

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

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**August 21, 2007**

**MEMBERS PRESENT:** Chairman Charles LeBlanc, Vice Chairman David Witham, Carol Eaton, Alain Jousse, Charles LeMay, Arthur Parrott, Alternate: Thomas Grasso

**EXCUSED:** Henry Sanders

**ALSO PRESENT:** Lucy Tillman, Chief Planner

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**I. OLD BUSINESS**

A) Approval of Minutes – July 17, 2007

A motion was made, seconded and passed by unanimous voice vote to accept the Minutes with a minor correction.

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B) Petition of **Richard A. and Bonnie M. Porzio, owners**, for property located at **431 Pleasant Street** wherein the following are requested: 1) a Variance from Article IV, Section 10-402(A) to allow a 6' x 9' 10" shed with: a) a 4'± right side yard, and b) a 4'6"± rear yard where 5' is the minimum required in each instance, and 2) a Variance from Article IV, Section 10-402(B) to allow an 8'9" x 21' pergola with a 6'2"± left side yard where 10' is the minimum required; and 3) a Variance from Article III, Section 10-302(A) to allow 48.9%± building coverage where 30% is the maximum allowed. Said property is shown on Assessor Plan 102 as Lot 71 and lies within the General Residence B and Historic A districts. *This petition was postponed at the July 17, 2007 meeting.*

Chairman LeBlanc announced that this petition had been withdrawn by the owner.

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C) Request for One-Year Extension of Variance granted September 19, 2006 for property located at **10 Commercial Alley and off Penhallow Street.**

After consideration, the Board voted to grant the Variance Extension through September 18, 2008.

## I. PUBLIC HEARINGS

Chairman LeBlanc announced that Petition 5) for 968 Middle Road had been withdrawn by the applicant.

1) An Appeal Pursuant to RSA 676:5 was requested by **1000 Market Street Corporation, Trustee, Nine Seventy Six Realty Trust and Dennis Prue, Trustee, Dover Realty Trust**, concerning property owned by **HarborCorp, LLC, Harborside Associates & Harborside Inn, Inc. located off Deer Street, Green Street, Market Street, Russell Street & Maplewood Avenue** concerning the Planning Board approval of the site plan entitled “Site Construction Plans for Harborside Hotel, Convention Center & Residential Condominiums” relative to parking. Said property is shown on Assessor Plan 118 as Lot 28, Assessor Plan 124 as Lot 12 and Assessor Plan 125 as Lot 21 and such other land of the City as shown on the subdivision/lot line revision plan and lies within the Central Business B, Downtown Overlay and Historic A districts.

Chairman LeBlanc announced that he wished to make it known that the attorney presenting the appeal was his next door neighbor. He stated they have no financial dealings and he felt he would be objective in considering the appeal.

### **SPEAKING IN FAVOR OF THE APPEAL**

Attorney Douglas Macdonald, on behalf of Dover Realty Trust and, for Attorney Ryan, the 1000 Market Street Corporation, stated that this was a fairly simple appeal from the recent decision of the Planning Board regarding final site plan approval for the HarborCorp Westin project. He stated that he had raised significant issues regarding the zoning ordinance in his letter and appeal. They do not believe the decision meets the requirements of the zoning ordinance.

The basis of their appeal is a provision in Section 10-401(*Article IV*)\* regarding nonconformance. That provision states that if you have a change, addition, expansion, or similar activity with a nonconforming use, that change requires the project be brought into conformance with the zoning ordinance, or relief must be sought for whatever change was occurring. This was consistent with past decisions of the Board. They’re requesting that the Board consider the project and their duties and obligations under the ordinance and, if the Board finds what they present is true, to at a minimum, remand back to the Planning Board for consideration in compliance with ordinance.

Attorney MacDonald stated that the Sheraton exists downtown with some parking in a building on one lot and a second lot with surface parking. There’s no dispute that, back in 1984 or 1985, when the Sheraton was being built the required number of spaces was somewhere between 559 and 561. There’s also no dispute that, by a special exception granted by the City in 1985, 401 spaces were allowed for the project rather than the 559 number. The zoning ordinance, with the provision he referenced earlier, was written 10 years later. He reiterated that any change must conform to the ordinance or relief must be sought.

Attorney McNeill referenced the chart at the back of the memorandum provided by the Planning Department where it indicated 401 spaces for the existing Sheraton complex and continued with a listing of adjustments. The chart was presumably based on information supplied by the applicant throughout the process. He stated this really wasn’t about a numbers game that evening except, to

a limited extent, the number of spaces required with respect to the 401 spaces. The question that evening was, under the zoning ordinance, was the Sheraton project which required 559 spaces before the special exception, now required due to changes, to account for 559 spaces. They believe the answer was “yes.” He stated the City had based its calculation on 401 spaces and that basis was wrong.

Attorney MacDonald stated that he had outlined several key provisions of the zoning ordinance in paragraph 27 of his appeal, the most important of which he had read, but there were also issues with taking a special exception off-line for greater than 8 months. Under 10-401(A)(1)(a) (*Article IV*), this basically extinguishes it. There were other reasons why the special exception goes away. The buildings will be connected by a skywalk so physical dimensions will be changed. They were changing lots and eliminating the surface parking lot which was the basis for the special exception in the first place. This is a nonconforming property, which is being changed, and needs to be brought into conformance. He reiterated that the focus of the appeal was the use of the 401 number when the correct number to be used should be 559 or 561.

Attorney MacDonald stated that the final point was that there really was no public benefit in the project. The spaces would be needed by the hotel, leaving little left over. A great deal of public money was going into the project and decisions had been made based on erroneous numbers. The public has a right to have accurate information and know there is compliance with city ordinances.

There was a brief discussion among Mr. LeMay, Ms Eaton and Attorney MacDonald about the parking figures and how they were derived, with Attorney MacDonald stating that he was not asking them to get into the numbers as that was for the Planning Board.. He was asking them to consider if this was a nonconforming use and if it was changing. They need to look at the zoning ordinance and see if what had been presented by the City was in compliance and take action based on their conclusions.

Mr. Parrott referred to a summary sheet in the packet titled “HarborCorp, Parking - Zoning Analysis,” stating that, even though Attorney MacDonald felt the numbers weren’t important, he wanted to read Point 15 of the July 5 appeal memorandum. This stated, “The primary concerns ... relate to the shortfall in parking for the Project, the inadequacy of the Project’s traffic studies, and a recently discovered Zoning Ordinance issue, which is the focus of this appeal.” He asked Attorney MacDonald what his bottom line was as to the shortfall, which in the summary sheet, was 1,037. Stating that he felt the numbers were important, Mr. Parrott maintained the Board needed to know because the appeal memorandum states it is a key point.

Attorney MacDonald responded that the numbers were important, ultimately. With regard to the summary, he noted that it was stamped at the bottom that it was received by Attorney Ryan whom he was representing that evening.

Ms. Tillman clarified that the stamp indicated that it had been received at the meeting from Attorney Ryan.

Mr. Parrott stated that Attorney MacDonald was speaking for Attorney Ryan so that was why he was asking him the question.

Attorney MacDonald replied that, in his letter that was also submitted, they would see an analysis of different shortfalls, backed up by a traffic study expert, based on an 80% usage or occupancy rate. After a correction from Mr. Parrott, he noted it was 85<sup>th</sup> percentile. The shortfalls ranged from in the 100's to a couple of thousand and Attorney Ryan's analysis was 1037.

Mr. Parrott stated that was the reason he was asking the question. What was Attorney MacDonald's figure?

Attorney MacDonald responded that his figure had been presented in his letter to the Planning Board. It might not be conclusive because he wasn't sure they had the accurate numbers, which was one of the issues brought to the attention of the Planning Board and the Traffic and Safety and Technical Advisory Committees. His letter set forth ways to get two different numbers based on the information provided to him. He stated, again, that this appeal doesn't go to that final number of what the shortfall is. The basis of the appeal was that the analysis and the approvals were based on an improper figure of 401, while the number with regard to proper parking figures was 559.

Chairman LeBlanc summarized, so, according to the 1995 zoning ordinance, which Attorney MacDonald had read, because there was a change in the original configuration of the property that triggered the 401 parking spaces, it was his contention that the 401 figure is now erroneous and it should be brought into conformance with current usages and should be around 560.

Attorney MacDonald stated that was correct based on his understanding of the language of the zoning ordinance.

In response to a further question from Chairman LeBlanc regarding the period of time the surface parking would be off-line and whether that would constitute an intentional abandonment, Attorney MacDonald cited Section 10-401(A)(1)(a) of the ordinance in which "a building or structure or use of land in which a nonconforming use is discontinued for a period exceeding eight months, or which is superseded by a conforming use, cannot again be devoted to a nonconforming use." He didn't know how long it would be off-line, but suspected it would be greater than 8 months.

### **SPEAKING IN REBUTTAL TO THE APPEAL**

Mr. David Holden stated he was the Planning Director for the City and had been making parking calculations for over 25 years. He outlined a brief history of parking standards in the City and the variety of solutions that had been considered in the past. He noted that parking was not recognized in the zoning ordinance as a principal use.

Historically, what has been looked at is a ratio of what parking should be provided. Generally, the public and private parking resources in the City show 1 parking space for every 3 uses in the Central Business district, and a 1 to 1 ratio elsewhere. In most cities, parking is never on a 1 to 1 ratio in the downtown as the land is too valuable in terms of economic development

Mr. Holden stated that, essentially, everything comes down to June 1, 1997 when the City Council declared that we would treat all downtown properties the same and it was done by establishing baselines as of that date. To calculate that baseline, there were only two procedures. Procedure One simply was the sum total of the uses, no BOA action. Procedure Two was for all others. He read from Procedure Two in Article XII, Section 10-1201(A)(5) how to determine the first

component of the initial total parking threshold figure, which he stated was the 401 spaces. The second component yielded 0. The third component was additional off street parking required due to a Change of Use or Building Permit issued during the period from December 18, 1995 to June 1, 1997. They believe the Sheraton did expand slightly and, whatever that represented would have to be added to the 401, which would up that requirement slightly, not exceeding the end result.

Mr. Holden explained how the initial parking threshold was designed to give everyone an equal starting point. It's the same approach with Procedure Two except that it was recognized that a number of properties, several examples of which he cited, went through the Board of Adjustment process to get some parking relief. This relief has to be factored in. The threshold was only to establish a beginning point so that any new and subsequent development after 1997, if it was an increase, would trigger a review. In general terms, the largest new development for the Sheraton is the Westin. Everything they did exceeded the original, initial parking threshold.

Referring to the parking calculation chart, Mr. Holden outlined how the Department had maximized usage in their estimates, so that they would end up with a conservatively high figure, which on the parking calculation chart was 2186.3. He noted that the credit at the top, which he submitted was actually a requirement, was 401 from the first Sheraton project. Missing from it would be any of the additional uses that came in during that two year period from 1995 to 1997. He noted that the ordinance was amended in 2006 to recognize a public parking facility that is an attached structure. Each parking space provided would count as three. The 700 plus space garage, which will be transferred to the City under agreements, will almost achieve the unmet parking need of this property.

Added in toward the total supply of parking, but not the credit, would be 106 spaces in the parking facility at the existing Sheraton and 54 surface parking spaces. The Department had added 742 new parking garage spaces, 106 existing garage spaces and 54 outside spaces to get 902 spaces. This, multiplied by the three from the ratio, roughly meets the needs of 2,700. For the Department, this meant that the ratio was being preserved and that, under the ordinance, the project met every requirement for parking for a project coming in after 1997.

Mr. Holden stated that he can find no intent to abandon any of the Sheraton's parking resources. There is no lapse of the Special Exception, which runs with the property. While other policy issues had been raised, the only issue before the Board was whether the Department did the calculation right and he was pleased that Attorney MacDonald felt they had done the math correctly.

In response to questions from Mr. LeMay, Mr. Holden stated that the existing parking at the Sheraton had been adequate, allowing for the fact that the ordinance provides parking for the uses and demand may vary on special days. He outlined the reasons why there were two different parking figures, with the 401 spaces for the revamped project coming forward for approval. While the original number for the project may have been 569, that was for what was envisioned as a much larger project, which morphed during the approval process into what they now have.

Mr. LeMay stated that what troubled him was they were increasing the number of rooms by 100% but increasing the actual, physical, parking spaces by only 50%. It seemed to him that it starts to get somewhat congested.

Mr. Holden responded that what he was addressing would, again be a policy issue which was not before them. He noted the City Council's policy, as represented by the zoning amendments approved last year, and the spirit of the debate as to the proper role of the City with regard to provided parking. Principal uses of parking on private lots were discouraged and the City has taken a very public stance that it provides a good deal of public parking spaces.

There followed a brief discussion between Mr. Parrott and Mr. Holden regarding the parking survey done by Maine Traffic Resources, the protocol of using an 85<sup>th</sup> percentile, whether this was industry practice, and the validity of their conclusions and applicability to this particular City. Mr. Holden stated that it confirmed that a 1 to 1 parking ratio would not be appropriate. Mr. Parrott stated the reasoning was sound, but he had been going after a figure.

In response to a question from Vice-Chairman Witham, Mr. Holden confirmed that there are currently 401 physical parking spaces. This was not grandfathered as such, but factored into the calculation and essentially carried forward as a requirement. There was a brief further discussion of the numbers and correct ratios to apply. Mr. Witham stated he understood the 3 to 1 ratio, but felt that, with the ratios coming after the granting of the original Special Exception, the Sheraton was somehow getting a double benefit from it.

Mr. Holden stated that the 401 could have been accounted for in a number of ways. The real benefit would have been if the 401 was taken out, but the ordinance requires that it be placed in. The ordinance also requires that the parking credit apply to all parking so that the parking benefit accrued for the parking garage applies to all unmet parking needs.

After a statement from Vice-Chairman Witham that the 401 was then simply a number that is part of the calculation, Mr. Holden stated it was in the calculation but he was right. The ordinance was deliberately written to allow for the parking credit to apply to all parking. Again, it was a leveling element as of 1997 for all the properties that hadn't had any relief.

Ms. Eaton stated she understood the 401 was for the existing building and the Sheraton has an addition which has to meet the new parking calculation.

Mr. Holden stated it was correct at the time the project was proposed which was during that roughly two year period when there wasn't any parking requirement. The ordinance requires that they calculate what the number was so, essentially, the applicant was retroactively taking that number into consideration. He noted that Mr. LeMay's comment was correct in that the parking garage itself creates a fairly significant credit. When a final tuning of the numbers is done when the final engineering plans are prepared, it will come out to about a 200 car space, more or less.

Mr. Jousse raised the issue of what he understood to be Attorney MacDonald's allusion to Article 10-401 (*Article IV, Section 10-401*) and the fact that the Sheraton is going to be altered and, therefore, required a variance.

Mr. Holden stated that he felt Article XII, which tells how to do parking calculations, trumps that section. In addition, he had no knowledge that the Sheraton will be closed during this process and there was no intent to abandon the parking. The Certificate of Occupancy will be issued for the uses that are there, resulting in a 754 car parking garage which meets all the parking needs established by the zoning ordinance of the City of Portsmouth.

When Vice-Chairman asked him to say, in a nutshell, why he felt Section XII (*Article XII*) trumps Section 10 (*Article 4, Section 10*), Mr. Holden stated because it tells exactly how to calculate the parking for any change of use that occurs after June 1, 1997. He added that any remedy to this is not a variance or a special exception, but is all administrative.

### **SPEAKING IN OPPOSITION TO THE APPEAL**

Attorney Malcolm McNeill stated he has represented HarborCorp all through the process. He passed out some material to the Board. He stated that it was important to note that the appellant challenging the zoning classification has the absolute burden of proof that there has been an administrative error with regard to the zoning ordinance. Mr. Parrott asked the best question of all when he asked Attorney MacDonald what he was alleging was the shortfall in parking. Attorney McNeill stated that question had never been answered. Attorney MacDonald commented that it was something that should have been handled through the planning process and the numbers were a mystery. There was no mystery. The Planning Board had completed all of its deliberations with regard to this project and the appellants participated in the entire process. Attorney MacDonald has the duty to come before the Board and state how many spaces were short.

Mr. LeMay's question about the focus of the issue of 401 versus 559 was also a good one. Attorney McNeill stated that, even if Mr. MacDonald's argument was correct, there still was an excess of parking based on the calculation just presented by Mr. Holden. He reiterated the duty of the appellant to supply evidence and demonstrate an error of law by an administrative official and stated this hadn't occurred.

Attorney McNeill referred to the summary of his comments that he had submitted. He questioned the appellant's ability to bring a Planning Board Appeal. According to RSA 677:15, the party must be aggrieved. He stated this was an effort by Ocean Properties to stifle competition and not an appropriate land use appeal. He noted there were examples of similar actions cited in his submittal. He stated that the appellants had appealed to the Court after the zoning change and the Court had ruled against them as they were not an aggrieved party. He cited several other appeals, the outcome and the reason for the rulings. He also noted that Mr. Dennis Prue, also an appellant, has not indicated in the pleading before the Board any grounds by which he is damaged. He stated that Mr. Prue, on information and belief, is an employee of Ocean Properties or an entity controlled by Ocean Properties and does not live in the premises that he claims are being harmed.

Quoting from RSA 676:5, Attorney McNeill outlined the limited jurisdiction of the zoning board in this appeal, with the criteria being whether there had been a violation of the zoning ordinance in the decision in this case. Mr. Parrott, in the course of his questioning had raised other issues which were irrelevant to the case before the Board. The issue was if there had been any defect in the action of the City as it related to the calculation of parking, which solely relates to the ordinance. He noted that, in the writings of the appellants' attorneys and the Maine Traffic Resources letter, no allegation has been made that there was a violation of the zoning ordinance.

Similarly, in the submitted materials, they made absolutely no reference to the parking credit or to the multiplier. Attorney McNeill stated they did not just miss these items. All entities had dealt previously with the multiplier but chose to not include it in this appeal. He noted references to the parking credit system in filings of Mr. Prue and Attorney Ryan before the Superior and Supreme

Courts. He quoted from Mr. Prue's pleading before Superior Court on the Planning Board decision now before the Board, in which the City's intermodal parking credit system was covered in detail. The fact that it had not been included in the challenge that was before the Board was, Attorney MacDonald felt, indicative of the approach they've taken with regard to these appeals.

Attorney McNeill described how the owners have worked with the City for approximately two and a half years, in which time the joint development agreement and the number of parking spaces were reviewed by City Boards, Committees and consultants to determine if they had reasonably complied with the zoning ordinance. The agreement provided for the number of parking spaces that are the subject of the appellants' appeal. He also noted that the City Council, in 2006, over the objections of the appellants, allowed the credit to apply when there's a collaborative effort between a developer and the City with regard to a parking garage. These legislative actions, both in approving the bonding for the garage, enacting a joint development agreement, and also enacting the enabling legislation to change the zoning ordinance reflected an understanding of the basic ordinance requirements as well as what was perceived to be the needs of the City as it relates to parking.

Attorney McNeill stated that, in the four appeals or challenges brought by the appellants, they are challenging not just HarborCorp, but the City of Portsmouth and the review that's been done by Mr. Holden and all of the other boards that have looked at this project and deemed it to be in the best interests of the City. He stated that he and the owners agree with the calculations of the City, except they believe Mr. Holden took a very conservative approach to calculating the parking spaces. Their calculations would allow for at least 50 more.

His final points included the following: The Sheraton Portsmouth Hotel was not being expanded by the bridge to the Westin Hotel; the Sheraton Hotel and Westin Hotel, by action of the City Council in 2006, are not nonconforming uses for the districts in which they exist; the argument that an owner, in expanding the amount of available parking to a volume 200 spaces greater than is required by the City, somehow violates the zoning ordinance by taking appropriate time to construct the parking facility, speaks to the weakness of the appellants position. Attorney McNeill stated that, in the one issue before the Board of whether the applicant complies with the zoning ordinance relative to parking, the appellants, with the sole burden of proof here, have failed to show that they are either aggrieved in the first instance or, secondly, that there is a violation. Attorney MacDonald had stated there was a violation, but he didn't know what it was in terms of a specific number of spaces he alleged were short.

Harbor Corp has complied with all of the agreements which it has executed with the City, with all of the conditions of approval, with all of the new zoning ordinances as passed by the City as it relates to this project, and with all of the recommendation of the City and its traffic consultants as it relates to parking. There was no zoning violation in this case. The testimony of Mr. Holden should be relied upon; and the appeal should be denied

In response to a question from Mr. Martin Coil, a local resident, Chairman LeBlanc confirmed that somewhere in the area of 200 extra spaces would be available in the garage for the public.

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



Attorney MacDonald stated that it was clear from his letter to the Planning Board on June 7 that he had an idea of where the shortfall was and this appeal was about using correct numbers. It was not true that the only interest of his client is competition and no court has ruled that is their objective. He reiterated that the bridge between the hotels extends the building. With respect to the various pleadings and appeals, under case law, if you are taking an appeal from a Planning Board decision and there is any zoning element in it, it goes to the zoning board of adjustment. If there are dual elements, it has to go to both the zoning board and the court. The paragraph Attorney McNeill had referenced from Attorney MacDonald's pleading to the Superior Court was not in the appeal, as what they were appealing was the zoning ordinance issue. The important part of the credit, he stated, was touched on by Mr. Witham where they were taking a special exception granted in 1985, reducing the 559 to 401 and then multiplying it by 3. Attorney McNeill had maintained that was not what they were doing - the only thing they were multiplying by 3 was the surface lot. Attorney MacDonald stated, if so, then they still got a reduction. They were still getting 900 spaces out of a reduced figure.

Attorney MacDonald reiterated that what was before the Board was a zoning issue and the enforcement of it. He stated that the appellants were tax payers with property close by and there was an impact on them. No court had said they had no standing in this appeal and the City's memorandum said the appeal was before the Board in a proper manner. While he respected Mr. Holden's experience, he disagreed with some of his presentation. He had not seen or heard of any prior presentations to the Planning Board of a 1997 directive and he is sure the public doesn't know of any. The proper facts and number should be before the public. He understands the 3 to 1 ratio, but taking a special exception and multiplying it by 3 to 1 does not seem to him to be leveling the playing field in accordance with the ordinance. There was nothing in the ordinance with reference to expansion of a special exception and what the Board considered in 1985 was not considered subject to a multiplier. What he did see in the ordinance was about nonconformance requirements of this ordinance. The ordinance should be read and followed for what it says.

## **DECISION OF THE BOARD**

Chairman LeBlanc stated that they had an appeal of a Planning Board issue as it relates to parking. They had the option before them to either grant the appeal and send it back to the Planning Board or they could deny the appeal, in which case the Planning Board's decision is in place.

Mr. Witham made a motion to deny the appeal as presented and advertised, which was seconded by Mr. Jousse.

Mr. Witham stated that, obviously, we were inundated with a lot of information here regarding aspects of the parking calculation credits, much of which wasn't very relevant to what was specifically before them. He felt the appellants came before them and referred to Section 10-401 (*Article IV, Section 10-401*), which says if you have a non-conforming use that has any alterations, expansions, and so forth, then it must be brought up to conformity, in this case in terms of parking. Essentially, what the appellants were saying was that since the owners of the property were doing work on the project and connecting a bridge, the required parking spaces should be brought back up to 569. (559)

He stated he might agree if there wasn't Section XII (*Article XII*). He felt that Article XII, Section 1201-5 (*Article XII, Section 10-1201*)(A)(5) "trumps" Section X (*Article IV, Section 10-401*) in

this situation. He noted specific sentences under Procedure Two: “In this instance, the total amount of parking relief that has been granted prior to December 18, 1995 by the Board of Adjustment shall constitute a component of the initial total parking threshold figure.” It goes on to say, “This figure shall be used in the future as a basis for determining whether a change of use in the lot will produce a greater parking need.”

Whether there was adequate parking was not before the Board. The appellants had come before them and said the 401 space parking figure couldn't be used, but the property must be brought into conformity due to the work alteration or expansion, and so forth. Mr. Witham stated he felt that the ordinance tried to create a basis point for all these properties in determining parking and, to him, that was Section X, 1201-5 (*Article XII, Section 10-1201(A)-5*). The way the zoning is written, the 401 number is what is to be used in coming up with the calculation. None of the other numbers were relevant at this point. Even the 401 itself wasn't all that relevant, but how to go about calculating it. He felt the Planning Department and what they presented to the Planning Board was all accurately done and in compliance with the zoning. Article X (*Article IV*) does have merit and the Board gets into that with setbacks when something's torn down and rebuilt. He didn't see the correlation here.

Mr. Jousse stated that what really stood out in his mind was that the appellant said what the Planning Department came up with is a wrong number, but I don't have the right number. The only concrete information that he saw was what the Planning Department did and it appeared to him that the procedure that was used to come up with those figures abides by zoning ordinance.

Mr. Parrott stated he was also troubled by the fact that the appellants cannot tell us what their figure is, while alleging there's an “unmet need.” It seemed to him that, if you're saying that the other fellow's calculations are incorrect, you're obligated to say here are my assumptions; here's the calculations; and therefore here is the conclusion and here's why I'm right and you're wrong. They declined to do that. It seemed to him a very weak argument to say “you're wrong, but we don't know how far wrong and we'll rely on somebody else to tell us.”

Mr. Parrott stated his second point was with respect to Article XII, Section 10-1201(A), in which it says in part “a use which is nonconforming as to the requirements for off-street parking shall not be enlarged or altered unless off-street parking is provided for the original building, structure or use(s) and all expansions, intensifications or additions sufficient to satisfy the requirements of this Ordinance.” This was important because it says “enlarged or altered.” With respect to how much parking is needed, the size of the building is key and, in this case, they're talking about building a proposed walkway over the street. That won't add any rooms or square footage that will generate any parking needs. He didn't feel it was an alteration to the building in a significant way. It was a major stretch to say that the addition of another means of access and egress, which happens to be over to another building, comes under this particular paragraph. It was a weak basis for their appeal and he couldn't credit the argument.

Ms Eaton stated she reads these regulations and does parking calculations all the time as a part of her job and sees very little ambiguity in the regulations. It seemed very clear that the Planning Board had followed the procedures in the ordinance and come up with no unmet parking need.

Mr. LeMay stated he was not persuaded that one section of the zoning ordinance necessarily trumps another, but he felt that the computation of the City as it is shows 199 spaces surplus, so he didn't see a material difference and the section of the zoning ordinance was a moot point.

Mr. Witham added that for him the fact that the appellant came in and didn't say what he thought the parking credit should be had no impact on him. He wasn't looking for a final figure. In terms of the word, "trump," what he meant was that there was language in Article XII that wouldn't be there if it didn't have the purpose of addressing these issues. If X (IV) always overrode XII, there would be no reason to have the language in there. It was there to address specifically what it does.

Chairman LeBlanc stated he agreed with Mr. Witham's last comments. He thought the attorney for the appellants actually said in his presentation that he had numbers but wasn't going to push them because he felt it was a procedural issue that was at fault and why this appeal had been brought. He stated that the arguments that had been brought forth by the City clarified the issue. .

The motion to deny the appeal was passed by a unanimous vote of 7 to 0.

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2) Petition of **Forum Group LLC, owner**, for property located at **67 Bow Street** wherein a Variance from Article V, Section 10-505(B) was requested to allow the installation of 6 roof mounted condenser units on the rear of the building that do not meet the required 50 dba at the property line. Said property is shown on Assessor Plan 106 as Lot 53 and lies within the Central Business A, Downtown Overlay and Historic A districts.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Peter Loughlin stated that Forum Development needed to install some roof HVAC units but the City ordinance regarding noise has a 50dba limit, audible at the property lines, for any given property. He felt the limit was low given the ambient noise in the downtown area. Their units, the quietest and smallest manufactured, would slightly exceed that limit. He outlined his exhibits, which included product information, logs, and photographs which he passed around. The units would be on top of the shed dormer shown in the photographs. Noise goes directly out from the units and should not be audible below the roof, or at ground level. The units are about a square yard in footprint and 33 inches high. Attorney Loughlin reviewed the log he had submitted which included the date and time, the conditions and the readings taken at the property line which ranged from 53 to 63 decibels. He identified sources of ambient noise in the area.

Addressing the criteria, Attorney Loughlin stated that there would be no diminution in value and he doesn't think anybody will notice they are even in place. Regarding the public interest, any sound generated would be quieter than other items in the area and, in any case, not audible at ground level. It is in the spirit of the ordinance to avoid undue noises, but life in general generates noise. He stated that granting the variance would allow a reasonable use of the property while denial would not promote the public good in a significant way. The special conditions would be that this is one of the few properties where there was little ground area to accommodate placing the units so that the roof was their only option. Their current water cooled system is outdated and maintenance is a problem. This was no longer an effective way to handle their HVAC needs. There was not a lot of space to attenuate sound so a variance was needed. They had explored alternatives, but none was reasonable.

In response to questions from Mr. Grasso, Mr. James Labrie, one of the owners, stated that one of the top floor units is residential, but the equipment unit was non-vibrating so there will be no impact on the tenant. At the property line where there was a common wall at least 12 to 15 inches thick, the readings had been between 53 and 52 decibels.

There followed a brief discussion of the manufacturers specifications, which had been verified by an engineer and the City’s Plumbing Inspector, and the multiplier effect of additional units in the submitted logarithmic scale. On the closed side of the units, which would be toward the downtown area, the reading is 7 decibels lower.

**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 it appeared the applicant had done everything reasonably possible to ameliorate the effect in an area with the greatest ambient noise. Regarding the public interest, he stated the installation would be unnoticed by the public or abutters. There was no room to place the units on the ground and it wasn’t even clear that would be a better situation. It was in the spirit of the ordinance to prevent excessive noise and preserve peace, which they were doing as well as they could given the ambient noise. Justice would be served by allowing the owners to update their HVAC systems and there was no evidence that surrounding property values would be affected.

Mr. Parrott agreed, stating that the hardship was based on the physical configuration of the building and how it sits on the land. There was no place to situate these units, which were technologically advanced over the current system. They would be up on the roof, out of earshot of almost everyone, with the river on one side and a busy street with its own noise on the other.

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

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3) Petition of **William Ashley, owner**, for property located at **103 Oriental Gardens** wherein a Variance from Article II, Section 10-209 was requested to allow the replacement of a 14’ x 66’ manufactured home in the same location with a new 14’ x 66’ manufactured home in a district where manufactured homes are not allowed. Said property is shown on Assessor Plan 215 as Lot 9 and lies within the Office Research district.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Debora Panebianco stated she lives at 308 Oriental Gardens and was representing this lot. This would simply be replacing a unit which had been declared uninhabitable by the City. The owners had abandoned the property and the mobile home was demolished. The replacement would be the same size, but upgraded as to code and the correct pad.

In response to a question from Chairman LeBlanc, she confirmed that the replacement would be in the exact footprint as the original home.

### **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. Grasso made a motion to grant the petition as presented and advertised, which was seconded by Ms. Eaton.

Mr. Grasso stated this was fairly straightforward, replacing an uninhabitable unit with one more modern and up to code. It would be in the public interest to make this upgrade. Because the site was in a grandfathered mobile home park, denial would interfere with the owner's reasonable use of the property. He stated there would be no injury to the public or private rights of others by allowing a more livable replacement. Substantial justice would be done by granting the petition and he did not believe property values would be diminished by the replacement.

Ms. Eaton agreed an upgrade would be in the public interest. It was an existing mobile home park so there was no change in use. It would be in the spirit of the ordinance to replace a home in the same footprint as the one condemned and neighbors would benefit from the upgrade.

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

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4) Petition of **909 Islington Street LLC, owner, Robert Ovington d/b/a Ovington Produce, applicant**, for property located at **909 Islington Street** wherein a Variance from Article II, Section 10-208 is requested to allow 2,200± sf in an existing building to be used for a wholesale warehouse and distribution business in a district where such use is not allowed. Said property is shown on Assessor Plan 172 as Lot 7 and lies within the Business district.

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

Attorney Phillip Pettis stated that the photographs the applicant was passing out represented a variety of views of the property, which was set back from the road at the end of Islington close to Route One Bypass. The surrounding uses include the Ampet gas station, Dow's Automotive, the Sylvania shop and the railroad. A variance was necessary because their proposal was considered an industrial use in a business zone. The applicant's business picks up produce in Boston and returns to the main location to put into trucks for area deliveries. The proposed use is in a unit on the far left-hand side of a large building. Primary access and the majority of activity will take place in the rear of the building where the only view will be from the railroad, none from the street. There will be no assembly, manufacture or warehousing. 75% of the produce will be delivered and removed within 24 hours, with the balance on site 72 hours at the most. They

believe the operation may not fall within the definition of an industrial use, which would not require a variance.

Should a variance be necessary, he felt the criteria were met. The use would fit in well with the area and there would be no diminution in property values. The surrounding entities are commercial and the area behind the property is zoned industrial. The use was not contrary to the public interest, as it was hidden from Islington Street. There would be nothing offensive or issues of public health, safety or welfare. Denial of a variance would create a hardship as the interior was open and not appropriate for professional offices. He stated that justice would be done because Ovington Produce does not meet the definition of industrial use and denying this request may be singling out this particular use while other neighboring uses are industrial. They were asking for very limited relief and this was not a manufacturing plant which would create a smell or blight in the neighborhood. There would be less than 5 employees. His final point was that the zoning ordinance would allow for uses such as takeout restaurants or bakeries where food was being prepared. That would not be appropriate here due to the location, size and scope of the building.

In response to questions from the Board, Mr. Ovington stated that he picks up and sells daily. Any discarded product would go into a locked dumpster which would be emptied weekly.

#### **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. Parrott made a motion to grant the petition as presented and advertised, which was seconded by Mr. Grasso. Mr. Grasso stated he would like to add a stipulation that there be no prepared food on the premises, to which Mr. Parrott agreed.

Mr. Parrott noted that the ordinance has 68 allowed uses for business districts, but he hadn't seen any that applied to this type of business, so the Board is properly considering a variance. He stated that it would not be contrary to the public interest to allow this activity which served many local small businesses. The special conditions were that this particular use was not anticipated and not listed as an allowed use. The restriction in the ordinance interferes with a reasonable use as this would be one business in a large building with other small businesses in a business zone. No public or private rights would be affected. It will fit into existing space, with a small number of employees and light truck traffic. He stated it was in the spirit of the ordinance to promote and encourage small business. There was no overwhelming justice that would tip in favor of denial simply because this use was not specifically listed. There would be no diminution in surrounding property values as the business would be one small portion of a larger building with other businesses.

Mr. Grasso stated he agreed and had nothing to add.

The motion to grant the petition with the stipulation that no prepared food would be on site was passed by a unanimous vote of 7 to 0.

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5) Petition of **Port City Plumbing & Heating LLC, owner, and Kerri L. Grant DC, d/b/a Cafe of Life Chiropractic, applicant**, for property located at **968 Middle Road** wherein the following were requested: 1) a Special Exception as allowed in Article IV, Section 10-401(A)(1)(d) to change the use of 950± sf on the first floor from a Convenience Goods II store to a chiropractic office, with hours of operation from 7:00 AM to 8:00 PM, Monday through Saturday, to share a treatment room; with hours ranging from 7:00 AM to 8:00 PM, Monday through Saturday, and 2) a Variance from Article IX, Section 10-908 to allow 2 attached signs totaling 60 sf in a district where such signs are not allowed. Said property is shown on Assessor Plan 232 as Lot 90 and lies within the Single Residence B district.

Chairman LeBlanc announced that this petition had been withdrawn by the applicant

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6) Petition of **Historic New England, owner**, for property located at **143 Pleasant Street** wherein the following were requested: 1) a Variance from Article II, Section 10-207 to allow the property to be used: a) as a function facility for weddings, parties and other non-museum events (including amplified music) from May 1st to October 15<sup>th</sup>, annually for up to 150 persons outside or up to 131 persons year round in the carriage house, and, b) the carriage house to be converted into a lecture space for up to 131 people and a catering kitchen be installed; and 2) a Variance from Article XII, Section 10-1204 Table 15 to allow 1 handicap parking space to be provided onsite where 75 parking spaces are required in addition to the required parking for the existing uses of the property as a museum and caretaker apartment. Said property is shown on Assessor Plan 108 as Lot 14 and lies within the Mixed Residential Office and Historic A districts.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech stated that this request deals with property known as the Langdon House. They were seeking a variance for weddings and various types of receptions that have been held there for years. An application had been filed to make the carriage house more ADA compliant and convert it to a meeting facility, while improving ingress and egress. They asked to provide a catering kitchen, essentially a warming kitchen, for occasions when there was a caterer on site. He stated that the Planning Department had determined that the Langdon House must now obtain a variance to allow a wedding or rehearsal dinner on site. He handed out Section 10-207 of the ordinance, stating that their application was for relief from item 21), which he read. He stated that similar activity had been happening for years and should be grandfathered. There had always been ample parking for the 3 to 4 non-museum related events held each year

Attorney Pelech stated that it would be in the public interest to allow an upgrade to this non-profit museum and national historic landmark. The facility would be more ADA accessible and a handicapped parking space would be added on site. He took issue with the departmental memo which, he stated, indicated the test for unnecessary hardship was the reasonable use of the property. He stated it was that literal enforcement results in hardship because restriction interferes with owners reasonable use. Reading again from Section 10-207, item 21), regarding periodic celebrations, etc., he stated this would be allowed use under that section. Attorney Pelech stated there was no fair and substantial relationship between the general purposes of the zoning

ordinance and the restriction on the property and no public or private rights of others would be violated by granting this variance.

With regard to the parking, a variance was needed due to the special condition of the gardens being an integral part of a historic landmark. Were they to pave them over to create parking? They have always had adequate parking across the street with most of their occasions in the evening or on the weekend. He stated it was not reasonably feasible to provide parking on-site and to do so would destroy the character of the property. It would be in the spirit of the ordinance to allow what had been happening for years. Denial would create a hardship for the owner which was not outweighed by any public benefit. He addressed the submitted memorandum from the Police Department by stating there was no basis for their opposition. In the years of having 3 or 4 weddings per season, there have been no complaints about noise or alcohol or parking. He stated the petition met all the criteria. The Board could place limitations if it wished after the museum representative outlined their activity. He noted the capacity of the carriage house would be 131 and outdoor events would be limited to 150 attendees.

In response to a question from Chairman LeBlanc, Attorney Pelech confirmed the carriage house would be heated. In the past, meetings or museum related events have been held in the Langdon House, which was not the most appropriate space.

Elizabeth Farish stated that they had been having 3 functions a year since 2004, limiting attendance to 150 people as part of their own self-governing policy. She read a portion of their vision statement so the Board would understand what they want to do with the carriage house

In response to questions from the Board, she stated the outside activity, if the variance was granted, would be relatively the same, but there would more year-round events with a heated facility, with around 56 people attending. The space could be used by other non-profit groups, such as Portsmouth Advocates, theater companies for rehearsal, environmental organizations. The weddings began before the files in her office were kept, so at least prior to 2004.

Mr. Larry Yeardon stated he was the President of Strawberry Banke and supported their application. He felt that weddings and other kinds of profit making endeavors were vital to the financial success of organizations such as this, and his as well. They have a very small impact on citizens but are a big part of financial picture of these organizations. He added that he lives at 420 Court Street, a close neighbor, and experienced all of the weddings.

Mr. Peter Mechard stated he was the former site manager for the John Langdon House and, to speak to one of the Board's questions, functions had been going on since the 1980's. Initial work had been done on the carriage barn, in part, to accommodate functions. They have made an effort, over the years, to minimize the impact of functions and not overpower their primary function.

Ms. Kirsten Barton stated she lives at 300 Court, which abuts the property, and finds them to be incredible neighbors. She supports their application.

Mr. Parrott stated that all of the groups she had mentioned seemed to be non-profit or not-for-profit and asked Miss Farish if it would be the policy to keep the use to those sorts of groups to avoid competition with commercial halls.



Ms. Farish stated they have made provision for basically non-profit groups, but might rent to a for-profit organization, although it was not part of their agenda and there would be a careful screening of the people using the facility.

In response to further questions from Chairman LeBlanc, she stated the inside functions were difficult to predict, but would be self-limited to preserve resources. There could be an inside wedding, with 56 seated at tables. The outdoor concerts would be part of their own public program and the museum would not be rented to someone outside to have a concert. The provision for amplified music was part of their current contract, but it was required to be ended by 9:00 p.m. and be kept fairly low in decibels.

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

No one rose to speak.

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

Mr. John Grossman stated he lives at 170 Mechanic Street. He stated that during '92 and '97, he helped to organize weddings there. The Langdon House found that too many destroyed their lawns, so they had to restrict them. He felt the facility served the community well.

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

Chairman LeBlanc asked if all members of the Board had seen the letter from Deputy Police Chief DeSesa, which had been provided for them that evening.

Ms. Tillman clarified that the advertisement was for parking relief based only on new uses, not for the museum uses and caretaker apartment. There was no parking calculation included in the variance for that, just for the commercial function facility. There was no dispute that historic houses can hold their own programs, it was the commercial use that they considered requiring a variance. It was not an allowed use in a historic house.

### **DECISION OF THE BOARD**

Mr. Witham made a motion to grant the petition as presented and advertised with the stipulations that the outdoor events be limited to a maximum of 6 per year and that amplified music would be allowed no later than 9:00 p.m. Mr. LeMay seconded the motion.

Mr. Witham stated that his concerns about the way to generate new income and with the catering kitchen had been addressed in the presentation. In terms of parking, when he had attended an event, he had no trouble finding a parking spot. He stated that it would be in the public interest and in the spirit of the ordinance to keep these museum homes going and no one in the public had spoken against it. This would be one tool to keep the museum afloat, and with the stipulations, would be controlled and reasonable. Considering how the property has been used for many years, strict interpretation of the ordinance would interfere with the reasonable use of the property and, at some level, zoning does allow for these types of events. To allow an occasional wedding won't interfere.

With reference to the public or private rights of others, he acknowledged the letter from the Police Department, but stated that in view of other things that take place, this won't make much of a dent. These were reasonable people and reasonable hours. It would be an injustice to not allow any more events, which would not be outweighed by any benefit to the public. With regard to surrounding property values, several neighbors had been affected by events and seemed happy with the arrangement. No one had spoken against. While he understood the concerns of the Planning Department and the Police Department, he felt this request was reasonable.

Chairman LeBlanc asked if he would agree to amend his motion to specify that outdoor events would be held only from May 1 to October 15. Mr. Witham stated he agreed to add this to his motion.

Mr. LeMay stated he agreed, but would suggest an additional restriction that the use of the facilities by groups not directly related to the operation of the museum be restricted to non-profit organizations.

After a brief discussion of individual versus commercial events with Ms. Tillman, Mr. LeMay stated he would withdraw his suggestion and leave it to the discretion of the organization running the facility.

Ms. Eaton stated this was too much of a departure and thought a new proposal might be needed. Having lecture space for 131 people and weddings for 100 was pretty significant.

Mr. Parrott stated that it would be entirely appropriate for the Planning Department to call for a variance because, if this passed, it would put the past practices on a formal basis and leave the museum building and the City in a better position than they are now. It could be approved with reasonable stipulations as to numbers of events and people and so forth. The question of what kinds of groups to rent to and not cannot be spelled out in detail, but he trusted the assurances of the managers of the property that they will use discretion and rent out to folks that won't be a nuisance to the neighborhood.

The motion to grant the petition, with the stipulations that the outdoor rental events be limited to between May 1 and October 15, and that amplified music will stop at 9:00 p.m., was passed by a vote of 4 to 3, with Ms. Eaton, Mr. Grasso and Chairman LeBlanc voting against the motion.

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**III. ADJOURNMENT.**

The motion was made, seconded and passed to adjourn the meeting at 10:35 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary

\* *Note to Minutes: Administrative corrections made to the Minutes for Petition 1) are indicated in italics.*