

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

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

February 20, 2007

MEMBERS PRESENT: Chairman Charles LeBlanc, Vice Chairman David Witham, Carol Eaton, Alain Jousse, Duncan MacCallum, Arthur Parrott, Henry Sanders, Alternate Charles LeMay

EXCUSED: None

ALSO PRESENT: Lucy Tillman, Chief Planner

I. OLD BUSINESS

A) Approval of Minutes – January 16, 2007

After a clerical correction, a motion was made, seconded and passed unanimously to accept the Minutes as corrected.

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B) Petition of **Wayne D. Moore, Murry Hill Properties Inc, owner**, for property located at **304 Maplewood Avenue**.

Chairman LeBlanc announced that the attorney for the applicant had requested to move the hearing on this petition to the end of the evening's agenda.

With no objection, consideration of the petition was so moved.

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II. PUBLIC HEARINGS

1) Appeal from a Decision of the Historic District Commission's Decision of December 6, 2006 denying a Certificate of Appropriateness concerning the Petition of **7 Islington Street, LLC**, owner, for property located at **7 Islington Street** wherein permission was requested to allow demolition of an existing structure (southern wing of building, garage building, house structure, and commercial building), new construction of an existing structure (new 3-4 story mixed use building), and exterior renovations to an existing structure (renovate exterior, replace windows, add exterior stair and canopy) as per plans on file in the Planning Department. Said property is shown on Assessor Plan

126 as Lot 51, Plan 126 as Lot 49, and Plan 126 as Lot 52 and lies within the Mixed Residential Office, Central Business B, Historic A, and Downtown Overlay Districts.

Chairman LeBlanc stated that at least two parties would be speaking, the applicants and representatives of the Historic District Commission. He asked that the presentations be made in an orderly and succinct fashion and outlined the four options before the Board as the following:

- 1) Remand back to the Historic District Commission to allow the Commission to continue working on the proposal with the owner.
- 2) Uphold the decision of the Commission.
- 3) Overturn the decision of the Commission.
- 4) Table for additional information.

SPEAKING IN FAVOR OF THE PETITION

Attorney Paul McEachern stated that the hearing of this appeal was provided for by statute and he agreed there were basically two parties before the Board, the applicant and someone speaking for the Commission. He stated that they should base their decision on the record, to which he would refer. He also wanted to try to help with the law as it was a legal decision they would be making. They had previously transcribed the entire proceedings before the Historic District Commission and had made two copies available to the Planning Department. The Board had received a verbatim transcript of the September 6, 2006 and November 1, 2006 hearings, which he stated would be the essence of their ruling, and he had extra copies of some of the sessions that evening. He would be referring to those submittals.

He stated the primary exhibit on display is the location of the proposed building at the corner of Islington and Bridge Streets. The application is for a structure on Bridge Street, cross-hatched on the site plan, which is partially within the Historic District and partially outside, although the Historic District Commission has jurisdiction over entire structure. He stated that one of the principal issues was the impact of this proposal on areas outside the district. The Historic District shown is in green and doesn't include the rest of Bridge, running from the middle of the proposed building down to Hanover, or Tanner Street. The numbers within the circle on the site plan indicate buildings within the district. The architect would provide an overview of activity before the Historic District.

Steve McHenry stated that, in their experience with the Historic District Commission, they try to bring the Commission along with them through the design process almost like members of the design team. He felt this gives them plenty of time to look through all the options. Although they intended to make the project smaller than what would be allowed, they had started the process of five work sessions and then a public hearing by showing a number of building masses that zoning would allow them to do with the oversight of the Historic District Commission. He referenced several of the exhibits on display showing the surrounding area, which widely varied in architectural styles and context. The project fell in one zone and district and was at the end of another zone and within an overlay district. In one zone, they can go to 60' high but in the adjoining one only to 40'. The final plan was 42' high, 18' lower than allowed.

Mr. McHenry read portions of a letter he had written to his client in which he described what he had presented at each work session, during which they had shown at least 10 options, all of them showing buildings of at least stories. In addition, the site walk was to note elements of design and included presentation boards at various points which would show the perspective views from various vantage points. The most commonly voiced problem by the members at the public hearing was the overall size and he could not understand why this issue was the cornerstone of the denial. There was ample opportunity for objections during the work sessions, yet only one member in August voiced concern about size. They normally expect some opposition, but what they did not expect was the Historic District Commission to suddenly change its mind during the public hearing after months of encouragement.

He had also noted in his letter that, during the public hearing, there were several references to the relationship of buildings on lower Bridge Street and Tanner Street, a series of two story, woodframe buildings as if these buildings alone should dictate the scale of any proposed new structure. He drew their attention again to the graphic on the board and the numbers corresponding to the photographs on the center board. He stated that these buildings represented part of the architectural context and they believed that their design had made appropriate accommodations to the scale of the existing architectural context, which included buildings of great variety as to scale and size. They attempt to make the Commission members stay involved in the design, listening and responding to their ideas. He had stated in his letter that there would seem to be no incentive in the future to continue this way if the Commission acts in an arbitrary manner and a great opportunity would be lost.

In response to a question from Chairman LeBlanc as to what might have contributed to the Commissioners, as Mr. McHenry claimed, changing their minds at the end, Mr. McHenry stated that there were a couple of contributing issues. There were overlapping zones and also two of the members had not been to the work sessions. The alternates in their place had given a favorable impression, but were not allowed to vote at the hearing and the two who had not attended the work sessions voted against the project. In the appeal, they changed their vote

Mr. Witham stated that in reading the minutes on the rehearing, it seemed that the Historic District Commission was surprised among themselves about the outcome and were urging him and his client for one more work session to address, among others, the scale issues and his sense was that the client felt there had been enough. He raised the question as one of the Board's options was to remand back the petition.

Mr. McHenry stated he was not always in control of how many times they come back because there may be a limit. He's also seen situations where items of a minor nature can be taken care of with amendments, but to say at the end that the building was too large seemed arbitrary.

Mr. Witham commented that at the site walk before the first public hearing, one of the members was quoted as saying the purpose was to see the building in context. He was surprised to see that it was only at the end of the process that a site walk was mentioned. He wondered what the site walk was like that, after five months of looking at the project, all of a sudden they get there and this project is too big.

Mr. McHenry stated that on the site walk, they set up views on four corners all around the site showing their building from that view. They felt that was a good graphic device to display the size and scale of the building and how it fit into a neighborhood. They had felt the comments on the site walk were encouraging.

Mr. LeMay asked how many sessions they would expect on this size project.

Mr. McHenry stated they had gone through 5 work sessions and a public hearing which, in comparison to a project such as Eagle Photo seemed kind of overkill. This was not a signature location and they felt that they had devoted sufficient time.

When Mr. LeMay asked if the relationship with the Commission was similar on the two projects, Mr. McHenry replied that their relationship with the Commission had always been good. They received good knowledgeable feedback and the Commission tended to be a sounding board for architectural taste.

When Mr. LeMay clarified that his question was more to process, Mr. McHenry stated there were a lot of minor issues that the Commission has to deal with that could be dealt with administratively by a set of guidelines that could be issued. Some people don't have an architect and the Commission wastes a lot of good intelligence and experience on items that could be administratively handled.

Mr. Parrott stated that Mr. McHenry had indicated he worked with the Historic District Commission on several occasions. In reading the earlier minutes, he did not find major issues raised, particularly with respect to size, height or mass. He asked Mr. McHenry how he thought it got so far down road before these very serious and fundamental questions were raised.

Mr. McHenry stated he couldn't answer that. They felt they were showing all aspects and all types of 360 degree views in every graphic form at their disposal.

In response to a further question from Mr. Parrott, Mr. McHenry indicated that "monolithic" from a technical architectural point of view meant looking like one big form as opposed to something like the Eagle Building which is really one big building, but looks like three fitted together. He agreed when Mr. Parrott asked if it was, then, more the appearance than the actual physical construction.

Ms. Eaton stated she would like to clarify again what they had mentioned about if one part of the building is in the Historic District, then the whole structure is in the district although the lot may not be. She asked if that was true with particular reference to the lot she indicated on the site plan.

Mr. McHenry indicated, "yes."

Ms. Eaton then asked if the same would not then be true for the second part, the Tanner Street property also – the property that was going to be torn down.

Chairman LeBlanc stated it was not part of the structure.

Attorney McEachern stated that one of the mandatory requirements of the Commission is seeking advice from professional, educational, cultural or other groups or persons as may be deemed necessary. He stated they can hire outside consultants and charge the applicant if they deem it necessary. That wasn't done.

Attorney McEachern stated that the Commission is limited by the authority granted by the legislature, which says their jurisdiction is to consider the impact in the Historic District, not outside. He felt that the impact on Tanner Street had been the guiding force for the decision and quoted some comments from Vice-Chairman Adams regarding Tanner Street made at the August 9 final work session. He stated that Chairman Rice, on page thirty of the same hearing had also made comments indicating that one of the purposes of going to Tanner Street was to consider the impact of the massing of the building upon that street. He stated that the Historic District Commission cannot consider the impacts of property outside the District on applications before them.

Attorney McEachern stated that the second point of their appeal is that Commissioner Adams should have been disqualified from the Rehearing and he had made a Motion to disqualify him. The law states that you have to be as fair as jurors in the case and he referred to tab 3 in his packet which included RSA 500a:12 which sets out the standards for jurors. They had asked that Commissioner Adams, after his statements on September 6th, be disqualified from the November 1st Rehearing because he had said he was not going to change his opinion. As governed by the statutory guidelines, when you make up your mind ahead of time, you should not sit on a judicial board. Apparently, the Commission had an opinion from the City Attorney who stated he could sit. Attorney McEachern stated that the Board were the judges that evening and could decide whether Commissioner Adams made up his mind ahead of time. If they concluded that he did, then he should not have sat.

The Appeal's third point was that the Commission failed to act within the 45 day period allowed for action and he felt this was a helpful point for the future. In RSA 676:9, page six of their appeal and elsewhere in their submissions, it says that the Historic District Commission shall file a certificate of approval or notice of disapproval within 45 days after the filing of the application unless the applicant agrees to an extension of time.

He believed the architect didn't know about the 45-day requirement and Attorney McEachern had looked to see if there was an agreement to go past the 45 days and there wasn't. They weren't being malevolent, but there is an ignorance of the law because the Commission should have required that there be a specific, on the record, agreement about this and should perhaps have advised the applicant which hadn't been done here. They went over 5 months of inviting the applicant back and basically designing the building, which was not intent of the statute.

Attorney McEachern stated the next point was that the Commission has to make findings of fact, as does the Board of Adjustment. The Board has criteria and then votes on the motion based on that so as a Board, they incorporate in their vote the findings of fact. If the Board turns down an applicant, they have to tell the applicant what parts were not complied with. That didn't happen in this case, which is legally insufficient.

He concluded that the Commission made specific legal errors which require a vote of the Board to reverse the decision and that's what he was asking them to do and what, he felt, the evidence in the case required them to do.

Chairman LeBlanc asked if the 45 days issue started from the day the application was initially filed or completed as he understood one of the purposes of the work sessions was to get to a completed application.

Attorney McEachern read from Section 676:9 of the statute, "The historic district commission shall file a certificate of approval or a notice of disapproval pursuant to RSA 676:8, III within 45 days after the filing of the application for the certificate, unless the applicant agrees to a longer period of time." His reading of that was if, within that period, the applicant agrees to an extension, then it's extended and, in this case, the applicant asked for a further work session, which was held on May 10. After that, the applicant asked for no further work sessions, nor agreed to any further extensions, so it would be 45 days from that work session, dated from May 10.

With respect to Vice-Chairman Adams' ability to sit, Chairman LeBlanc stated, he had been of the opinion that anyone on this Board, although challenged by the applicant, still has the right to make up their own mind as to whether they fill the bill for a juror of standing and he believed that had been backed up by the City Attorney.

Mr. Jousse referred back to the 45 day issue and stated he viewed this as a business contract, which could be verbal, written or implied. When the applicant, as he viewed it, agreed to several work sessions over successive months, didn't that automatically extend the 45 day period?

Attorney McEachern stated the applicant shows up - he doesn't agree on the record. The statute is clear. It doesn't say he has to agree in writing. He just has to agree. The boards should follow the law, not say they don't have to do so if the applicant is not aware of it and shows up. The law is that it's 45 days and the purpose, in his opinion was to not extend the process

Mr. Witham stated that there's an application for a work session and then the more formal application in the process. Was Attorney McEachern claiming that the application for the work session starting the process for the 45 day time period?

Attorney McEachern stated that the statute says it was the filing of the application. A work session is one application for one work session and then it goes on through several months.

Mr. Witham asked if there wasn't a separate application filed for a public hearing.

Attorney McEachern stated these are regional applications. The statute doesn't talk about that. It just says they are entitled to an up or down vote within 45 days of filing the application, one application.

Mr. Witham stated he did not believe an application for a work session entitled them to a vote.

Attorney McEachern stated it was his understanding that the process was started by an application.

Mr. Witham commented he thought Attorney McEachern had stated before that it was an application for a Certificate of Appropriateness, which is really a separate application that is filed after the work sessions.

Attorney McEachern stated he had said, “if that’s how it’s done.”

Mr. LeMay stated he believed the intent of the 45 days was to keep boards from sitting on an application and forcing them to act. There’s been action taken at least every month over the entire process. When it came to the point where the applicant had finished showing all the different variations at work sessions, the applicant said this is the end of what I’m going to do and please vote and they did. He thought it satisfied the intent of the law and there was tacit agreement all along from what he could see.

Mr. Jousse stated he had an application dated August 18 and asked if there were more.

Attorney McEachern stated there was a application before the April 19 meeting which should be a part of the department’s records.

Ms. Tillman stated there was an application for a work session and then there was an application for a public hearing, which was received on August 18, 2006.

Attorney McEachern stated he would submit that the statute refers to the first application, when they first filed the application for the project.

Chairman LeBlanc asked the City Attorney if he could answer the question of whether the 45 day period starts with the initial application or the application for a public hearing.

Attorney Robert Sullivan stated that the statutes describing the operations of the Historic District Commission and, in particular the appeal process, are very vague, incorporating by reference approximately 15 other statutes. The second handicap is very little litigation at the Supreme Court level regarding Historic District Commission appeals or decisions so a huge number of questions won’t be answered until an issue gets to the court. With specific regard to the 45 days, there is no answer to that. We have a record on file on which the Board will make a decision. As of now, they City Municipal Government and administration does not have a position. The Historic District Commission has been appealed to this Board and their decision becomes the City’s view on the particular 45 day question plus all the other questions raised before the Board. His thought, in reviewing the 45 day issue focuses less on when it began and more on whether there was agreement to continue. His personal thought is along the lines of tacit or implied agreement of the developer by staying in and going forward with the process. He was not prepared to give them a definitive answer right then and, in fact, he reiterated they would be setting that guideline.

Mr. Jousse asked if the Commission could make a decision to approve or disapprove a project at a work session.

Attorney Sullivan responded, “no.” There is a requirement that there be a public hearing which would be meaningless if a decision were rendered prior to that.

Mr. Jousse stated his interpretation, then was that the clock starts to run when the application for the public hearing is received.

Mr. Witham stated he was also struggling with the purview of the Historic District Commission in terms of going outside the property.

Attorney Sullivan stated that he took Attorney McEachern's argument to be an argument against the Ordinance. There are at least three places in the Ordinance where the Commission is instructed to look at properties in the area and proximity of the actual property, even though they don't have jurisdiction over those properties, in light of impact on the property on which they do have jurisdiction.

Mr. Witham stated he was also struggling with the fact that it seemed the Commission was comfortable with the project until Tanner Street was factored in. Someone on Tanner St can build up to the height limit in their district and it may have an adverse effect on the Historic District, but the Historic District is under guidelines as to what they can do on the outside. This is 7' higher than what the abutting property can do and is considered out of scale. A lot of this idea of proximity and surrounding area is all in the footnotes. It's not clearly spelled out. The Tanner Street factor is, to him, the key point he's trying to unravel it.

Attorney Sullivan stated that the Board, in the final analysis, is being called upon to make a determination as to whether the Historic District Commission acted unlawfully or unreasonably. The Board had heard the argument from Attorney McEachern about whether looking at Tanner Street was "unlawful" and Attorney Sullivan had given his response. If the argument that looking at Tanner Street and the way it was done is "unreasonable," that could be a different argument and more of a judgment call, but it is a fair question for the Board of Adjustment to consider in making their determination on the question.

SPEAKING IN OPPOSITION TO THE PETITION

The following abutters spoke in opposition:

Ms. Christine Mayeux of 64 Bridge Street

Mr. Martin Burns, 288 Hanover Street

Ms. Rebecca Conway & Mr. John Conway, 37 Tanner Street

They felt the project overwhelms in both scale and mass and represented everything wrong with development in downtown and worried about a domino effect leading to the extinction of an affordable neighborhood. They stated that what was allowed in terms of height might not be the most appropriate for the District. It was stated that the beauty and design was on the Bridge Street side and those entering Portsmouth along Islington Street would see a large brick wall, a parking lot and a dumpster. The Tanner Street residents stated their property values, sunlight and privacy would be affected and there would be more traffic and noise. Those on the site walk were asked to look at the building from the Tanner Street perspective, but now were told Tanner Street is not relevant.

David Adams stated that he was the Vice-Chairman of the Historic District Commission. He wanted to reinforce what he felt was the underlying issue in this application which was that, in good faith, the architect and the majority of the Commissioners had contrary views about the project. He cited Article X of the Ordinance and accompanying footnotes, which words such as “area,” “setting,” “surrounding,” “proximity,” and “broad.” The Commission allowed themselves to look at the area and not just the building that is in the Historic District. They were reviewing this building and making comparisons as described by the Ordinance in context.

Mr. Witham stated that, obviously, footnotes have a lot of subjective terms and asked how the Commission grappled with an area with a lower height limit abutting one significantly higher. You buy a piece of property with a higher height limit, abutting a lower so you know you won’t be able to exercise the full limit, you’ll have to scale it down, although scale isn’t always the height.

Mr. Adams stated that he grapples with it by asking if this is going to be the best time to deal with this. In other words, sometimes a project comes in and scale is obviously a problem and it disappears and they never see it again. Sometimes the applicant has made some concessions to the neighborhood and they weigh the pluses and minuses. At a certain point, you feel the way you are looking at it fits. At other times, it doesn’t and, in this circumstance, it didn’t.

Mr. Parrott asked about the term applied to the project as “monolithic” and what that meant in plain English.

Mr. Adams stated that an example such as the Franklin Block was monolithic. One block or lot. The buildings such as those along Ceres Street would not be because they are all, apparently, different buildings with different storefronts, fenestration patterns and roof lines. They don’t give you the same sense of being all one piece because of the differences. Monolithic is not the same thing as mass.

Mr. LeMay stated that one of the purposes of the Historic District Commission was to preserve and protect the architectural resources of the City and asked what, in this project and its surroundings was particularly historic and being preserved.

Mr. Adams stated that it was the rhythm of the buildings along Bridge Street that caused him to vote against the proposal. They flow down and set the theme for that street and the next. Reading the Ordinance and how projects should be reviewed, it is not enough to say this building doesn’t contribute to the flow, but he felt it absolutely had a significant impact on this and other streets and was too tall for neighbors.

Asked to comment by Mr. Sanders on the 45-day issue, Mr. Adams stated he, along with the applicant, was unaware of it and the issue has never been raised. They’ve always had work sessions where something transpired and the applicants kept coming back. It is only when the whole package is put together with materials and manufacturers that it is properly before them and then they can take action. The confusion can arise because it is a dual process. It’s the same kind of application for the work session as for the public hearing, but with the one for the work session, the applicants don’t have the type of information needed at the time. He didn’t feel they had an application properly before them until the evening of the vote.

Mr. John Rice stated he was the Chairman of the Historic District Commission. Regarding the issue of consulting with experts, he relied on the City Attorney for an opinion on the 45 days issue and whether David Adams could sit and whether Tanner Street could be considered in their voting. He felt they should not get hung up on Tanner Street. They had issues of height, mass, roof line, as well as the question of taking off a wing of the Buckminster Building which had historical value. They had allowed the developer on this project to tear down many buildings and put up infill buildings in the past. In those cases, the buildings were in terrible shape or had little historical value. Referring to Tanner Street, they had a gentle little neighborhood that hadn't been seen until the site walk.

In response to Mr. LeMay's question about what was historic, he stated the building doesn't have to be historic to be important. If it is contributing, then it is in the scope of their review. Mr. Witham had raised the question of work sessions. In the record, they could see that many times he had asked the applicant to have more work sessions as they had issues that were not resolved. When it got to the site walk and public hearing, he felt there was going to be a problem.

Mr. Jousse referenced an email in the file from Attorney McEachern advising it was the intent of the applicant to consolidate the parcels so that in the site review process, the land would be considered as a single consolidated parcel so it appears the applicant is considering the whole parcel to be within the district. Tanner Street would then be fair to consider.

Mr. Rice stated that the Buckminster certainly was. With regard to Tanner Street, you could go either way and still be on solid ground.

Mr. Parrott asked, going back over the work sessions and with reference to mass or size, was it an evolving process with the one that ended up before the Board the smallest.

Mr. Rice stated that Mr. McHenry could answer that.

Mr. Parrott posed further questions about the length and content of the work sessions, indicating that he was trying to get at the necessity of multiple discussions and if they were absolutely necessary to revise the design or whether the project could have passed earlier in the process.

Mr. Rice stated there were initially 3 to 5 massing sites, which evolved with the discussions and he felt the process was necessary and stated the project could not have received earlier approval. The final massing remained essentially the same.

Stating the overall size of the building seemed to be the deal breaker, Mr. Parrott asked if there had been serious discussion about the overall size of the building.

Mr. Rice maintained there were a lot of issues that were deal breakers, including the roof line, which is one of the reasons he pressed for a site walk, at which point they discovered Tanner Street

Mr. Parrott stated that earlier he had asked Mr. McHenry how the project could get so far down the road and then have a miscommunication or whatever with respect to overall size and mass come up and his response was that he didn't know.

Mr. Rice stated it was his impression that the majority of the Commission had a problem with the roofline and the elevator shaft, among others, and had a problem of mass which was mentioned in the sessions and then they would move onto other elements. He had felt there were unresolved issues on the table, which is why he recommended another work session.

Ms. Eaton asked if they agreed about the building being torn down and was surprised the Buckminster Building was not more of an issue.

Mr. Rice responded that they knew if the project were approved, it would have been.

Mr. Witham commented he was at one of the work sessions and thought it went very well, with some positive comment about the mass and scale. He still was surprised that they could go through a five work session, five month, process without fully thinking out the impact on Tanner Street.

Mr. Rice stated the Commission members were the ones suggesting a site walk at the end which, in hindsight, could have been earlier.

Ms. Ellen Fineberg stated she was a member of the Historic District Commission. Regarding the Tanner Street piece, they didn't feel it was part of the process. It only came into play further in the work session process.

In response to a question from Mr. Witham, she indicated there was a house on Tanner Street which would be torn down to allow access to parking.

Mr. Witham stated so then the demolition outside the Historic District Commission and design of the parking lot are not within their purview.

Ms. Fineberg responded it would be an accessway to the parking. She noted that someone brought up the issue of all lots becoming one project and did that bring Tanner Street into the District and stated she didn't have an answer.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney McEachern stated he had three points, the first of which was whether the inclusion of other lots in the project brings them into the Historic District. The applicant doesn't have the power to change the configuration. Because part of the building was in the Historic District, the entire building, not the lot, was subject to the jurisdiction of the Board.

Another point was that they don't have to rely on their memories. He had reproduced two copies, which included verbatim transcripts of all the work sessions, which the Planning Department had. He had provided additional copies of excerpts to the Board and he quoted favorable comments from the May 20th session, page 24 regarding two options before them.

His third point was that it seemed that Attorney Sullivan's interpretation of the law and his were at variance and he submitted they were not. Attorney Sullivan addressed his remarks to the City

Ordinance which included the words cited by Vice-Chairman Adams. There was also no disagreement that State statute says what he indicated, which was that the Commission can consider the impact on the Historic District. He stated it was the rule that State statute trumps the City Ordinance and they are obliged to read the Ordinance so that it is consistent with the statutes. When the ordinance says “proximity,” or “neighborhood,” that means within the Historic District, not outside it. The idea that you were told this evening that you can go either way on this is plain legally wrong and you should call them as you see them. He didn’t disagree with the City Attorney’s reading of the Ordinance, but reiterated that he was obliged to read it in light of State statute.

DECISION OF THE BOARD

Chairman LeBlanc reviewed the options which the Board could take which he had stated at the beginning of the hearing. He felt option 4), tabling for additional information, was out of the question with all the information already in front of the Board.

Ms. Eaton asked, if they denied it, where that left the applicant.

Chairman LeBlanc stated they could submit a new application or appeal to Superior Court.

Mr. Parrott stated he would like to make a motion that they remand the petition back to the Historic District Commission with the following conditions:

- That the four criteria in Article X, Section 10-1004(B) (1) through (4) of the Zoning Ordinance be addressed in making their decision.
- That the Historic District Commission document the Findings of Fact.
- That the decision letter be signed by the Chair of the Commission.
- That a minimum of one work session will be arranged by mutual agreement between the applicant and the Historic District Commission and that the work session will be followed by a Public Hearing at which the vote to grant or deny the petition will be taken.

Mr. MacCallum seconded the motion.

Mr. Parrott stated that it was apparent that there were some process weaknesses, which he believed could be fixed. He hoped the parties could resolve the issues. This would also give the City Attorney and the applicant’s attorney time to decide on Tanner Street and whether the Historic District Commission can “look over the fence” or not. He felt there would not be a lot work in the work session as much had been covered that evening, but it was certainly worth one more shot.

In seconding, Mr. MacCallum noted that Fisher v. Dover would not apply to this petition and to remand it for further discussion would be worthwhile. As a final comment on the 45-day issue, he felt that the applicant did agree, if not expressly then implicitly by going forward without protest beyond 45 days. While the Historic District Commission in denying, it deserved another look.

Mr. Witham asked, if the motion were denied, what would happen and Chairman LeBlanc indicated they would need a new motion.

Mr. Witham stated he would not support the motion as that option won't resolve many issues. The applicant's attorney had raised a number of points which he felt they needed to resolve. Until this issue of including Tanner Street or not was resolved, he didn't feel they were going anywhere. They have State statute and local zoning to consider. While he didn't think there was any error in the Historic District Commission, he found an element of unreasonableness when you take the scale of a 40' height zone and impose it on a 60' height zone. Part of Commission's job is to work with what is allowed by zoning .

Mr. Sanders agreed that there were remaining issues to resolve. He concurred with comments that remanding may be a burden and cause a delay in coming to a conclusion. He sought to uphold the decision of the Commission and would not support the motion.

Ms. Eaton asked what happens if the applicants did not agree to another work session.

Chairman LeBlanc stated that the decision of the Historic District Commission would then stand.

Ms. Eaton stated she was not sure that a work session would help the issues needing to be dealt with, such as the 45-day issue, the area, and the application. If it would help everyone get beyond this, however, she would support the motion.

Mr. Jousse stated that there was an application on August 18, with a vote taken on September 6, 2007, less than 45 days. As far as the Tanner Street concerns, this building will affect the surrounding areas. Because the applicant wants to combine three lots into one, all will come under the jurisdiction of the Historic District Commission. He felt sending it back wouldn't do any good because the Commission asked the applicant to have another work session and the applicant refused. He would not support the motion.

The motion to remand the petition back to the Historic District Commission with the following conditions was passed by a vote of 5 to 2, with Messrs. Sanders and Witham voting against the motion:

- That the four criteria in Article X, Section 10-1004(B) (1) through (4) of the Zoning Ordinance be addressed in making their decision.
- That the Historic District Commission document the Findings of Fact.
- That the decision letter be signed by the Chair of the Commission.
- That a minimum of one work session will be arranged by mutual agreement between the applicant and the Historic District Commission and that the work session will be followed by a Public Hearing at which the vote to grant or deny the petition will be taken.

It was requested that Attorney McEachern contact the Planning Department to arrange the designated work session.

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2) Petition of **Portsmouth Farms LLC, owner, and Starbucks Coffee Co, applicant**, for property located at **1855 Woodbury Avenue** wherein a Variance from Article IX, Section 10-908 was requested to allow the following: a) a 17.36 sf freestanding sign 15' from the front property line where 20' from the front property line is the minimum required setback, b) 49.02 sf sf free-standing signage where 37.5 sf is the maximum allowed, and c) 77.95 sf of aggregate signage where 37.5 sf is the maximum allowed. Said property is shown on Assessor Plan 215 as Lot 11 and lies within the General Business district.

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

Attorney Bernard Pelech stated that the parcel in question had two problems, the narrow lot and the fact that the amount of signage is based on the front length of the building, which was very narrow. With only 25' of frontage, the allowed signage is only 37.5 s.f., which is very limiting. The 77.95 s.f. is due to a menu order board which is behind building. He distributed a handout, which included sign definitions and the plan submitted to the Inspection Department. They were originally scheduled to come before the Board without the menu board as the Inspection Department did not believe the menu board counted toward signage as it was not visible from the street. The Planning Department determined that it did constitute a sign subject to the square footage requirements and administratively withdrew the petition.

Attorney Pelech stated there were special conditions with regard to the land, noting that the project has already undergone extensive scrutiny by Conservation and the Planning Board. Because of concerns raised, the applicants decided to demolish the former Pizza Hut building and build this narrow building to preserve a stand of trees serving as a buffer between the site and a residential area. Additionally, there is a 25' grassy strip between the front property line and Woodbury Avenue, which will contain plantings. The pylon sign is actually 40' from Woodbury Avenue, which is also a special condition.

He stated that the request was reasonable. The letters are only 14" high on the front façade sign, which is approximately 80' from Woodbury. That would be illuminated by neon tubes, which is allowed in the district. He then listed dimensions and locations of the remaining signage on the building, detailed in his exhibits. He noted the biggest sign on site was the menu board at 31.58 s.f. He felt he had shown there was no reasonable feasible alternative given the size of the building and also noted that the spirit of the ordinance would not be violated. The building was set back from the road. The signage was not distracting to the public and it was in the public interest to allow them to identify the site. The pylon sign was critical to identification so there would be no justice in denying the petition. There was no objection from neighbors.

When Mr. Jousse asked about the signage on the former Pizza Hut, Ms. Tillman produced a tax card with a picture of the Pizza Hut signage.

In response to further Board questions, he indicated it would be a left hand turn into the site coming into the City and at that point, Woodbury Avenue was actually six lanes and sign #7 was two sided facing north and south.

Mr. MacCallum asked Ms. Tillman how the maximum allowable square footage was determined and she indicated it was done by the Building Department, determined by the linear footage of the building.

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

Mr. LeMay stated that the petition met all the criteria.

Mr. Parrott stated that, while the Board normally doesn't look favorably on excessive signage, this was an unusual situation. The actual size of the signs was modest for a highly commercial area. The menu board, which was out of sight, was what made the totals seem even larger. It was a reasonable request which they could approve with no damage to the Ordinance.

Chairman LeBlanc noted that this was being granted in lieu of what was administratively withdrawn in January and Mr. Parrott agreed.

The motion to grant the petition was granted by a vote of 6 to 1 with Chairman LeBlanc voting against the motion.

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B) Petition of **Wayne D. Moore, Murry Hill Properties Inc, owner**, for property located at **304 Maplewood Avenue.**

Mr. Parrott made a motion to remove the petition from the table, which was seconded by Mr. Sanders and approved by unanimous voice vote.

Attorney Pelech stated that the property was at the corner of Dennett Street and Maplewood Avenue and was a medical supply operation, with a specialized product line, not a high intensity use. He stated that the zoning used to have these little neighborhood business zones, in which this was located when the project was first approved. Over the years, there had been stairs built to the second floor, now removed, and it was used for things such as employee lunches. In 1995, the property was rezoned to Mixed Residential Office and retail businesses became a non-conforming use. They are requesting to use the second floor as storage, rather than have multiple deliveries of small amounts of product.

He stated that the parking was adequate with 11 spaces and that and the lot will remain the same. There would be no diminution in value of surrounding properties. The unique special conditions were that this was an allowed use prior to 1995 when it became non-conforming. No public or private rights were being violated as the public will not know if second floor is used for storage or

not. The spirit and intent of the Ordinance will not be violated as this is a low intensity use, which will enable the owner to utilize currently empty space. They will be able to have more product on site. Savings in buying in large amounts will be passed onto the public. They were also not adding a retail use as the building had been built for this use, which was there for 18 years. This will enable the owner to utilize a currently unused second floor.

Mr. MacCallum asked Ms. Tillman what the reason was for not allowing storage.

Ms. Tillman stated it stemmed from the original approval. The building was constructed for a medical mart and there was then a restriction on the square footage to 2,000 s.f. so using the second floor would have exceeded that limit. Zoning and restrictions have changed, but the original restrictions still apply so an additional variance is needed.

**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. Sanders made a motion to approve the petition as presented and advertised, which was seconded by Ms. Eaton.

Mr. Sanders stated that the petition should be granted for the following reasons:

- This is an appropriate accessory use in previously empty space.
- With restriction of storage to medical supplies as an accessory use to the first floor medical supply business, the public’s interest will be protected.
- Having to maintain an empty second floor would interfere with the landowner’s reasonable use of the property.

Ms. Eaton stated that, with the restriction in the type of storage, she felt the petition could be granted.

The motion to grant the petition as presented and advertised was passed by unanimous vote of 7 to 0.

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**IV. ADJOURNMENT.**

The motion was made, seconded and passed to adjourn the meeting at 11:05 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary