccessful venue without amplified music. There will be no diminution in value of surrounding properties. They've gone to all the neighbors and asked for their support and they have each signed off on this. It is not contrary to the ordinance and bring it back to its original use. There is a benefit to the public interest as it makes those historical values preserved. Substantial justice is done because it promotes a cultural benefit.

Reverend Jeffery McIlwain of Mission Church stated he has seen churches that have become defunct. When the opportunity came to move the congregation into Pearl, it was a perfect match. He is looking to build a congregation from this historical church. He explains that this was a Zion church which has a rich history. He is looking forward to a future here.

Chairman LeBlanc asked why they needed amplified music.

Reverend McIlwain stated that in the church they have a piano, organ and have choirs coming in.

Chairman LeBlanc asked if the building that small would need amplification. If there was a simple piano in there is could be easily heard without amplification.

Reverend McIlwain stated that it was just common now to have electrical instruments and microphones. They could go without it.

Chairman LeBlanc stated that that was what he was asking. He doesn't know if anyone around the church knows if they have signed on to the petition, but if he had bought a house near there, he would be upset at the music. Since it has been relatively quiet for some time, it would be a shock.

Chairman LeBlanc asked if the Sunday service was at 11 am on Sunday morning.

Reverend McIlwain stated that that was correct. The only other time there would be a district event would be on a Saturday at 11 am.

Attorney Ford stated that the platform here is a good example of how the absence of amplification creates noise. There is a noise ordinance – but something like this which is useful would be barred from Pearl as it exists.

Mr. MacCallum asked if this was a correct statement.

Chairman LeBlanc stated that they are being amplified because they are being broadcast. The variance had a stipulation of no amplified music.

Ms. Tillman asked which section he was referring to.

Attorney Ford clarified that he was not referring to the ordinance, but rather the existing variance.

Mr. Marchewka stated that in regard to the noise ordinance, there are hours that they are limited to.

Ms. Tillman stated that 7 am to 9 pm in a Mixed Residential district. The decibel reading should be 55 DBA at the property line.

Mr. Marchewka stated that as long as someone is within the decibel levels, how can they tell them that they can't amplify sound.

Chairman LeBlanc explained that it was because the variance they approve stipulates no amplification.

Mr. Marchewka stated that then they have a residence that has band practice every night. They should be dealing with decibel levels.

Ms. Tillman explained that amplification is only a component of the request. This is a Mixed Residential Office district, and there are several uses listed in the variance request that would not be compatible with the uses in the mixed residential area. The church services are only part of this use. Weddings, special events, live performances, rehearsal space, opening night galas which require extended hours of amplification.

Attorney Ford stated that it in his view, the existing variances permit the description of what Mr. Dodd outlined as a particularized version of what are called events.

Ms. Tillman stated that the size of the function hall is getting bigger.

Attorney Ford stated that the area was getting bigger.

Ms. Tillman stated that they were taking one of the dwelling units and making it a function area.

Mr. Gary Dodds stated he was the new owner and would like to address the noise issue. He is trying to be a good neighbor. He doesn't have the signatures of all the abutters, but he does have one abutter here. He tried to tell people that this what he is doing and he has had literally no complaints with what was there before. He is always thinking of the neighbors and letting the abutters know his intentions. If there is an ordinance on the noise level, he will adhere to it. If he needs to turn the music down lower, he will be happy do that. He would like to run through what he intends to do. He had plans showing the first and second floor as it is today. He added the proposed plans and showed the stair relocation and the function area. He will enlarge the two bathrooms and make it more handicap accessible. It will hold a greater number of people.

Chairman LeBlanc asked if the ramp would go up to the second floor.

Mr. Dodds stated that the ramp would go to the first and then there would be some sort of stair chair to go up.

Mr. Parrott asked if he would give them the stipulation of the conservation easement in summary. He just wants the nature of it.

Mr. Dodds stated that he is certain that it is a preservation easement and they cannot physically touch certain areas within the NH preservation alliance.

Mr. Parrott asked if any of that dealt with uses.

Mr. Dodds stated that it did not.

Mr. MacCallum stated that he has no problem with anything that they do. His only concern is the amplified music and ancillary noise. He gathers that the church was built about 140 years ago.

Mr. Dodds stated that it was built in 1858.

Mr. MacCallum stated that it has been in use for 150 years and has not needed any amplification or sound system.

Mr. Dodds stated that times change. His amplification choice would be surround sound, because right now the sound is domed. Envision the music coming from the original balcony and playing over the top of the people on the floor. Just to be able to hear all the notes clearly is the concern; it is not necessarily the loudness.

Mr. MacCallum stated that variances are forever and if they grant it then he would have to act responsibly. If he then sells it to an irresponsible owner what assurance does he have?

Mr. Dodds stated that that was a good question. He doesn't know what they can put on as a stipulation. If he does sell it, he doesn't know how to reassure him except saying that he will do everything he can to minimize and keep the noise low. There is no insulation in there right now, so he will be putting that in. This will not be a rock concert; there will be small art performances such as art speak.

Mr. Witham stated that it's not like he sold it to someone who could come in with loud music. There are decibel controls to cover noise for all districts. They could pick the most restrictive district and apply that.

Mr. MacCallum asked if it was the most restrictive district.

Ms. Tillman stated that it appeared to be. The level stops at 45 between 9 pm to 7 am.

Chairman LeBlanc stated that they can apply it as long as the provisions of the article are met.

Mr. MacCallum stated that he wanted to respond to the remark that Mr. Witham made. They faced this issue with the Brewery Lane Tavern and there are restrictions. There's always going to be noise and one of the basis on which they are denied a variance. Yes, there are these limits in place and sometimes it can become an enforcement nightmare, but there is no problem with the uses – not even parking. He doesn't like it but there is little that he can do. He does have a problem with noise.

Chairman LeBlanc asked if the amplified music and the performers up in the balcony would be using surround sound.

Mr. Dodds stated that depending on what the performance is, they would try to get it loud enough so that everyone could hear. It doesn't have to be that loud.

Chairman LeBlanc asked that there would be speakers place around the building so the music isn't just coming from one large speaker.

Mr. Parrott asked if there was central air.

Mr. Dodds stated that there were units in the third story that were just not hooked up. They have the capability but just no juice.

Mr. Parrott asked if the windows could be opened when it was hot.

Mr. Dodds stated that he planned to use the air conditioning so he doesn't have to keep the windows and doors open. Right now they are painted shut.

Mr. Christopher Loder, an abutter across the street, stated that he had a number of conversations with Mr. Dodds. His primary concern was if there was already a way to measure the ordinances. He has requested in advance that he test the sound inside and outside to see how the sound carried and if it is possible to leave a sound meter in the building to allow people within to police their own sound. He

mentioned places that he has seen with different types of amplification. He can vouch that Mr. Dodds has been very forthcoming about his intentions.

Mr. MacCallum asked Attorney Ford if he was familiar with Fisher v. Dover.

Attorney Ford said no.

Mr. MacCallum stated that he cannot come back with the same thing that was previously denied. This Board has already imposed that stipulation in a prior decision.

Mr. Dodds stated that that was a different request. He believes that that involved the construction and the apartment and the return of the property to a series of uses, not as a closed historical function as Attorney Ford outlined. He mentioned the previous granting and the stipulations attached to those. He didn't know the background of a 1997 decision. If the facts aren't the same, the decision that came out of those facts is not binding on a different set of facts.

Mr. MacCallum stated that what he has in front of his is a synopsis. In the past, a restaurant was allowed, and Mr. Dodds is now looking for more than that. If there was a limitation on amplified music and operating hours for those functions, the restrictions would also apply to expanded uses.

Mr. Dodds stated that they would have all functions appropriate to a function hall.

Mr. MacCallum stated that he also wanted live music, wedding receptions and special events. On average, those create more noise than using the facility as a restaurant.

Mr. Dodds stated that he supposed that depended on the restaurant. The real answer is that there is a noise ordinance. Noise levels are permitted that are relatively quiet. That is the regulatory regime aimed at the program. One can have loud noise without amplification and one can also have amplification without loud noise. The real issue is not amplification, but the amount of noise coming to the property line.

Mr. MacCallum stated that they would be open daily until midnight. In talking about noise and disruption, everyday till midnight, they could have 150 people leaving at midnight. That would cause noise and disrupt. It seems a little much in, in his opinion, that they would be open everyday.

Mr. Dodds stated that he doesn't expect that a situation like that would occur.

Chairman LeBlanc stated that they were asking for it to occur.

Mr. Marchewka stated that they were in a residential neighborhood. He thinks that 10 pm would be a more reasonable time.

Mr. Dodds stated that he thinks that it goes till 11 right now. He doesn't have a problem closing at 11 on weekdays, and having it open Fridays and Saturdays till midnight. This isn't a bar or a restaurant.

Mr. Marchewka stated that as Mr. MacCallum pointed out, someone else could come in and run it differently.

Chairman LeBlanc stated that the hours would be Thursday 9 to 11 and Friday and Saturday would stay open until midnight.

Mr. Dodds stated that that was fine. He added that they could be open on New Years until 1.

Mr. Holloway stated that if they were going to use this as a church, then the service should start between 10 and 1.

Chairman LeBlanc stated that if they stipulate the hours as 9 to 11, then they can't do it.

SPEAKING IN OPPOSITION TO THE PETITION

Chairman LeBlanc read notes and emails from Mr. Joseph St. Cyr and from a person who submitted a handwritten one. Their concerns were with parking and noise. Sometimes the residents cannot get into their parking spots or driveways because of blocked traffic. Some residents have children.

An abutter stated that if the ordinance requires a certain number of parking spaces, the request should be for a complete waiver. Parking is a big problem in the neighborhood. Having rules on the books sometimes makes enforcement tricky. They must see the fallacy in equating this request with reviving a church. The church is very small and this petitioner is not affiliated with the church. This is a for-profit business. The church is a very small use and it would be a private for profit enterprise giving a little bit of space to a church. Making the building available for the people of Portsmouth is nice, but again, it is for profit. If it were a museum, that would be one thing, but it is for pay. The surround sound is another issue. Having a wedding does not involve quiet sound. In addition, one of the letters mentioned people getting out of a function. During warmer months, large groups of people walk around his house making noise. Weddings can have people that have had too much to drink. He has two young children and he has a concern about people streaming out at 11 pm or midnight. It is really going too far beyond what was granted and he is not happy about it.

Mr. Martin Burns, of 288 Hamilton stated that it sounds like a nice group of people. His main concern is amplified music and that is why he wrote the letter. He remembers the Malibu Beach Club and how he used to watch his windows shake with that operation. This owner says that wont happen and he believes him, but he is concerned with the next owner. The request that he read on the abutters sounded like any type of amplified music. Enforcement is a whole other deal. The police are too busy or it is too hard to enforce. He is very concerned.

With no one further rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Parrott moved to grant the variances as presented and advertised, except adding two stipulations to the first variance:

- that there be no amplified music;

- that the closing hour would be 11 pm, with the exception of New Years Eve, when it would be 1:00 a.m

Mr. MacCallum seconded the motion.

Mr. Parrott stated that the uses could be continued. With respect to amplification, the number of people inside will generate a substantial amount of sound. Amplification is a reasonable restriction when residences are so close. It is essentially a residential area and this is a lot to grant in a residential area. The owners should expect some limitations on the use of the space.

Mr. MacCallum stated that one question they did not receive a complete satisfactory answer for was why, if it operated for 150 years without amplification, it would need it now. The need to have amplified music does not trump the need of the neighbors to have peace and quiet. They have no choice but to deny that aspect of the request. Granting this with stipulations is essentially what was granted in 1997. It is not contrary to the public interest because Mr. Dodd's plans will enhance the public interest.

This building was erected in 1858 and was there long before much of the abutting residences and properties. It is unreasonable to ask the church to be torn down or move or not be allowed to be used. It is a reasonable use considering its physical settings – the building itself is markedly different from the properties surrounding it. They should allow uses with the imposed restrictions. With the restrictions in place, it will not injure the public or private rights of others. It is consistent with the spirit and intent of the ordinance, which encourages arts and quality of life. Substantial justice is done because the building is unique and has been there long before other properties. It would be an injustice if the owner could not use it for reasonable activity such as proposed. There will be no diminution in values to surrounding properties. As to parking, all the criteria of the Simplex and the Boccia are met. He highlights the aspect that the building is in a unique setting and was there long before everything else. Nothing reasonable can be done to reconcile reasonable use of the property and parking, because there just isn't any parking. Special conditions do exist with respect to parking.

Mr. Marchewka stated that he had a comment on amplified music. He doesn't think that it is unreasonable to ask for permission to have amplified music and mikes for speakers. As long as it is regulated, he thinks it is appropriate. That being said, he wouldn't support hours after midnight, but certainly a church service on Sunday that goes until 9 pm would not be unreasonable. No matter the type of gathering, they will have a mike that is amplified. Would the makers of the motion feel differently about what they proposed? He would support a limited amount of amplification.

Mr. Parrott stated that it was not his intent to prohibit a voice amplification sound system, just music.

Mr. MacCallum stated that it was his understanding that it was only regarding amplified music. They can use a microphone if they wish.

Chairman LeBlanc asked about the electronic organ. It is music, but it is integral so would they be able to have that?

Mr. Parrott stated that they could.

Mr. Marchewka stated that the guy next door could have a party and maybe offend someone. It seems unreasonable to not allow any amplified music.

Mr. Witham agreed. Just hearing the words amplified music puts the fear of God into everybody, but they have rules to control that. The ordinance says that this much noise can leave the building. Enforcement should not be the issue. There are good rules in place already. Taking away rights to now allow something because of the worry of enforcement is ridiculous.

Chairman LeBlanc stated that this is a positive motion to grant the uses and the parking. If defeated, this goes down in flames.

Mr. Marchewka stated that he was hoping the makers of the motion would amend.

Mr. Holloway stated that it was his concern that it handicaps the church. How will they enforce the noise level except for the police? He cannot support the motion without amplification.

Mr. Marchewka offered having the amplification cease at 9 pm.

Chairman LeBlanc stated that the ordinance is very specific. At 9 pm, the music has to go down to 45 decibels 4' off the ground at the property line.

Mr. Parrott stated that as a practical matter, it is not their problem.

Mr. MacCallum stated that he disagreed.

Mr. Witham stated that they were overstepping their bounds.

Mr. Marchewka stated that that was why he was suggesting a certain time of night.

Mr. Parrott stated that there were a lot of different groups coming in.

Mr. MacCallum stated that if Mr. Parrott wanted to withdraw, he will withdraw his second. He agreed with Mr. Marchewka in principle but is worried about the practicalities. This is the first line of defense for the abutters.

Mr. Parrott asked the Board if tabling it would help for them to think it through. He is willing to withdraw. He withdrew his motion, which Mr. MacCallum seconded.

Mr. Marchewka moved to approve as presented and advertised with the stipulation that amplified music be allowed only until 9 pm everyday.

Chairman LeBlanc stated that the stipulations should include that the standard hours of operation would be till 11 pm daily except for New Years Eve to 1:00 a.m.

Mr. Witham seconded the motion.

Mr. Marchewka stated that it was difficult to tell the property owner that they can't amplify anything. This property at this location has been operating in a similar fashion for 150 years and is unique in that it shares an environment with mixed uses. To strictly apply zoning restrictions would interfere with its use. The stipulations are there to protect the public and are not contrary to the public interest. It will continue to be a meeting place as it has been for many years without disrupting the neighborhood to any great extent. This is consistent with the spirit of the ordinance and should operate in the same manner as a homeowner in the conduct of their lifestyle. Substantial justice is done by allowing the operation to continue. The value of surrounding properties would not be diminished because there is no change to what is operating there.

Chairman LeBlanc asked the parking relief and Mr. Marchewka stated that his reasons applied to both.

The motion to grant the petition was passed by unanimous vote.

~~~~~~

III. ADJOURNMENT

The motion was made, seconded and passed to adjourn the meeting at 12:05 a.m.

Respectfully submitted,

Danielle Auger
~~~~~~