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

7:00 p.m.	**CITY COUNCIL CHAMBERS**	**March 28, 2006, reconvened from March 21, 2006**

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

MEMBERS EXCUSED: None

ALSO PRESENT: Lucy Tillman, Chief Planner

Chairman LeBlanc called the meeting of the Board of Adjustment to order at 7:00 p.m.

I. PUBLIC HEARINGS

8) "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, 38 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 Griffin outlined a sequence of events leading to the rehearing, including the Boccia vs. the City of Portsmouth case, which was an appeal of the Board's December 17, 2002 decision granting variances to the property. A copy of that decision was in the packet as Exhibit 2. He stated there was ultimately a remand by the Rockingham County Superior Court to the Board, Exhibit 3, but with limited scope, namely, could the benefit sought be achieved by some other method reasonably feasible to pursue taking into consideration the financial burden on the landowner and the relative expense of available alternatives. The Superior Court remand order in turn resulted from the remand to them by the Supreme Court.

He stated this hearing was unique and markedly different from the type of petition the Board normally heard. The Board was being asked whether the construction of a 100 room hotel could be achieved by some other reasonably feasible alternative than the six variances already granted. If the decision is yes, then the petitioners need to seek another design. If it is no, then the 2002 decision remains in place. The nature of the motion should not be simply to grant or deny, but rather whether a 5-story, 100-room hotel with four area variances is a reasonably feasible alternative to the 100-room hotel with 4 stories and six area variances which the Board approved in 2002.

He stated the number of the rooms in the hotel was also not an issue before the Board. Both the Supreme Court and the Superior Court had established that Mr. Ramsey was entitled to a 100-room hotel and he had cited in the packet a number of excerpts from the Supreme Court decision with Boccia that supported that proposition. He had also provided the Board that evening a report on a later case, Vigeant vs. the Town of Hudson, in which the Supreme Court said that in the context of an area variance, the question of whether the property can be used differently than what the applicant had proposed is not material and specifically said that the 60-room hotel proposed in Boccia was not a viable alternative to the proposed 100-room hotel.

The third reason why this matter was unique was because the Supreme Court said that the Superior Court had considered and determined that the remaining four prongs of the variance test had been satisfied. He stated this meant that the Supreme Court had concluded that granting the variances to allow a 100-room hotel on this site would not devalue surrounding properties; would meet the public interest; would be consistent with the spirit and intent of the ordinance; and would result in substantial justice. Therefore, the Board need not reconsider those issues in answering the questions before them.

The fourth was that the Supreme Court found Mr. Ramsey had satisfied the first prong of the test, namely whether an area variance was needed to enable his proposed use of the property given the special conditions of the property. Those special conditions were unique to the property and included the presence of wetlands which limited the possible areas where the hotel could be sited and the narrow shape of the parcel. It also said that the records support the finding that the variances were needed to enable the proposed use of the property and the 100-room hotel as designed. The Supreme Court in its remand concluded that the only remaining issue was whether there was a reasonably feasible method of effecting the proposed use without the need for variances and taking into consideration whether the variances were necessary to avoid undue financial burden on the landowner. The Supreme Court then cited two possible alternatives, namely, the use of underground parking or adding an additional level to the hotel.

Attorney Griffin stated that, at the public hearing in December, questions were raised as to whether a 100-room hotel could be built on the site without a variance and the answer was "no". When Mr. Ramsey's property was rezoned to General Business in 1998, the City wanted to ensure that the impact of the hotel on the surrounding residences would be kept to a minimum. It was agreed between the City and Mr. Ramsey that the most desirable location for the hotel would be as close as possible to Market Street and as far away as possible from the adjoining residences on Kearsarge Way.

In March of 2000, the City agreed to deed to Mr. Ramsey a portion of the old abandoned Kearsarge Way, which was highlighted in yellow on Exhibit 4. In return, Mr. Ramsey gave the City a conservation easement of 2.12 acres over the rear portion of his property which was highlighted in pink. The purpose of this easement was to ensure that this area would constitute a permanent vegetative buffer between the hotel and the adjoining residences. A copy of the deeds were Exhibit 5 in the packet. Exhibit 7 was a copy of the conditional use permit issued to Mr. Ramsey to allow storm water runoff from the hotel parking lot to be discharged into a wetlands buffer.

The New Hampshire Wetlands Board reviewed this request and indicated that the area that would be impacted by the conditional use permit, which was outlined in green on Exhibit 4 and consists of 1.9 acres, must also be placed in a conservation easement with the result that nearly 60% of Mr. Ramsey's land would be encumbered by conservation easements and would not be able to be built upon. He believed the Supreme Court was referring to this fact when it said in the motion that the special conditions of the land, including the presence of wetlands, limited the possible areas that the hotel could be built and make it difficult to comply with the applicable setbacks or other restrictions, such as conservation, so that area variances might be necessary from a practical perspective. The portion of the property that could be built upon is limited to the 2.9 acre westerly portion of the property which is outlined in orange.

Ambit Engineering was retained to determine whether the necessity for variances could be eliminated by implementing either of the alternatives suggested by the Supreme Court and, in addition, Ambit came up with a third alternative, which is a 4-story hotel with outside parking and a 3-story above-ground parking garage. He indicated that Exhibit 9 in your packet was a series of floor plans. C-1 shows a 4-story 63' x 310' hotel with outside parking, which represents the plan the Board approved in 2002. C-2, shows a 4-story 63' x 310' 100-room hotel with outside parking and a 3-story above-ground parking garage. C-3 shows a 5-story 63' x 263' 100-room hotel with outside parking and C-4 shows a 5-story 63' x 300' 100-room hotel with a 48-space underground parking garage and outside parking.

Attorney Griffin stated that the impact of the number of variances required for each scenario was summarized in Exhibit 10 with the conclusion that variances would still be required in each instance. The special conditions of the property, namely wetlands, the irregular shape, the fact that it is encumbered by two conservation easements, and the City's desire to have the hotel located as far away as possible from adjoining residences really require that the building be placed where proposed on the western end of the property. In addition, DeStefano & Associates had developed a cost analysis, shown on Exhibit 11, for each alternative because the court cited there should be no undue burden on the landowner, with the conclusion that only plan C-3 was comparable to the original C-1.

The Supreme Court in Boccia also stated that when special conditions of the property make it difficult or impossible to comply with applicable setbacks or other restrictions, area variances might be necessary from a practical perspective to implement the proposed plan. Attorney Griffin stated that it was their position that, because of the special conditions and other restriction associated with Mr. Ramsey's property the variances are needed from a practical perspective to implement a 100-room hotel. In addition, he read the 11 stipulations which were imposed by the Board in 2002 and would minimize the impact of this project on the residential areas.

In conclusion, it was their opinion that constructing a 100-room hotel with either a 3-story parking garage or an underground parking garage are not reasonably feasible for Mr. Ramsey to pursue because, first of all, they wouldn't eliminate the need for any of the six variances, but in fact would increase the degree of some. Secondly, they would pose an undue financial burden on him due to increased costs and declining rate of return, which would not support the additional debt service required. Exhibit 13 is a letter from TD BankNorth with their conclusion that options C-2 and C-4 are not bankable as additional costs associated with parking garages raise the price too high.

He stated that Mr. Ramsey would prefer to build the 4-story, 100-room hotel for which the Board granted 6 variances in 2002. In the end, however, it was up to the Board to determine whether a 5-story, 100-room hotel with 4 variances is a reasonably feasible alternative. If the answer is yes, the 5-story hotel with 4 variances will replace the 4-story one with 6 variances. If the answer is no, then the prior approval of the 4-story, 100-room hotel with 6 variances approved in 2002 will remain in place.

When Mr. Parrott questioned why there was no presentation for a 6-story hotel which might minimize the degree of relief needed, Attorney Griffin stated they would then need a height variance which he did not believe the court would want. Part of the impact on the neighborhood is visibility.

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Thomas Keane stated he represents 1000 Market Street Corporation which owns property directly across the street. In December of 2005, the Board heard the same application. There was no new evidence or allegations of any faulty procedure. His client does not object to a hotel, but believes a 100-room hotel as currently proposed is overdevelopement of that lot. He stated Attorney Griffin has attempted to convince the Board that he is entitled to a 100-room hotel. Rezoning in the past has allowed hotel use, but it does not state in the ordinance the number of rooms that need to be in a hotel. He quoted from the court decision regarding exploring reasonably feasible alternatives, concluding that rezoning is all the court ordered, not to allow a 100 room hotel. The Boccia decision did not guarantee the number of rooms.

Even assuming they were talking about a 100-room hotel, he stated no Profit & Loss Statements had been provided to show that a hotel built with parking garages or any of the other alternatives would result in financial hardship. The Board was correct in December when it said it was unclear that it had to be a 100-room hotel. He questioned whether, if Mr. Ramsey went to a smaller or larger number of rooms, that would void approval and stated the court did not specify 100 rooms in the decision.

Mr. Witham asked whether the Vigeant case, where it says 60 rooms versus 100 rooms is not material, didn't fly in the face of what Attorney Keane was saying.

Attorney Keane responded that the proposed use is for hotel use and nowhere in the zoning does it say they were entitled to build a 100-room hotel.

Mr. Witham reiterated that Vigeant said it was not material and he was trying to understand the argument.

Attorney Keane stated that the Supreme Court that remanded the case still leaves a question. Their stating that the only thing that could be built is a 100-room hotel does not make sense to him. He felt it said to take a look at what was being proposed and the financial impact on the applicant and asked if there were alternatives that would still result in a financially feasible project with fewer variances and less of an impact on the neighborhood.

Mr. Witham stated the Board was trying to deal with what the court has asked them to do and didn't see why the Board should consider all the other possible numbers of rooms instead of what had been presented.

Attorney Keane maintained they had to consider what was presented and whether there were any alternatives.

Mr. Jousse stated he believed the court gave permission to build up to 100 rooms and it was up to the applicant to determine the exact number, not the Board.

Attorney Keane stated he wished the court had been more clear. They did not say the applicant could build up to 100 rooms, but that there were other reasonable alternatives to achieve the use, which was that of a hotel. He stated the court was always talking about use.

Chairman LeBlanc stated it was his opinion that the court ordered that they look and see that there are alternatives that the owner has proposed and that they do not eliminate all of the variances. What they had before them that evening was looking at alternatives to a 100-room hotel which was granted by them to the applicant. That is the only question, not the size as that was dealt with when they first gave their approval. Now they were looking at alternatives for the envelope that the hotel can assume and the financial burden.

Mr. Beam of 222 Kearsarge Way stated he remained in opposition. The Boccia decision does not say they were entitled to any size hotel. He stated he believed Attorney Griffin's basic assumption was not correct and that was followed by financial numbers with no backup. There should be more detailed cost/benefit analysis to support decision

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. John Chagnon stated he is the engineer for the project and that adding stories and shortening the building would not significantly affect the setbacks. 60' is a standard width to allow for a corridor with rooms on both sides. The ordinance setbacks of 50' from the rear and 100' from front don't allow any width on the right side and the front setback is a very irregular boundary. A 60 room hotel would still require variances.

Attorney Griffin stated they were talking about a 100 room hotel because that is what Mr. Ramsey asked for and for which he received approval. The reference to the Supreme Court was long ago and before the variances were granted in 2002. The Supreme Court even then concluded it was a 100 room hotel. He maintained they have presented a cost analysis.

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

DECISION OF THE BOARD

In response to a question about alternatives from Mr. Marchewka, Chairman LeBlanc stated that, if the Board was to choose one of the alternatives, they would have to specify which one. If the the original grant was appropriate, the motion should just be to uphold the original plan (C-1) with all of the original variances.

Mr. Marchewka made a motion that the Board uphold their previous decision, which was seconded by Mr. Holloway.

He stated he had come to the conclusion that they were talking about a 100 room hotel although nothing in the zoning ordinance itself ties a certain area of land to a certain number of units of hotel space. He didn't see, in any event, a huge difference between 60 and 100 rooms. It would still be a hotel use and have roughly the same impact.

Mr. Marchewka stated that the applicant had presented four site plans, all of which require variances. The analysis was detailed and demonstrated that these were costly alternatives. He felt the 4-story alternative was preferable as it had less impact on the neighborhood and there was not another reasonably feasible alternative to pursue.

Mr. Holloway stated he agreed with Mr. Marchewka.

Chairman LeBlanc asked for clarification that Mr. Marchewka's motion was to uphold the December, 2002 ruling, which was plan C-1 with all its stipulations and Mr. Marchewka stated that was correct.

Mr. Jousse stated he would support the motion. The applicant had presented four scenarios with all the pertinent information necessary to make decision. What had been granted in 2002 was the most appropriate.

Mr. Witham stated that, after considering it, he could see no alternative without a variance. If they start moving the structure around, then they jeopardize some of the other criteria that have been met. He noted there were no profit and loss statements, but they had been given the rate of return statements. If the opposition had a problem with those numbers, it should have been presented. He stated he would support the motion.

Mr. Parrott stated that the additional information provided that evening, particularly the financial aspect, had been very helpful and he had an understanding, on a practical basis, of what would be involved in going up another floor.

A motion to uphold the variances granted December 17, 2002, and clarified on November 15, 2005, with the 11 listed stipulations outlined in the Board's letter of decision dated December 18, 2002, was passed by a unanimous vote of 6 to 0. The stipulations were listed as the following:

- That there be no more than 100 rooms maximum;
- That there be no restaurant, bar, tavern or the sale of alcoholic beverages allowed;
- That a conference center not be allowed;
- That there be sidewalks constructed;
- That the utilities be placed underground;
- That bus and truck parking be designated away from the residential area;
- That refrigeration trucks do not run all night;
- That 6'-8' high evergreen screening be placed around the parking area where needed;
- That dumpsters be screened and enclosed to the rear of the property;
- That lighting be downward or shielded so that it does not shine into the residential neighborhood; and,
- That snow storage will not be located in the northern most part of the lot away from where residential homes are located.

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9) Petition of **Robert W. and Kate S. Paterson, owners,** for property located at **72 Orchard Street** wherein the following were requested: 1) a Variance from Article IV, Section 10-402(B) to allow a 20'6" x 24' detached garage with: a) 2'7"± right side yard, and b) an 8'6"± rear yard where 12'11" is the minimum required, and 2) a Variance from Article III, Section 10-302(A) to allow 27.8±% building coverage where 25% is the maximum allowed. Said property is shown on Assessor Plan 149 as Lot 31 and lies within the General Residence A district.

SPEAKING IN FAVOR OF THE PETITION

Mrs. Paterson stated that her husband was passing out photographs of the property. She referred to pages 10 and 11 of their packet for their argument in favor of the petition. The same side setback will be maintained while improving the rear setback. This was a small lot similar in layout to others in the neighborhood, with neighbor's structures abutting their property on either side. There was not a lot of space between the patio and the garage. Sheet 3 of the packet shows that they did look into options that would conform to the ordinance but those used up all the space on the lot. They were simply asking to replace what was there with what would accommodate a modern vehicle, while improving the value and appearance of the property.

SPEAKING IN OPPOSITION TO THE PETITION

No one rose in opposition

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mrs. Paterson indicated they also have a signed document of support from the abutters.

Mr. Witham asked what was the specific reason for the roof pitch to jump to a 12/12.

Mrs. Paterson said it was to match the house and add a little more height for storage.
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Mr. Jousse asked what was the present and proposed use of the garage.

Mrs. Paterson responded that it was nothing at present. It is falling apart and leaks. They would like one which could accommodate a car as well as some storage. They currently use on-street parking.

Mr. Parrott noted that the photograph doesn't show any driveway to the garage.

Mrs. Paterson stated there was none presently. Sheet 1 shows a paved section which ends at the fence and they were proposing to continue as shown on sheet 2 to drive into the garage. Sheet 3 shows what would happen if everything was shifted into the yard.

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. Marchewka.

He stated they were only asking for what they have, slightly modified to accommodate a car. The proposed garage is a conforming size.

He stated that it was not in the public interest or the intent of the ordinance to take away what the applicants already had. Surrounding properties would not be diminished because what was proposed was similar to what was there now. The existing garage is non-conforming with the greatest non-conformance the side setback and that same setback was maintained. They are pulling the garage as far forward as possible to bring into more conformity at the back. The sought benefit cannot be achieved any other way due to the shape of the property and the existing structure. Moving the garage more to the middle to bring into conformance would ruin their yard.

In seconding, Mr. Marchewka stated it was a reasonable request to rebuild on the same foundation and have the pitch of the garage roof match that of the house. They were just moving the structure out a little further to the front and up a little higher.

A motion to grant the petition was passed by a unanimous vote of 7 to 0.

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10) Petition of **Gino Bona and Stephanie A. Parry, owners**, for property located at **68 McDonough Street** wherein the following were requested: 1) Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) to allow a 10' x 17.5' two story addition with: a) a 1'-2' right side yard and a 5' left side yard where 10' is the minimum required, b) a 13'± rear yard where 20' is the minimum required; and, c) 59.7±% building coverage where 35% is the maximum allowed; and, 2) a Variance from Article XII, Section 10-1204 Table 15 to allow no parking to be provided where 2 parking spaces are required. Said property is shown on Assessor Plan 138 as Lot 40 and lies within the Apartment district.

SPEAKING IN FAVOR OF THE PETITION
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Mr. Gino Bona stated that he had purchased his home three years ago. He stated the existing home is too small and it is a hardship to not have room for a dining room or a kitchen table. They have one car and, with the proposed addition, that can comfortably fit within the allowed 13'. The Board had stated in January that there would be no useful yard space after allowing for parking. They would rather have the needed living space than room for another car which they do not have.

Mr. David Calkins, the contractor for the proposed project, stated that the addition would not be contrary to the public interest, but would bring in tax revenue while allowing the family to grow. This was a single family home in the Apartment District. If it were switched back to income property, the options would be limited. He noted that direct abutters are not affected. The main abutter was a building of condominiums at the rear with parking.

He stated that the ordinance restriction interferes with the reasonable use of the property and, if they can't build further, they would have to sell or rent the property. The lot is abutted by two streets and is very small, but held to the same standards as much larger lots. Mr. Bona passed around some pictures which showed that there was a previous addition at the rear, which was removed in 1997. Mr. Calkins maintained there are no other feasible options. The property was already non-conforming with regard to setbacks and coverage.

He stated that, in January, they had asked for 67% lot coverage, which they have scaled back to about 59% in answer to the Board's concerns. This was the most cost effective alternative and anything further would sacrifice the whole project. Mr. Calkins stated it was consistent with the spirit of ordinance as it allowed for both parking and a recreational area. The renovation would be consistent with the trend in the area for renovation and the value of surrounding properties would not be diminished.

In response to a question from Chairman LeBlanc, Mr. Calkins stated that the current lot coverage was just over 44%.

Mr. Brian Bishop stated he is the owner of 58 McDonough Street and is in favor of the proposed variance. This is a very small house on generally the same size as his, which is two houses down.

SPEAKING IN OPPOSITION, TO THE PETITION, OR SPEAKING, TO, FOR, OR AGAINST THE PETITION

Mr. Calkins stated they also had a letter of support from the owners of 7 McDonough Street, which Chairman LeBlanc indicated was in the Board packet.

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

DECISION OF THE BOARD

Mr. Parrott made a motion to deny the petition, which was seconded by Mr. Jousse.

He stated this was difficult because it was a very small house on a small lot, but because variance approvals are permanent, they have to look past the situation of the current owner. One issue

was lot coverage and the need to prevent overcrowding of the lot and neighborhood. The dwelling virtually sits on the sidewalk on two sides and on the other side there is a 3' clearance. A long view has to be taken and, with 10' taken up by the addition, there would be only 13' for the required two spaces, which would not be enough. He stated it was not in the long run interest of the city or public good to grant.

Mr. Jousse stated that, while this was a relatively small request of an addition, relative to the size of the property, it was a lot. This would not promote the circulation of air.

Mr. Marchewka stated that he would not support the motion. Currently, there was a small house on a small lot and it would be the same with the addition. In looking at the tax map, he saw the addition as having no impact on the surrounding neighborhood. There is substantial open space in that area, a corner unit bordered by two streets. Given the size of house, he would waive the extra parking spot.

Mr. Witham stated he would support the motion. While he had no real concerns about setbacks, coverage and parking spaces, he was uncomfortable with literal enforcement of the ordinance resulting in unnecessary hardship. The property was in an Apartment zone and part of their duty was to maintain zones for what they are. If this were a single residence zone, he would feel differently. He sympathized with the homeowners but felt approval would contribute to the pulling off of the small affordable homes.

Mr. Berg stated that he was swayed by both Mr. Marchewka's and Mr. Witham's comments. He was concerned that the variance was permanent and the next owner may have two cars and it is important to preserve parking in a high density area. He noted that houses in Atlantic Heights were almost all smaller on smaller lots. This was a setting where houses should be kept as modest as possible with the right balance of open space.

Chairman LeBlanc stated that he will not support the motion. Simply because this was an Apartment District doesn't mean that every structure has to be rented. This residential use could be a very beneficial influence on the neighborhood.

A motion to deny the petition failed by a vote of 3 to 4, with Chairman LeBlanc and Messrs. Berg, Holloway, and Marchewka voting against the motion.

Mr. Marchewka made a motion to grant the petition as presented and advertised, which was seconded by Mr. Holloway.

He stated that this was a small residence and an area variance was needed to enable the proposed use. The following were the reasons for granting a variance:

- The existing building was located on a corner lot bordered by two streets. The modest addition will not interfere with light and air or otherwise negatively impact the surrounding neighbors.
- This was the least amount of expansion that would allow for the addition of a desired room.
- Given the size of the dwelling and lot, one parking space was reasonable.

In seconding, Mr. Holloway stated he had nothing to add to the comments.

Mr. Berg noted that they were really only talking 10 feet and a room couldn't be added that was more narrow.

Chairman LeBlance asked if the maker and second would agree to modify the motion to stipulate that there would be one parking space provided. Messrs. Marchewka and Holloway stated they would agree.

A motion to grant the petition as presented and advertised with the added stipulation was passed by a vote of 4 to 3, with Messrs. Jousse, Parrott and Witham voting against the motion.

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11) Petition of **Melissa Bicchieri, owner**, for property located at **206 Northwest Street** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow a 19'8" x 29'6" two story addition with a 6'10"± front yard where 15' is the minimum required. Said property is shown on Assessor Plan 122 as Lot 6 and lies within the General Residence A and Historic A districts.

SPEAKING IN FAVOR OF THE PETITION

Mr. Mark Beliveau stated that he was representing the property owner. He listed the plans in the package provided as depicting the existing site, the proposed site, elevations, overview, floor plan and photographs. He noted that the property owners had been granted variances in April of 2005 from the front yard and rear yard setbacks. He indicated the structure and setbacks on the existing conditions plan and also where the two additions that were granted last year would have been located. After receiving the variances, the property owner needed to go to the Department of Environmental Services to seek a waiver to build the additions.

After an initial denial and further discussions, a compromise was reached that the DES would grant a waiver on the right side, but not on the rear. They suggested moving the addition from the lower left to the lower right. With the denial of the waiver for the rear addition, the homeowner was barred from using one of the variances granted last year. They were now before the Board seeking only one variance for the front yard setback. Mr. Beliveau indicated the revised plan for which the DES had granted a waiver, noting that the addition on right side is approximately twice what was granted last year.

Covering the criteria, Mr. Beliveau stated that the variance would not alter the essential character of the neighborhood or be contrary to the public interest. It would be consistent with the spirit of the ordinance which allows reasonable uses of property. Justice would be done because denial would create much more of a burden on the property owner. He believed that the values of surrounding properties would be increased. This was a classic case where hardship was inherent in the land due to the odd configuration and water on two sides. There were no reasonably feasible alternatives and some of the challenges were described in the architect's packet.

Ms. Wendy Welton outlined the issues involved with trying to move floor plans around while working with the Historic District Commission on their concerns. She indicated on the elevation
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plan the ramifications of the various construction alternatives considered. Their conclusion was that the proposed plan was the only one that would best solve the problems, as well as anticipate the wishes of the Historic District Commission.

Mr. Bill Kennett stated he owns the house at 239 Northwest Street which is diagonally across from 206. He stated the addition would be an asset to the neighborhood.

SPEAKING IN OPPOSITION TO THE PETITION, OR
SPEAKING TO, FOR, OR AGAINST THE PETITION

With no one 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. Witham.

Mr. Berg stated that most of the rationale for their granting of the initial variance still applied. In order to receive a waiver from the Department of Environmental Services, changes had to be made to one of the additions. The floor plan was a reasonable one and the architect had explained how there is no other way to accomplish the same outcome. Justice would be done in that the home would be restored and made historically appealing. The shape and impact of setbacks creating a triangle and the water setbacks, combined with the position of the existing dwelling made almost anything they do require a variance.

Mr. Witham stated that the second area of infringement was exactly the same as that which had been previously approved. The only real place to expand is off the side proposed. This was very consistent with the historic district and should have no adverse effect on the public.

The motion to grant the petition as presented and advertised passed by unanimous vote of 7 to 0.
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12) Petition of **Icon Realty, LLC**, owners, for property located at **1303 Woodbury Avenue** wherein the following were requested: 1) a Variance from Article III, Section 10-304(A) to allow a 58'± front yard where 70' is the minimum required, 2) a Variance from Article XII, Section 10-1201(A)(3)(e)(2) to allow up to a 0' front yard for parking spaces with 16 being within the required 40' buffer, 3) a Variance from Article XII, Section 10-1201(A)(3)(e)(1) to allow parking spaces and accessways within 100' of a Residential district, 4) a Variance from Article II, Section 10-207 to allow a retail drugstore in a Mixed Residential Business district where such use is not allowed, 5) a Variance from Article XII, Section 10-1201(A)(3)(c)(1) to allow non-residential parking spaces and accessways within 50' from Mixed Residential and Residential lot lines where 50' is the minimum required, 6) a Variance from Article III, Section 10-304(C)(2) to allow a building within 100' of property zoned residentially where buildings are required to be a minimum of 100' from residentially zoned property, 7) a Variance from Article III, Section 10-304(A) to allow approximately 18±% open space where 20% is the minimum required, 8) a Variance from Article V, Section 10-504(D) to allow a non-residential dumpster in a Mixed Residential Business district where said dumpster are to be located not less than 20' from a Mixed Residential Business district, 9) a Variance from Article XII, Section 10-1203(A)(1) to
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allow a loading area within 100' of a residential district and no screening provided where a 100' setback and screening are required. Said property is shown on Assessor Plan 217 as Lot 1 and lies within the General Business and Mixed Residential Business districts.

Messrs. Berg and Marchewka declared they were stepping down for this petition.

SPEAKING IN FAVOR OF THE PETITION

Attorney Malcolm McNeill stated that, under the most severe test, the Governor's Island Standard, all of this cumulative relief was necessary for this site. He referred to the aerial photos included in the exhibits which speak to what types of use were reasonable. The first photograph shows the intersection of Woodbury Avenue and Market Street Extension. This was an area of intense commercial activity, of which the Mixed Residential Business Zone occupies a portion. The cumulative lot size requirements for the two zones were met, but the problem was the shape.

He identified the second through fourth views, the third of which showed that much of the periphery of the site was owned by the state or city with a green area indicating a buffer between this property and that owned by the municipality. The fourth view showed the intensity of development around the area. Another copy was of the present zoning map, on which the red striped area was their lot, the brown piece being business, which would permit the pharmacy, and then what he referred to as the "pinocchio" zone, the MRB zone with an unusual shape. This had been designed to accommodate uses that were already in place, but were no longer there. On the other side of the street in the MRB zone were a variety of uses. He stated that, with a triangular general business zone, overlaid with an MRB zone with setback requirements intended to keep commercial uses out of the zone, there was a cumulative effect resulting in the need for all these variances.

Attorney McNeill pointed out the 14,000 s.f. plus or minus drug store on the provided plan with the needed docks and dumpsters and noted that, if approved, the plan would next go to Site Review. The main access would be off Granite Street. He stated that, if every setback and use restriction were applied, only a corner of the building, or 572 s.f., would be built and 5,000 s.f. of parking. No one could argue that that would be a reasonable use. Even if the Board determined that a commercial use was reasonable, it couldn't be put in a structure of that size.

With regard to the proposed site, he pointed out on the display the areas of existing nonconformity. He stated that, on an acre and a half of land, it was not reasonable to be limited to a 572 s.f. building. Much of parcel was in the business zone where a pharmacy was allowed. The historic use of the site was non-conforming. He stated the variance would not be contrary to the public interest. With commercial activity abutting and bordered on three sides by roads, this piece of land should only be used for commercial purposes.

In terms of general size, an acre and a half could easily accommodate a pharmacy of this size. The triangular shape of the lot, multiple zonings to accommodate no longer existing uses, and the existing non-conformity were all special conditions that create an unnecessary hardship and interfere with the landowner's reasonable use of the property.

Attorney McNeill stated there was no fair and substantial relationship between the zoning ordinance and the specific restriction on the property. The Mixed Residential Business Zone is

mainly designed to protect the other side of Woodbury Ave. He contended that this was not an overuse of the site, nor would it injure public and private rights of others. The pharmacy might even generate less traffic than the previous entities.

The desired benefit could not be achieved by some other method. The alternative would be a 527 s.f. building and 5,000 s.f. of parking on a spot which was the apex of commercial activity. No reasonable use could be made without variances and it was in the spirit of the ordinance to allow a reasonable use. The major part of the space was zoned for this use and justice would be done by allowing it to be used for a commercial purpose and tax it appropriately. Attorney McNeill stated the building would be subject to site review and appropriate buffers. A pharmacy was not an intense use, which not diminish surrounding property values, but might actually raise them.

Mr. MacCallum asked why it was not possible to build a smaller building which would not encroach on the Mixed Residential Business district.

Attorney McNeill replied that the lot was an acre and a half and the minimum lot size in General Business is an acre. The problem was the shape of the lot. Pulling back from the MRB would mean a minuscule building. He noted the existing structures which were already in violation.

Mr. MacCallum stated the proposal would expand those violations. He asked how the conclusion was reached that the only use was a major commercial use.

Attorney McNeill replied that the MRB Zone was an artificial zone to take into account uses that were already there, but were now abandoned. They believe they were proposing a use that was reasonable, considering the setbacks and the intense development in this section of Portsmouth. The client bought the property after the uses had been abandoned. In response to a question from Mr. MacCallum, he stated the property had not been under contract before the uses were abandoned.

Mr. MacCallum asked why it was not possible to cut off the bottom 20’ of the building so the pharmacy was totally in the General Business District.

Attorney McNeill stated that some of the uses presently there were close to the residential area. The design was a prototypical Rite-Aid design. There would be inherent site review protections and the use would not represent an adverse effect on residential properties.

Mr. MacCallum questioned why they had not gone to the City Council to rezone the property.

Attorney McNeill replied it was an unusual site, with an unusual shape and characteristics. Under the circumstances in this part of the City, it was reasonable to present this proposal.

Mr. MacCallum stated that doesn’t really answer the question of why they needed to come for 9 different variances.

Attorney McNeill stated that there were Mixed Residential Business uses across the street. Across on Granite Street there were houses that had been there for many years and there was an attorney for one of residences there that evening to support the project.

Mr. MacCallum stated that most of the restrictions for which they were seeking relief were designed to protect residences and asked why they couldn't make a smaller building for starters.

Attorney McNeill maintained there would continue to be violations no matter what was put on there. There was only 500 approximate s.f. of building that would be allowed on the site.

Mr. MacCallum asked what would be the result if the Board granted 50' as a buffer.

Attorney McNeill stated it would help, but they could not put that building on the property.

Mr. Parrott asked how many prototypical Rite Aid designs there were in the whole country.

John Schmitt identified himself as a civil engineer working on the project and stated there are two buildings that are typical. This design is prototypical in the northeast. The other which was used was approximately the same size, only shortening up the building on one end. The width remains the same.

There was a brief discussion of the building in North Hampton whose size was approximately 14,000 s.f., the same as this project with some architectural details to be worked out.

Attorney McNeill noted the lot in North Hampton was more rectangular.

Mr. Parrott stated the front of the store was facing a major intersection and the back facing residents across Granite Street and asked what the residents would be looking at.

Mr. Schmitt stated the main entrance faces the intersection. There would be a shingle roof with clapboard siding and bow windows. The structure would be one-story high.

In response to questions from Mr. MacCallum about reopening the greenhouse or the take-out restaurant, Ms. Tillman stated they would have to research exactly what portion of the greenhouse was in the MRB District. The retail portion would be allowed in General Business. A take-out restaurant would need a variance to reopen.

Attorney Jack McGee stated he was representing the owner of 1383 Woodbury Avenue, Mr. Katkin, who strongly supports the proposal. He described events in the 1970's and how the existing lot was truncated by the State of New Hampshire. The only two residences affected are that of Mr. Katkin on the corner and the house behind, which was vacant and has been bought by a developer. He stated there was a great deal of buffer and, with the dimensional requirements, it couldn't be developed for modest commercial purposes or generate enough of an income stream. He felt the project met the Simplex and Boccia standards and would serve a need where people would walk to Rite-Aid for convenience goods. The only alternative would be to take a car and drive to K-Mart Plaza.

In response to questions from the Board, Attorney McGee responded that Mr. Katkin would state this was his residence; he was not sure of the other developer's plans but they probably were not residential. Rather than speculate about the other developer, he felt the Board should look at this

property and the proposed use and noted there was no one there in opposition. Mr. Katkin did sell the land for the project and has no interest in it.

Mr. Steven Berg stated that he was a member of the Board of Adjustment, but had recused himself. He was speaking as an abutter, as a Director of the Cody Foundation who leases the Wentworth School. This was a fairly low impact use of a parcel which is now an eyesore.

SPEAKING IN OPPOSITION TO THE PETITION

Mr. Stuart Hunziger stated he runs the management company for Eastern Development Group, an LLC who purchased the 51 Granite Street parcel for a substantial price. He stated that the fact that the drive-through pharmacy requires 9 variances supports his position that the parcel should be up before the City of Portsmouth for rezoning. He stated his charge was to redevelop, renovate, and sell the property as a residential home. They would be aggrieved by the development of this parcel as proposed. In response to a question from Mr. MacCallum, he stated they have no plans for further development other than residential.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney McNeill stated he did not know how the prior speaker was damaged. They bought their property for a use which was ultimately not achieved. He felt the testimony of Attorney McGee was more appropriate. He didn't know what to say about a developer stating their property would revert to residential. He further stated that a zoning change would not resolve all issues. This was not an area to spot zone.

DECISION OF THE BOARD

Mr. MacCallum made a motion to deny the petition, which was seconded by Mr. Parrott.

Mr. MacCallum stated he regarded this as a frontal assault on the zoning ordinance. The applicant was trying to custom tailor portions of the zoning ordinance in General Business and Mixed Residential Business by seeking 9 variances. He did not believe that hardship had been demonstrated. Nobody was saying that the applicant didn't have a right to use the property but the issue is how gargantuan the structure needs to be and the need to consider the rights of abutters. He stated he didn't see why it couldn't be made smaller.

He believed, as a result of Mr. Hunziger's comments, that there were going to be residential uses. There were other commercial entities but nothing on the same scale as that proposed, which violates too many ordinances. In response to his question as to why it couldn't be smaller, the answer was that this was a prototype. In effect, they were saying they knew this was in violation of the ordinance but they wanted to do it anyway. If the applicant had come before them with a scaled down plan he might have entertained it, but he felt the applicant was walking all over any residential rights. Mr. MacCallum stated that the request was against the public interest with the sole exception that buildings such as this not be within 100' of property zoned residential. He did not see any hardship associated with this property. There were other businesses there, but smaller in scale. He didn't feel the question had been fully answered as to why the greenhouse and the take-out restaurant were not there. He was not satisfied that they had decided to

discontinue the use. The property was appropriate for other uses and smaller uses. He did not agree that modest commercial uses were inappropriate for this parcel.

Mr. Parrott felt this might set a record for the number of variances requested. He agreed with the concept of having something there that was useful and attractive and what was there now was neither. This design was not appropriate for that site. While it was a good use, he didn't believe it couldn't be shrunk to be more appropriate for the shape of lot and inclusion in the Mixed Residential Business zone. He had seen the Planning Department work with developers to come up with a solution that satisfied a lot of people, which might or might not involve a rezoning. It was stretching the use of variances to have 9. This was a design that hadn't reached its full potential.

Mr. MacCallum added that he didn't think the buildings out there now were unattractive. They were rundown, but could be spruced up.

Mr. Witham stated that his concern had been one of the criteria, which was that the variance should not be contrary to public interest or alter the character of neighborhod. Right now, the Market Street extension was a buffer from large scale commercial development. By granting all these variances, they would be allowing that larger scale development to jump across the street. He stated he was not convinced by the argument that the zones were only there for a reason at one time. The fact of the matter was that those were the zones now and these variances would all violate that buffer. Even if the answer was to go for rezoning, the Board had to vote on what was there now.

Chairman LeBlanc stated he would not support the motion. He felt one of the reasons they were there was to deal with properties which were unique such as this one and he thought the variances could be granted.

A motion to deny the petition passed by a vote of 4 to 2.

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III. ADJOURNMENT

A motion was made, seconded and passed to adjourn the meeting at 10:15 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary
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