

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

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**MAY 27, 2008, Reconvened  
From May 20, 2008**

**MEMBERS PRESENT:** Chairman Charles LeBlanc, Carol Eaton, Thomas Grasso, Alain Jousse, Charles LeMay, Arthur Parrott, Alternate: Derek Durbin

**EXCUSED:** Vice Chairman David Witham, Alternate: Robin Rousseau

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

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**I. PUBLIC HEARINGS**

Chairman LeBlanc announced that petition #11 had been withdrawn.

9) Petition of **Peter and Judi Paradis, owners**, for property located at **481 Dennett Street** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow an existing rear dormer to be expanded across the rear of the dwelling resulting in a 4'± left side setback where 10' is the minimum required. Said property is shown on Assessor Plan 160 as Lot 27 and lies within the General Residence A district.

Mr. Jousse stepped down for this petition and Mr. Durbin assumed a voting seat.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Peter Paradis pointed out on the submitted drawing the two spots they currently have for storage. This was under the eave of the roof so it went from 5' in height to nothing. They would like to open it up and get more room there.

In response to questions from Chairman LeBlanc and Mr. Parrott, Mr. Paradis stated that, as far as adding on, this was the only place without changing the footprint. They were going to keep the footprint and just extend the existing dormer. He confirmed that the extended dormer would be contained entirely within the existing roof perimeter.

**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. Parrott stated that no public interest would be involved as the extension on an existing dormer probably would not be seen. The special conditions were that they want to expand a fairly small house on a fairly small lot and this was one way to do it without enlarging the footprint. This was a reasonable use of the house and the neighbors would see no encroachment. He stated that it would be in the spirit of the ordinance to accommodate homeowners with a better use of their property. There was no overriding interest of the public that would argue against approval and he could see no deleterious effect on neighboring property values. If anything, the house would look better, which was a slight positive.

Mr. Grasso stated that the way the building was situated on the lot, the applicant would need to request a variance for anything he wished to do.

The motion to grant the petition as presented and advertised was passed by a unanimous vote of 6 to 0.

Mr. Jousse resumed his seat. Mr. Durbin retained a voting seat for the balance of the hearing.



10) Petition of **Jason Lansberry and Jennifer Janak, owners**, for property located at **36 Spring Street** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) were requested to allow: a) an irregular shaped 677 sf 2 story addition with a garage on the 1st floor and living space on the 2nd floor with a 2.5'± right side setback where 10' is the minimum required, and b) a 38 sf porch creating 36.4%± building coverage for all where 25% is the maximum allowed. Said property is shown on Assessor Plan 130 as Lot 14 and lies within the General Residence A district.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard W. Pelech distributed a memorandum to the Board. He referred to the aerial photographs he and the department had submitted. The applicant was proposing to demolish the non-conforming detached garage on the right hand property line, 4' from the rear yard. An addition would be made to the existing structure which would contain a mudroom, a one car garage and some living space above. He stated that the property has special conditions. It was a 50' x 100' lot in a district where the

minimum size was 7,500 s.f. He submitted a petition which had been signed by a number of the neighbors who had seen the plans and had no objections to the project.

Attorney Pelech stated that the property was already non-conforming because of its size and right side and rear setbacks. The left setback of 3.5' will remain unchanged. They will move the garage forward so that the rear setback will become more conforming. The garage will also be moved away from the right property line leaving a 2.5' setback. A 14' x 10' deck would be removed. The footprint would be reduced by 500 s.f. and 677 s.f. plus would be added plus a small porch, which would be an entryway to the home. The current 32.1% of lot coverage would be increased by 4.3% to 36.4%.

Attorney Pelech stated that the request would meet the spirit of the ordinance as it relates to the intent of setbacks and lot coverage, which is to provide adequate light and air and prevent overcrowding. Access will be allowed for emergency personnel and, by taking the garage off the right-hand property line, the property will be more compliant. The special condition was, as already mentioned, that the property was already non-conforming. There was no reasonably feasible alternative. With the size of the lot, in particular the 50' width, a variance would be required for any addition to the structure. He noted that there had been a question in the departmental memorandum about a reduction in size of the mudroom. If they looked at the floor plans, there are stairways in that mudroom leading to the second floor. If they shrunk the mudroom, the stairways would be too steep and not meet requirements of the ordinance.

Citing “Chester Rod & Gun Club v. the City of Chester,” Attorney Pelech stated that to be contrary to the public interest, the requested variance should conflict with the ordinance so that it violates basic zoning objectives and these variances, if granted, would not. In fact, there would be an improvement. He stated one way to determine this was whether the essential characteristics of the neighborhood would be altered and, looking at neighboring properties, this would obviously not be the case. There were three detached garages at the rear of properties and all have 0' lot lines. Attorney Pelech stated that the hardship to the applicant if denied would not be outweighed by some benefit to the public. Regarding the value of surrounding properties, the property would be enhanced and the overall appearance improved which would increase values. They were not aware of any opposition.

In response to questions from Mr. Jousse and Chairman LeBlanc, Attorney Pelech stated that the stairs in the mudroom would go to a second floor which was being created over the garage. He confirmed that, with the garage being brought up from 4' to 20', the rear setback would be conforming. There was also a large vacant space abutting at the rear.

Mr. Roe Cole, the contractor for the project, stated they had gone through many revisions to try to scale the project back as much as they could. In response to a question from Mr. Parrott, he stated they currently have three bedrooms and two baths.

### **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 for discussion by Mr. LeMay.

Mr. Grasso stated that, at first, the setbacks seemed like a lot of relief but after hearing the presentation and given what was being targeted as the end result, he felt it was a decent proposal. He stated that, with the lot currently existing with a 0' setback, giving providing some relief would be in the public interest. The special condition was the 5,000 s.f. undersize lot so that almost any construction would need some relief from the Board. Positive changes would be creating additional setbacks where there are none and having the garage attached. There was no other reasonably feasible method to pursue. The builder had testified that they had gone through several proposals and cut back. Mr. Grasso stated that it would be in the spirit of the ordinance to enable the applicants to enjoy their home, justice would be done and the value of surrounding properties would not be diminished.

Mr. LeMay stated that this was a difficult variance because of the sheer volume of the house on the lot in terms of lot coverage, but the way it was configured makes it less intrusive. He felt it was better to move the garage in than have green space in the middle which does not benefit the neighbors. With a pre-existing, non-conforming use, as a practical matter, this was an improvement.

Mr. Parrott stated, as reflected in the sideline coverages, this was a classic case of overdevelopment. In terms of lot coverage, the standard for the city was 25% and this would bring it to 36%. It was a nice design, but was unfortunately putting a fairly large house on a small lot. He felt that a 3 bedroom, 2 bath house was pretty standard and, for all those reasons, had a problem with the request.

Ms. Eaton stated she had similar concerns, mostly because they were reducing the approximate 18' from the house to the lot line down to 2.5'. Yes, the garage was on the property line but the proposed configuration does not really improve the overall sidelines, with 3.5' on one side and 2.5' on the other. She also felt the lot coverage was high.

Mr. Jousse stated that he had viewed the property and, even with a 2.5' side yard, a two story garage 5' or 6' from the neighbors structure was going to impede air flow. He would be a lot more comfortable with a substantial right setback increase.

Chairman LeBlanc stated that the fact that the rear lot line was being increased to that required by the ordinance stood well with this petition. He felt the configuration of the adjacent lot to the right allows for light and air.

The motion to grant the petition as presented and advertised was passed by a vote of 4 to 3, with Ms. Eaton and Messrs. Jousse and Parrott voting against the petition.



11) Petition of **Old Tex Mex, LLC, owner**, for property located at **3510 & 3518 Lafayette Road** wherein the following were requested: 1) a Variance from Article II, Section 10-206 to allow a proposed 60' x 72' addition with 20' x 72' office mezzanine for use by trades contractors in a residential district where such use is not allowed, and 2) a Variance from Article III, Section 10-301(A)(8) to allow the proposed addition with a 55'± front setback where 105' is the minimum required. Said property is shown on Assessor Plan 297 as Lots 7 & 8 (to be combined) and lies within the Single Residence A district.

This petition was withdrawn by the applicant.



12) Petition of **Patrick Malloy and Birgit Christiansen, owners**, for property located at **233 Union Street** wherein Variances from Article XII, Sections 10-1201(A)(3) and 10-1204 Table 15 were requested to allow: a) 4 parking spaces that backout to be provided where 7 parking spaces are required, and b) required parking for the professional offices (3 offices) where parking shall not back out onto the street. Said property is shown on Assessor Plan 135 as Lot 71 and lies within the Mixed Residential Office district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Patrick Malloy stated that they own property at 233-235 Union Street which was built about 100 years ago as a duplex. About three and a half years ago, they agreed to lease the other side as office space believing they were in compliance with zoning regulations for Mixed Residential Office. He recounted how the Code Enforcement Officer had visited the offices and then approached him, advising that he needed to fill out the proper paperwork for what he had done. They were now asking for what was necessary for 3 professional offices. He noted that he saw a number of professional offices on their street. Mr. Malloy cited, and read, several sections of the Zoning Ordinance which he felt allowed professional offices in their situation and outlined how they met these requirements.

Mr. Malloy stated he was there that night asking for a variance from the parking space requirements for the 4½ spaces required, which would then allow the three professional offices to practice in his building. The description in the agenda did not match exactly what he filed. He read Article XII(A) regarding off-street parking. He stated that this did not apply to him as there was no new building and no addition to the structure. There was no change in the use of his property. There was a change in the tenant use. He read further from Section 10-204 and stated that he was in a Mixed Residential Office district

and he had mixed residential office uses. There was no intensification of use, in fact there was a “detensification.” The offices were in use Monday through Thursday only from 8:00 a.m. to 6:30 p.m. He and his wife were gone all day during the week and it was quite easy to park on Union Street during the day.

Mr. Malloy submitted a sketch to scale, stating that there was no new parking layout; nothing was altered. He read again from the Zoning Ordinance about the layout of driveways, stating that the paragraphs do not apply to them as theirs is a two family dwelling. He read from Article XII, Section 10-1204 and felt that the best match for them on the table was psychiatric offices, from which he concluded that he needed a total of 4½ parking spaces. He had 4, so he was a half space short. For the documentation he had filed with his application he had made a mistake and used the dimensions for angled parking, which he did not have in the driveway so the dimensions were conservative. He had determined that he was able to park 5 vehicles of a typical SUV scale and he wanted to submit his sketch showing this. He noted that there were two parking spaces at the curb in front of the property. He knew they didn’t count, but they were available for use. Mr. Malloy distributed letters of support from his neighbors and stated that the offices were very low key. Their property was one of the few owner occupied in the area.

Addressing the criteria, Mr. Malloy stated that it would be an unnecessary hardship to the applicant and tenant to have to break a 5-year lease. Without the offices, the use could actually intensify, particularly in terms of on-street parking, creating a hardship for himself and the neighborhood. He felt that these types of offices were a plus and would not result in a diminution in the value of surrounding properties. He stated that a professional use was granted by the ordinance and was an appropriate use, which also prevented overcrowding of the land. It was in the public interest to attract professional people to Portsmouth who provided a positive direction to the area. Regarding justice, this would allow them to be a part of the Mixed Residential Office zone, with all persons similarly situated treated alike.

Mr. LeMay asked who used the parking spaces now. Mr. Malloy responded that he and his wife use them in the evenings and the tenants and their visitors use them during the day. There also was street parking available during the day.

Mr. Parrott noted that, in Article II, Section 10-207, Table 3, Item 4, it says that professional offices are not allowed in the Mixed Residential Office district. Mr. Malloy stated that was correct, but, if you go to sub-paragraph 22, it allows professional offices. Ms. Tillman noted that it picked it up in 22.

Mr. Parrott stated that he didn’t agree with that, but would come back to that point. Over in the parking section, it also says in two places, first, that stacked parking, which they were proposing, was not allowed and, in another sub-paragraph, that there should be an internal circulation such that vehicles do not have to back out onto the road. And, this was what they were requesting.

Mr. Malloy stated he agreed with what Mr. Parrott was saying, but the ordinance also said that one or two family houses were exempted.

Mr. Parrott stated they were not using it that way. They had changed the use.

Ms. Tillman clarified that, once you have taken the use of a duplex and changed it to a dwelling unit with professional use on the other side, the property does not qualify for an exemption because, on the other side, the use has changed.

Mr. Malloy stated that, when you mix the uses, it was clear that there was some usage for each side.

Ms. Tillman stated that was correct. It was the gross floor area of the building up to, and including the 6” thick wall, so parking was based on gross floor area, and that’s why the parking was 7 for the building. It’s based on the gross floor area of the unit.

Mr. Malloy stated it couldn’t be that because they’re different for the types of offices. So, if you have different offices in the same building, they’d all have different parking places per square foot.

Ms. Tillman stated, so you would divvy up the parking depending on the square footage of each use. Yours are all professional offices. It’s one parking space for every 200 s.f., based on the gross square area.

Mr. Malloy stated they were 600 s.f. and Ms. Tillman explained those were the individual rooms, not the gross floor area of the unit.

Mr. Malloy stated he had not indicated the gross floor area of the unit. Ms. Tillman stated that the application, on the line for 233 Union Street, had listed 1,191 s.f.

Mr. Malloy stated that was the gross area of that side of the building. That was not the gross area of the offices.

Chairman LeBlanc asked if the offices had rights to the whole side of the building.

Mr. Malloy stated they did, but they don’t use the whole side.

Chairman LeBlanc stated that was irrelevant. The fact is that it was 1,191 s.f. and, therefore, that was what they have to calculate the parking area on.

Mr. Malloy asked what happened when you had mixed use on one side of the building. Ms. Tillman stated, then, she would have had to ask him additional questions.

Chairman LeBlanc stated that, if they didn’t use the entire side of the building, if, in fact, they were restricted to the 600 s.f. he said they used on a daily basis, then the calculations would be different, but according to the regulations, they have to go by the square footage of the entire building.

Ms. Tillman stated that they have to be able to get to their offices. There are hallways and stairways through the building. All that counts toward gross square area.

When Mr. Malloy stated that all those areas don't intensify the parking, Ms. Tillman reiterated that they count toward the gross square area, the operation of the office.

Dr. Ellen Becker stated that they had been tenants for the past three and a half years. Their schedules did not overlap and they make every effort to be courteous to their neighbors.

### **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 deny the petition as presented and advertised, which was seconded by Ms. Eaton.

Mr. Parrott stated that, unfortunately, this was the way it usually ended up when people go ahead and do things that are in violation of the City ordinances. This was a complicated zone with mixed uses which, in this particular case, were intensified by having three offices on one side of a duplex and a residence on the other side. The lot was configured so that parking was difficult at best even for a duplex. You're also supposed to drive around so you can exit going forward and that's not possible with the present situation in the driveway. He stated that the net sum was that the parking, as required by the city ordinance, just didn't work there, which was a direct result of the over-intensification of the use of the building. He suspected that, if this request were to be approved, they would be flooded with similar requests.

Mr. Parrott stated that when the property next door had been considered, there had been testimony from many of the neighbors, some of whom spoke that evening, about how impossible it was to park on the street at anytime. In this case, there would be four units, all needing parking. He felt this needed further consideration and a solution which would not need approval for stacked parking or end up with excessive cars on the street.

Ms. Eaton stated that there were just too many questions on this petition, which didn't seem to meet any of the criteria for a variance. The parking that was there didn't address their needs as it was and this intensification was too extreme in this area. She felt they would be remiss in going against the ordinance in granting this variance.

Mr. Durbin stated that it was an unfortunate situation where the tenants are actually in those offices, but, at the same time, he felt that the remedy lies in the law if it becomes prohibitive of them using the offices.



Mr. Jousse stated that this was probably a chain of events and nobody was trying to circumvent anything. The “fly in the ointment” was that, when they grant a variance, it is forever. While the situation had been going on for 3 years with, apparently, no problem, the Board had to look beyond the next few years.

Mr. LeMay stated that he, also, was going to stress that the variance was forever.

Chairman LeBlanc stated that granting the variance would not be consistent with the spirit of the ordinance. Although the current owners were good citizens, this could not be guaranteed in the future, which was what the Board had to consider.

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

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13) Petition of **Spinnaker Point Condo Association, owner**, for property located at **70 Spinnaker Way** wherein a Variance from Article II, Section 10-212(I) was requested to allow outdoor storage of sand and salt where outdoor storage is not allowed. Said property is shown on Assessor Plan 217 as Lot 2 and lies within the Office Research/Mariner’s Village Overlay district.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Gail Green stated she was the manager and agent for the Spinnaker Point Condominium Association. They were trying to aid the residents by keeping the roads and sidewalks sanded and having the materials stored on the property helps. The proposed location would be 300+’ from any property line in an unfinished area of the parking lot. The area was big enough so that trucks can back in and out with sand and the parking lot is more. That parking lot is more tucked away than any other in the complex.

Mr. Jousse asked how they were going to prevent salt from permeating into the green space and how would they protect it from the elements. Ms. Green stated it would be put on some sort of foundation and covered with a tarp.

Mr. Jousse stated he was trying to picture exactly where it was going to be. Was it going to be directly across from the parking spaces?

Ms. Green stated that the front of the structure, which was 20’ in length, would be set back 24’ from the pavement. There would be a cement pad, an enclosure made of building blocks, and a cover.

Mr. Grasso asked why the association could not just hire a construction firm.

Ms. Green responded that the contractors they use do provide the sand, but this was a large complex with over 3 miles of walkways alone. Snow removal would be expedited if a truck didn’t have to travel to get a load of sand and come back.

Mr. Grasso asked what was provided for the residents' individual use for steps and sidewalks and Ms. Green stated they put barrels out for them. This was strictly for the contractors to use on the roads and sidewalks.

Ms. Eaton wondered about a covered shed which would be a more protected environment. Ms Green stated that she didn't know of any shed that would be wide open enough so that trucks could get in and load.

Mr. LeMay asked if there were other maintenance buildings on the property and Ms. Green stated the community building had 3 garage bays attached. At his request, she indicated where they were located on the plan.

Mr. LeMay asked why nobody had envisioned the need for storage of sand and salt. Ms. Green stated that the community building was built in the 1940's and then converted, so it was not envisioned at the time.

Ms. Tillman noted that where the office building was had been problematic as it was close to abutting properties. The proposed location was on the far side of the site.

Ms. Eaton asked if there were other ordinances that deal with covering things such as salt.

Ms. Tillman stated that it was not in the Zoning Ordinance. If there were a DES regulation, they would have to abide by that.

A resident stated that she had lived in the complex for 10 years and that some elderly residents had fallen. It was crucial to safety to get in quickly to treat the pathways. She noted the condominium association was trying to keep fees down while not harming the environment. Quick and efficient sanding was also crucial to the field house which they have leased to the City.

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

No one rose to speak.

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

A member of the Board of Directors stated that on-site storage allows them to keep costs down. Unfortunately they don't have the money to erect something that would keep the sand totally out of view and the need had not been foreseen by the original builders. He noted that the three garages next to the management office couldn't accommodate trucks.

### **DECISION OF THE BOARD**

Ms. Eaton made a motion to grant the petition as presented and advertised, with the stipulation that it remain covered with an impermeable surface such as a tarp. The motion was seconded by Mr. Jousse.

Ms. Eaton stated that the concern here was salt and sand mixture being exposed to the environment, although that was not the intent of the ordinance. That was to keep too much outdoor storage from interfering with the residents. But they have moved this to a location that will satisfy the needs and protect residents. There were good reasons to have the storage where it was and, if covered, that would be protection enough.

Mr. Jousse stated that the chosen location was really out of sight and was hard to find even when you were looking for it. He noted that there was a lot of vegetation between that storage location and the resident buildings. It was more efficient to have materials as close by as possible.

The motion to grant the petition as presented and advertised, with the stipulation that the outdoor storage area for sand and salt remain covered with an impermeable surface such as a tarp, was passed by a unanimous vote of 7 to 0.

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14) Petition of **Icon Realty LLC, owner, Rite Aid Pharmacy, applicant**, for property located at **1303 Woodbury Avenue** wherein a Variance from Article IX, Section 10-908 was requested to allow a 79.81 sf freestanding sign 7’3” from property lines(two) where 20’ is the minimum required. Said property is shown on Assessor Plan 217 as Lot 1 and lies within the General Business and Mixed Residential Business districts.

Attorney Malcolm R. McNeill, Jr. presented a packet of material to the Board and stated that John Schmidt, an engineer from the PDL Companies, Phil Marshall from Rite Aid, and Alexander Dittami of Sign-A-Rama were also there. Attorney McNeill stated that, in 2006, the plan on display was approved and the proposed building was now in the final stages of construction. As indicated on the plan, the site was irregular in shape and the applicant does not own the full scope of the ground. He stated that the sign they were proposing was not excessive and the sole issue is its distance from the property line where 20’ is required. With this particular lot, the property line was far greater from the street right of way than was customary.

Attorney McNeill indicated where the sign was proposed at the apex of the property, noting that, while it was 13½’ back from the property line, that line was 25’ from the street. The sign was actually 75’ from the apex of the property because of the various public takings that had occurred and they were, in effect, more than 30’ from the side line of the right of way.

Attorney McNeill reviewed the materials he had provided, which included information on the previous variances granted in 2006 and the moves that had been made then, in terms of building placement, dumpster location and landscaping, due to concerns about the

proximity of residential properties. He stated they could place the proposed sign in two places where it would be allowed, one a small triangle near Woodbury Avenue and the other next to the Market Street Extension, where it would be almost entirely covered by trees and the landscaping proposed by the City. He noted that the sole reason for a sign was to be seen.

Referring to the site plan in the packet, Attorney McNeill indicated the area owned by the City and noted that, across the street from the proposed sign was entirely commercial. Continuing on the site plan, he indicated that there was a hill which partially obscured the legal location of the sign. Coming down Market Street Extension, you couldn't see the sign unless you reached the stop sign and strained to see it. He also noted that a sign placed in that legal location would be immediately contiguous to a residential zone. Similarly, coming up Woodbury Avenue, the effectiveness of the sign would be compromised by a neighboring house and landscaping.

Attorney McNeill reviewed the submitted photographs which illustrated the heavy tree area remaining remains at the site toward Woodbury avenue, the house he mentioned, the irregular shape of the site, and the significant setback from the pavement. He pointed out on the exhibit various distances from the sign to the boundaries, noting that, at some points, it was over 70'. From the sign's closest point to the sideline owned by the City, it was 32'. He stated that the effect of the proposed placement of the sign would be the same as that intended by the ordinance because, normally, ownership would go right up to the street.

Addressing the departmental comments in the memorandum regarding the Landscaping Plan in relationship to the proposed sign location, Attorney McNeill stated that the plans submitted for their consideration during construction were based on architectural components that went through the construction process. The sign company did not have the actual approved plans. After their construction plan had been approved by the Planning Board, the landscaping component had been delegated to Ms. Tillman and final landscaping plans had taken several months to complete. The location for the sign they were proposing was where a tree was shown on the Landscaping Plan. What the applicants were proposing was to move the tree to another location and, if they had to go back to the Planning Board with the change, they would. He stated that the bottom line was where else in this triangle would you put a sign in a manner that could be seen.

Addressing the criteria, Attorney McNeill stated that a sign strategically located away from residential uses, and in a business zone heavily used for business, would not be against the public interest. The sign was not oversized or offensive and would be further from the street than many others in the area. The public interest would not be compromised by a legal sign that gives the effective separation from the street that the ordinance contemplates. He stated that the special conditions creating a hardship were the triangular shape of the property, the effective size of the setback from the street, the existing residential zoning, and established landscaping and trees that would block the view of the sign in another location. Noting that he had reviewed why the sign should

not be in the only two legal locations, Attorney McNeill stated that there was no other reasonable method to pursue.

Attorney McNeill stated that it was in the spirit of the ordinance to have reasonable setbacks from the streets and the proposal would not represent sign pollution or offensive signage. Justice would be served as the sign was of a legal size. Given the variances previously granted and the use allowed, Attorney McNeill stated that there would be no diminution in the value of surrounding properties, which mainly had commercial uses. The proposed sign location was the most sensitive to the mix of commercial and residential properties in the neighborhood. Regarding the evolution of the Landscaping Plan, Mr. John Schmidt was available for questions. Attorney McNeill concluded that the Board of Adjustment had the authority to grant what they were requesting and, if they had to back to the Planning Board for the tree, they would do so.

Chairman LeBlanc asked what the elevation difference was between Market Street and the parking lot. Mr. Schmidt stated that the parking lot was at 71' and the Market Street Connector along the site was roughly 60'.

Mr. Schmidt provided a brief explanation of the multiple revisions to the Landscaping Plan and outlined their process as it related to the Planning Board. They had submitted various plans to Ms. Tillman and the Landscaping Plan on display was the final approved plan. He noted that the plan, as final, was much more than originally considered. An effort had been made to increase plantings along Granite Street to screen residential properties.

Attorney McNeill interjected that the point was that the signage company did not get the final landscaping plan, which was why the proposed sign location seems to be at odds with that landscaping plan.

When Mr. Grasso asked how they would fare 10 or 12 years down the road, Attorney McNeill stated that the landscaping was significant. Ms. Tillman could judge better, but all he was suggesting was that, for this particular site, there will be significant growth.

Mr. Schmidt added that the trees along the perimeter on the plan on display were depicted at full maturity so the Board could get a feel for the full canopy.

Mr. Grasso asked Ms. Tillman if a favorable motion were made, could they override the Planning Board's agreed upon design.

Ms. Tillman responded that they would have to go back to the Planning Board to amend the landscaping for the particular tree they were talking about.

Chairman LeBlanc noted that the Board can always grant a variance conditional on some other Board's action.

Mr. Parrott asked why no pylon signs were proposed in the sign permit dated December 21, 2007. What had changed?

There was a brief discussion among Mr. Parrott, Attorney McNeill and Ms. Tillman about the different sign permit applications, what they covered, and what had been included in the packet. Referring again to what was covered by the December, 2007 sign permit application, Mr. Parrott reiterated his question about what had changed in terms of perception of the signage needs.

Mr. Philip Marshall identified himself as the Project Manager for Rite Aid and stated that nothing had changed from that time to the present. There had been two applications, one dealing with attached signage and one with free-standing. The initial building plan had included signs, but they were asked to remove those indications.

Ms. Tillman clarified that the Board typically does not receive copies of the applications. While this appeal was for the free-standing sign, for the purpose of trying to explain what had already been granted, she had included the sign permit for the attached signage with her memorandum. She hoped that this, along with the Landscaping Plan, would be helpful to the Board.

Ms. Eaton referred to a plan and Ms. Tillman stated that had been provided by the sign company.

Attorney McNeill brought up the plans for clarity and pointed to where the approved sign was on the site plan, where the proposed landscaping would be and where the proposed sign would be. This was the accurate plan and, if the Board approved the sign location, he reiterated that they would go back to the Planning Board for approval of the revised Landscaping Plan.

Mr. LeMay noted that, at the base, the sign was already 10' over the road and it would be another 20' over from that? Was that typical for height? That is, were it stuck on the ground along with any other sign on the street, would it be the same height?

Mr. Alexander Dittami, from Sign-A-Rama, stated that, if they looked at BJ's gas sign, it would be 24'. Currently the ordinance allows up to 20' for a pylon sign. He stated it had to be that height because of the elevation from the roadway.

Mr. LeMay stated his point was that they already had 10' of elevation from the roadway.

Mr. Dittami stated that, in this case, that worked against them. For someone coming from the north, that 10' allows the sign to be seen. But, coming from Portsmouth, at the bottom of the elevation and in a depression, looking up, there was first the landscape screening and then the building behind it creating layers in heights. In that depression, it was hard to see anything.

Attorney McNeill stated that the important point was that the sign was not out of scale with the building.

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

Ms. Lenore Bronson of 828 Woodbury Avenue asked that the Board adhere to the existing sign ordinance, stating that there was no hardship for Rite Aid. She stated that the building was very high and large and dominated the whole area. It could be seen for hundreds of feet and there was signage on the building. There was a good sign at the entryway which was visible from 3 sides. She stated that the neighbors were concerned about the negative effect on property values and should not be further encroached upon by a sign closer than permitted. Rite Aid had already received 5 variances and should have had the foresight to include this application as well. She noted that a variance goes forever and, if Rite Aid leaves, there would be a replacement sign. If they did decide to grant the variance, she hoped that the Board would require them to go before the Planning Board.

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

Attorney McNeill stated that there would be a free-standing sign on the property because the applicant had a right to place one. The place with less impact on residential areas would be in the area he had previously indicated.

### **DECISION OF THE BOARD**

Mr. Jousse asked Ms. Tillman if, in figuring the signage, the pylon on which it stood counted toward the square footage. Ms. Tillman stated that it did not, only the surface of the sign itself.

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

Mr. Durbin stated that he believed it would be contrary to the public interest to set a precedent by allowing a sign closer to the property line, regardless of the property line issues in this case, particularly with respect to a mixed use neighborhood. He could not see any hardship in the property which would justify granting. Especially with the applicants working with the Planning Department, they should have foreseen the issue with the free-standing sign. He could not see any special conditions that actually existed. With regard to some other reasonable method, he stated that the applicants had already presented evidence that they could place a free-standing sign within the required setbacks. He didn't believe granting a variance would be in the spirit of the ordinance, which is to provide a buffer. He felt that the benefit to the applicant did not outweigh the public interest in maintaining the setbacks. He could not adequately speak to the value.

Mr. Jousse stated that the applicants had presented two other locations which would meet the setback requirements. They could put a sign, half the size of the proposed sign, in

each of the two locations which would be able to be seen from the Market Street Connector and Woodbury Avenue.

Mr. Parrott stated that, in terms of visibility, what you want to have visible is the building and it jumps right out at you and it is crystal clear what it was. He believed that all possibilities had not been explored, including possibly leasing space from the City. A sign could be put in a location which would not need a variance.

Chairman LeBlanc stated that, in a departure from his usual position relative to signs, he felt this was a reasonable request and would not support the motion.

The motion to deny the petition as presented and advertised was passed by a vote of 6 to 1, with Chairman LeBlanc voting against the motion.

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15) Petition of **Toby and Shelly L. Lavigne, owners**, for property located at **4 Moebus Terrace** wherein a Variance from Article III, Section 10-301(A)(7)(a) was requested to allow a 340 sf L-shaped deck 69 ½' ± from the salt marsh wetlands or mean high water line where 100' is the minimum required. Said property is shown on Assessor Plan 207 as Lot 24 and lies within the Single Residence B district.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Toby Lavigne stated that they would like to construct a small deck.

In response to questions from Chairman LeBlanc, he stated that it would be in front, by the entrance, but would still be within 100' of the wetlands.

**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. Jousse.

Mr. LeMay noted that the house was already in the setback and, with this deck on the other side of the house, away from the wetlands, there would be no public interest involved or infringement on private rights. In fact, it would be a hardship to the applicants to not be allowed to do this. He stated that there was no other place that would be not within the setback or would make this less nonconforming.



Mr. Jousse stated that, with the whole house within the setback, anything done would require a variance. The dwelling would be between the deck and the water so there would be no effect on the wetlands.

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



**I. OLD BUSINESS**

6) **Petition of Melvin R. and Nancy H. Alexander, owners**, for property located at **620 Peverly Hill Road** wherein a Variance from Article II, Section 10-209 was requested to allow a private school for grades 6 through 12 in a district where such use is not allowed. Said property is shown on Assessor Plan 254 as Lot 6 and lies within the Industrial district. *(This petition was postponed from the May 20, 2008 meeting.)*

A motion was made, seconded and passed by unanimous voice vote to remove the petition from the table.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Barbara Peterson stated that she was here as the applicant with the owner. They had had some unexpected questions the previous week from neighbors, but they had talked to them and put their concerns at rest. She distributed a handout to the Board.

Ms. Peterson stated that denial would cause a hardship as this would be a private school providing a high quality education for students who wish to excel in athletics or the arts and there was no other similar school in the area. She stated that they couldn't do it without this location as they couldn't afford any other space. It would also be a hardship if the owner of the building was unable to rent space for other industrial or retail purposes. She stated that the affordability also spoke to the criteria that there was no other method to pursue. She felt that granting the variance would be in the spirit of the ordinance. As written, schools are permitted, but only for students 18 years or older. The concern for students under that age was safety. Their students would be protected by not being allowed to walk in parking lots and on streets.

Ms. Peterson stated that the provided photographs show the sidewalk where there was only school parking and where the students would be dropped off and enter the building. She and one other staff member would be picking up the students and the policy was that they must be dropped at that specified space, which was 10' from entrance. They would not go into their parking lot or that of the abutters. She stated that current traffic patterns would not be interrupted as they would not use buses. There was no recess during school so students would not be running about. She stated that justice would be served by promoting the general welfare of Portsmouth and helping to improve the quality of life by scholar athletes and artists. Ms. Peterson stated that the school would not be contrary to

the public interest and that the abutters, including the person also renting space in the property, had no objections.

In response to questions from Chairman LeBlanc, Ms. Peterson stated that they would start as a pilot study of between 15 and 20 students. They could be comfortable with 28, which would be the upper limit of their expansion.

Mr. Parrott asked whether they would be teaching science and if there would be a lab with equipment. There was a brief discussion with Ms. Peterson of the type of lab they would have, with Mr. Parrott concluding that his point was that it was not on the plan.

Mr. Parrott asked about the state regulations for a school and how they stood on access and egress. Also, did it meet State Education Department standards.

Ms. Peterson responded that there were two egresses, an elevator and wide staircases. The sprinkler systems and alarms were all state of the art and the Fire Department had been impressed. They did meet the state education standards and also all local fire and health standards.

There was a brief discussion between Mr. Parrott about the office and classroom spaces and how each were designated on the plan. Mr. Parrott also asked about bathrooms, indicating they were not on his plan. Ms. Peterson stated she had just handed out a sketch of the entire second floor, to which she had been referring. Restrooms were indicated there.

In response to questions from Ms. Eaton, Ms. Peterson confirmed that the facility was entirely on the second floor and that the students would be transported from various locations.

Mr. Grasso asked if a number of the students would be individually transported by parents and Ms. Peterson stated that a lot would be carpooled.

Mr. Grasso stated that his concern was that the variance would go with the property. Ms. Peterson replied that a strict drop-off policy, if it were included with the variance, would go to others as well. When he asked if they would be providing meals and would there be a cooking facility, Ms. Peterson stated they would have a refrigerator and microwave and intended to work with two local restaurants to deliver meals.

Mr. LeMay asked, regarding the parking requirement, how many professional staff they would have. Ms. Peterson stated they currently have 5 and only 2 were full time.

Mr. Melvin Alexander stated that he was one of the owners and there were approximately 62 parking spaces on the property. The neighboring owner has also allowed an abutting area for an additional 7 cars.

When Mr. LeMay mentioned that students may want to drive and how would they ensure safety in parking, Ms. Paterson stated that the parking allowed them was right alongside the drop-off door for the safety of the children. They don't yet have any drivers.

Mr. Grasso asked, if those spots were designated for the school, how other customers would know not to park there and Mr. Alexander stated there would signage to designate the area.

**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**

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

Ms. Eaton stated that she couldn't get past a grade school in an industrial zone. She could understand a trade school, but that would be for adults. There was the issue of whether the kids could go outside or not and having to police it, as well as parents dropping off children and some students driving. She stated they could not meet all the criteria for granting a variance, particularly the spirit of the ordinance and special conditions creating a hardship did not exist.

Mr. Parrott stated that, in order to grant a use variance, there was a high barrier to jump over, part of which was the need for hardship in the land. He hadn't heard any argument presented as to hardship inherent in the land. As a practical matter, this seems an inappropriate place to be corralling kids and saying they can't step off the sidewalk. It was a great idea, but not in this location.

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

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**III. ADJOURNMENT**

It was moved, seconded, and passed by unanimous voice vote to adjourn the meeting at 9:50 p.m.

Respectfully submitted,

Mary E. Koepenick, Secretary