

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

EILEEN DONDERO FOLEY COUNCIL CHAMBERS

7:00 p.m.

**January 25, 2011, Postponed
from January 18, 2011**

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

EXCUSED: Alternate: Robin Rousseau

ALSO PRESENT: Lee Jay Feldman, Principal Planner

I. APPROVAL OF MINUTES

A) November 16, 2010

It was moved, seconded and passed by unanimous voice vote to accept the Minutes as presented.

B) Excerpt of Minutes – December 21, 2010 – 1150 Woodbury Avenue

It was moved, seconded and passed by unanimous voice vote to accept the Excerpt of Minutes as presented.

II. PLANNING DEPARTMENT REPORTS

A) Board of Adjustment Rules & Regulations – Proposed Revision

Mr. Feldman stated that the proposed revision was the culmination of Board comments on previous drafts. If there were any additional comments, he would have them inserted into the Rules and Regulations for their approval at the next meeting.

Mr. Witham commented that he felt the proposal captured the spirit and intent of where he would like to see it go with regard to the role of alternates on the Board. They could have further comments and discussion but, if there was a high comfort level, they could entertain a motion to adopt the revision in the Rules and Regulations.

Mr. Jousse stated that he found it very concise and addressed the concerns.

Mr. LeMay stated it was good and clear. He just wondered if there would be a problem if the alternate were not available for the subsequent meeting. Mr. Feldman stated that was a valid point. It would be more of a legal question and he would need to bring to Attorney Sullivan to see if any additional wording should be crafted. Mr. Jousse thought it would be treated just like a regular member who was not here for the second meeting. Mr. LeMay stated that he wasn't sure there was anything in the By-Laws regarding a participating member in one meeting having to participate in the next. When Chairman Witham asked if they should wait on the feedback or move forward, Mr. LeMay stated they had the spirit down and could move forward.

Mr. LeMay made a motion to accept the revision to the Rules and Regulations, subject only to review by City counsel. The motion was seconded by Mr. Parrott and approved by a unanimous vote of 7 to 0.

Attorney Peter Loughlin stated, as a point of order, that he thought Mr. LeBlanc should not be voting as his term had expired. He maintained that the fact that his successor had not been approved did not automatically extend his term.

Mr. Feldman stated that this had been cleared with City Attorney Sullivan before Mr. LeBlanc sat.

Chairman Witham stated that, in case any members of the public were there for the hearing, the applicants for 1 High Liner Avenue had requested to postpone their hearing to the February meeting.

Mr. Parrott made a motion to postpone the hearing until the February 15, 2011 meeting, which was seconded by Mr. Grasso and approved by unanimous voice vote.

Chairman Witham stated that there had also been a request to hear the last petition on the agenda regarding 295 Maplewood Avenue out of sequence due to medical reasons.

Mr. LeMay felt it was their prerogative to consider the order of the hearings and made a motion to hear the petition for 295 Maplewood Avenue first that evening. The motion was seconded by Ms. Eaton and approved by a unanimous vote of 7 to 0.

III. OLD BUSINESS

- A) Motion for Rehearing – 1150 Woodbury Avenue

Mr. LeBlanc noted that the motion for rehearing on 1150 Woodbury Avenue had not been heard and made a motion that the petition be denied, which was seconded by Mr. Jousse.

Mr. LeBlanc stated that, having read through the motion for rehearing, he hadn't seen anything new that hadn't been considered the last time. He stated that, on page four of the Motion for Rehearing, it read, "The applicant merely sought to increase the volume of the nonconformity, but not to enlarge the area of the nonconformity." Mr. LeBlanc stated that enlarging was enlarging and degree was not a factor. There was nothing new and the Board did not make a mistake in its deliberations. He noted that the Excerpt of Minutes regarding the property had been approved that evening.

Mr. Jousse agreed on the reasons for not granting the rehearing.

Chairman Witham also supported the motion to deny the request. While originally he had supported the petition, he didn't believe the Board had erred in any way and there was no new information that had not been available at the time of the original hearing.

IV. PUBLIC HEARINGS

6) *Case # 1-6 (heard out of sequence)*

Petitioners: 295 Maplewood Avenue Condominiums, Owner, and Joseph Cunningham,
Applicant

Property: 295 Maplewood Avenue Assessor Map 141, Lot 35

Zoning district: General Residence A

Description: To construct a sign projecting over the sidewalk 42" where 31.6" is allowed.

Requests: Variance from Section 10.1253.50 to allow a projecting sign to project more than one-third the width of the sidewalk.

SPEAKING IN FAVOR OF THE PETITION

Ms. Kirsten Cunningham thanked the Board for their understanding in hearing the petition early. She stated that they were asking for permission for a nonconforming sign. While they had analyzed the Ordinance and worked to conform, it was evident that a variance would be necessary. She stated that the public interest would not be harmed. The area was commercial with some residential. There were already some projecting signs and the former location of the Curtain Call had a carved projecting sign for years. The sign they proposed to erect would be tasteful and preserve the historic nature of the area which would be in the spirit of the Ordinance. Ms. Cunningham stated that substantial justice would be done by granting the variance. If they tried to conform to the Ordinance, the sign would be so narrow, it would not provide appropriate visibility on Maplewood Avenue which had a speed limit of 25mph but was not observed. This would also enable them to use the existing hardware on the building. She stated that the value of surrounding properties would not be diminished by a tasteful and appropriate sign. Literal enforcement of the Ordinance would result in a hardship due to the dimensional limitation in that section for a projecting sign. The sidewalk in front of 295 Maplewood Avenue was 8' versus 9½' on other city streets. With that limitation, compliance would severely limit the size of the sign so that it would not be as visible as needed.

In response to questions from Mr. Jousse, Ms. Cunningham confirmed that they would be using the existing bracket that the curtain shop had and the sign would be at the same height. The curtain shop's sign was longer so it was closer to the ground. They were proposing 40". Where the eyelets were now was 14½" from the building. They would move to 6" from the building and the sign would project from there but they would use the same hardware piece on the building.

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

With no one rising, the public hearing was closed.

DECISION OF THE BOARD

Mr. Grasso made a motion to grant the petition as presented and advertised, which was seconded for discussion by Mr. LeBlanc.

Mr. Grasso stated that basically the applicants wanted to identify their business in that location and he felt that, on this road in particular, knowing the location of a business would be in the public interest. He stated that the spirit of the Ordinance would be observed by allowing identification of the business and he didn't think that 10" of relief was unreasonable. In the justice test, he stated that there would be no benefit to the general public if the variance were denied and the value of surrounding properties would not be diminished. He stated that the hardship was that the size allowed by the Ordinance would be very small. With the height off the ground, he felt that the size was reasonable.

Mr. LeBlanc stated that he would not support the motion. He didn't see a particular hardship in the property. The Ordinance was there to keep the sidewalks open and clear and he felt that the sign company could have come up with another alternative.

Ms. Eaton stated that she also would not support the motion. There was nothing unusual about the width of the sidewalk which would allow a larger sign almost a third over the required amount.

Mr. Witham stated that he would support the motion. He had tried to think of what the authors of the sign ordinance had in mind and couldn't feel that this was the kind of thing they would want to stop. Using the existing bracket made sense. He noted that the front face of the building had a small roof projection and keeping the sign up against the building would result in a loss of some visibility. Mr. Witham stated that he didn't feel that granting this variance would change the essential character of the neighborhood and that this would be within the spirit of the Ordinance.

Mr. Jousse stated that he also would support the motion. He noted that the sign was nearly 13' off the ground and there was very little pedestrian traffic in that part of town. He felt it would be an advantage to have the business advertised and did not find the sign to be overwhelming.

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

- 1) Case # 1-1
Petitioner: SJW Ltd, Owner
Property: 25 Vaughan Mall Assessor Map 117, Lot 4
Zoning district: Central Business B
Description: To place a wall sign for a business not located on the ground floor.
Request: Variance from Section 10.1242 to permit a wall sign for a second floor business where one is not permitted.

SPEAKING IN FAVOR OF THE PETITION

Ms. Colleen Morrow stated that she was from Underwood Engineers which was asking for a sign for their business over a doorway. They were located in Vaughan Mall and recently there had been more traffic and clients looking for their business. Their entrance was under the existing Subway sign and Subway was willing to reduce the size of its sign to accommodate theirs. In response to questions from Mr. Jousse, she stated that the business had been on the second floor at that location since 1982. The original Subway sign was in three pieces with two extra sections at either end. Subway was going to remove two pieces on the end and slide their sign over which was where they would put their sign. Although the sign had not yet been designed, it would follow the same format as the rest on the building.

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SPEAKING TO, FOR, OR AGAINST THE PETITION**

With no one rising the public hearing was closed.

DECISION OF THE BOARD

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

Mr. LeBlanc stated that the signage was going to essentially remain the same, just with the formatting a bit different. This was a business which had been at that location for many years. The hardship was that the company was on the second floor and there was no way to advertise other than to take part of the sign which was already over their doorway. He stated that it would be in the spirit of the Ordinance to allow the business to adapt what was already there and he believed the rest of the criteria were met and they could grant the variance.

Mr. Parrott stated that the total amount of signage at this location had been unchanged and it made a lot of sense to allow some additional signage on the first floor. Although the business was located on the second floor, there were good reasons for not plastering the sign halfway up the building.

Mr. LeMay stated that he would be supporting the motion but had one little problem with what he saw. He noted that they had gotten into trouble before for granting variances for things which were specifically prohibited by the Ordinance. He read from the Ordinance that wall signs and parapet signs were permitted only for ground floor uses in single use buildings and, more particularly, that “any sign not specifically allowed is not permitted.” He felt he could consider this a first floor use

as the sign and entrance were on the first floor, but had no idea how somebody on the second floor got a sign. He asked if his interpretation was correct.

Mr. Feldman responded that it was. The intent was that in multi-use buildings signage for upper floor businesses would be on a wall kiosk or on a door listed with all of the other uses. They wanted to avoid signage above the first story that would litter a building with all of the different businesses because each one would want their own sign all over the building. The purpose was to keep the signage to a minimum and to be able to still identify those uses that were in the building. When Mr. LeMay asked if he was saying that he concurred, Mr. Witham commented that it seemed that part of it was to keep the signs probably this height and no higher. Mr. LeMay thanked him.

Mr. Witham stated that he would support the motion. The access to his office used to be through Underwood’s area and no could find them.

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

- 2) Case # 1-2
 Petitioner: Dorothy Katz M91 TR, Owner, and Puddle Dock West Thrift Shop, Inc., Applicant
 Property: 880 Islington Street Assessor Plan 166, Lot 51
 Zoning district: Business
 Description: To establish a retail business with less than the required number of parking spaces.
 Request: Variance from Section 10.1112.30 to allow 10 parking spaces where 34 are required.

SPEAKING IN FAVOR OF THE PETITION

Ms. Michael Toomire stated that Puddledock was a registered charitable foundation assisting individuals and families who need discounted or free clothing or household goods. They also offer donations helping other non-profits in the greater Portsmouth community. They had applied for a variance for the 10-11 parking spaces for the 4200 s.f. of retail space they will utilize. There was also 4200 s.f. in the basement which may or may not be included in their lease. She referred to a sketch in their packet depicting the existing parking spaces in the front and rear, the lot measurements and building measurements. She displayed an assessor’s card and a photo of the front 10 parking spots depicting their new signage. She felt that the Board would recognize, from previous variance approvals on this nonconforming lot with the last in January of 2007, that with the size of the building and the setting of the lot, there was no way to increase the parking.

Ms. Toomire maintained that most uses of the building would require more parking and further restrictions would deprive the owner of a reasonable use of the property. She stated that thrift shops in general have limited sections of item types which in turn limited the time that customers spend in the store, thus they required less parking spaces than a general retail store. The spaces they would use would be for one or two volunteers that staff the store and three to four customers maximum at any given time. She stated that this space had been vacant for years now and their

operation had the potential to enhance one of the key corridors into the City. They offered people from all backgrounds access to affordable clothing, furniture and household goods and their donators would be assisting with economic development and improving the local quality of life, all in keeping with the master plan.

Mr. LeMay asked if many customers would use public transportation and what other traffic there would be. Ms. Toomire stated that customers would exit public transportation and cross from Hannafords. They do get a lot of walk-in traffic, but didn't know the percentages coming specifically to their location. Mr. Grasso asked if the parking spaces would stay with the applicant if unit 2 came before them. Mr. Feldman responded that whoever was taking over that space would have to have a variance for taking the parking down to zero, although shared parking might be considered viable at the time. He noted that the history section in their packet included a variance for 7 parking spaces for a work force business. That variance was gone, but the corresponding variance to allow the parking spaces to back out onto the street was still in effect. In response to questions from Mr. LeBlanc, Ms. Toomire described their access and egress for large items, stating that they had access to the back even if they didn't use the basement for storage.

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 asked about an e-mail which had been sent to the Board. Chairman Witham noted the correspondents had been in favor, but Ms. Eaton thought there had been an issue. Chairman Witham read the e-mail into the record. The sender was not opposed to the petition but requested a provision regarding off-street parking along Thaxter Road. Chairman Witham noted that the request could be considered if someone made a motion, but he was not sure how they would enforce any provision.

Mr. Parrott asked if their present location on Islington was first floor space and what was the square footage. Ms. Toomire advised that it was first floor space and they had 1722 s.f. of retail and three storage units totaling 500 s.f. When Mr. Parrott noted that this was more than double, she stated that, due to the trend in the economy and the fact that they could have no furniture where they were, it was critical that they double their space at a minimum. Mr. Parrott stated he was trying to get an estimate of usage. Would they expect a lot more people in the store based on the fact that there was more merchandise. Ms. Toomire responded that there would be more people but they tended to come in and out quickly, or there would be a group of 2 or 3 in one car. There was also a lot of walk-in traffic. In response to a further question, she stated that she honestly didn't think the actual usage in terms of cars was likely to change due to a larger store or they would not be there that evening.

Mr. LeBlanc asked if there would be a problem if they restricted the loading of larger items to the rear door and she outlined the difficulties that might present for some customers with physical and transportation limitations. Chairman Witham noted that three or four years ago, they approved a furniture store in that location, which rarely had two cars. While he stated he was not advocating

only commenting, he stated that he could see the current Puddledock operation and three cars seemed like a busy day. Ms. Eaton stated that it seemed reasonable that the parking spaces were available. She felt they were able to support this business with plenty of space left for the future business. Regarding the abutter raised issue about parking on other streets, she didn't feel the Board had the authority to regulate that. If it became a problem, it would be an issue for Public Works. Chairman Witham agreed that it was a legitimate concern but one over which they didn't have much control.

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

Mr. LeMay stated that granting of the variance would not be contrary to the public interest. He felt that the property had been in this situation for several years and the nature of the neighborhood would not be changed. He believed the volume of traffic would not be dissimilar to what it was with the Loft. It was not like putting in a mall and the situation was somewhat self-limiting. You had a few cars every day and foot traffic and so forth. He stated that granting the variance would be in the spirit of the Ordinance. He thought this was a case of the use of the building on that lot being preexisting. The Ordinance at one time wound up creating the situation and there had to be some relief. Substantial justice would be done as the variance wouldn't change the situation in that area except that it happened to be uninhabited right then. However, not granting it would effectively prevent that use, which would be a hardship not just to the applicant but also to the owner. He had heard no testimony at all relative to the diminution in the value of surrounding properties. As to unnecessary hardship, he thought they were back to the size of the lot with the size of the building and what was left for parking. Although not used in strict conformance with the Ordinance, he felt that the petition could be granted.

Mr. Grasso stated that there had been several different businesses in the location with those 10 or 11 spaces in front and it seemed to have sufficed for all those different businesses.

Mr. LeBlanc noted that the volunteer parking spaces were to the rear which should help with the issue of parking on the street.

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

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- 3) Case # 1-3
Petitioner: High Liner Foods Inc, Owner
Property: 1 High Liner Avenue Assessor Map 259, Lot 14
Zoning district: Industrial
Description: To expand the existing maintenance building by 4493 s.f. and expand the office space by 3200 s.f.
Request: Special Exception under Section 10.440, Use #14.32 to allow the expansion of a seafood processing facility in the Industrial district.

Chairman Witham again noted that the petition for High Liner Foods had been postponed to the February meeting.

4) Case # 1-4

Petitioners: Michael's Realty Trust, Owner, and Lighthouse Manufacturing, LLC, Applicant

Property: 35 Mirona Road Assessor Map 252, Lot 3

Zoning district: Gateway

Description: To establish a light manufacturing use in the Gateway district.

Request: Special Exception under Section 10.440 Use #14.11 to permit a light manufacturing use as a special exception in the Gateway district.

SPEAKING IN FAVOR OF THE PETITION

Noting that Attorney Pelech had a conflict, Attorney Timothy Phoenix stated that he would speak on behalf of Lighthouse Manufacturing. He referred to the memorandum and plans submitted by Attorney Pelech, which was pretty straightforward. In summary, when the property behind the old Yokens was going to be developed, this was going to be a part of the project but it hadn't happened. Attorney Phoenix noted that the Planning Director had visited the current location of the business and concluded that it was indeed a light industrial operation. They manufactured small precision parts for aircraft, hand held parts, not huge machines or requiring large tractor trailers to bring materials in and product out. If approved, they would have a light industrial operation taking over the space where HD Baumann had a light to medium industrial operation years ago. At that time, the property was zoned for light industry but it has changed to General Business and, most recently, to the Gateway District, which required a special exception for that use. Attorney Phoenix stated that this particular lot really wasn't part of the gateway as it was at the end of Mirona Road on a cul-de-sac with eclectic businesses around it. There was a mixture of light industrial and general business uses, including the Comfort Inn, Yokens old lot, and two auto body shops. Approval allow replacing one use with a similar one with roughly the same number of employees. He noted that the business was now in Peabody, Massachusetts and most of the employees would commute. The business would integrate well and there would be no negative effect on municipal services including schools. The hours of operation would be approximately 8:00 a.m. to 4:30 p.m. with some hours staggered. They did not believe the business would have any negative effect on traffic.

Addressing the criteria for a special exception, Attorney Phoenix stated that there would be no hazard to adjacent properties on account of fire, explosion or release of toxic materials due to the nature of the business. He stated that there would be no detriment to property values or change in essential character of the area on account of location, scale, odor, smoke, dust or other pollutants or outdoor storage. The property was tucked at the end of a cul-de-sac with a use that was dormant and buildings in disrepair. He stated that there would be no creation of a traffic safety hazard or increase in traffic. As the use was dormant, there might be some increase but given the past use and the busy commercial industrial corridor, they believed traffic safety was not going to be affected and any traffic would be controlled by the intersections with lights.

Attorney Phoenix stated that there would be no excessive demand on municipal services. Not a large amount of water was needed and cooling was done by a recycled operation. There would be

no excessive demand for fire services and there would be minimal impact as a number of employees would commute. There would be no significant increase in storm water runoff as the lot itself would not change. The buildings would be rescued from disrepair and the aesthetics would be improved but it would otherwise remain the same. There were 75 parking spaces on the site and the requirement under the Ordinance was in the 40's. Mr. LeBlanc asked if there were any chemicals used in the cleaning of the products made and Attorney Phoenix assumed there would be some, alcohol or some kind of solvent. He really didn't know but it was a very clean, precision facility.

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

Mr. LeBlanc stated that, if the special exception criteria were met, they had little choice but to grant it. It appeared that all the conditions were met. The building and property would not change and all the other criteria had been met and the special exception should be granted.

Mr. Parrott stated that, regardless of how the lot was zoned, it was a good location for an operation such as light machining. The road was lightly travelled and buffered from Lafayette Road. While the surrounding businesses had changed a little over the years, it was still very much a business area.

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

- 5) Case # 1-5
 - Petitioners: 233 Vaughan Street LLC, Owner
 - Property: 233 Vaughan Street Assessor Map 124, Lot 14
 - Zoning district: Central Business A
 - Description: To construct a building exceeding the 50' maximum structure height allowed in the CBA district and exceeding the 40' maximum height allowance for portions of a building within 10' of a street right of way line in the CBA district.
 - Request: Variance from Section 10.531 to permit a structure designed for human occupancy (elevator penthouse and lobby) with a structure height of 62'5" where 50' is the maximum structure height allowed.
 - Variance from Section 10.531 to permit a structure designed for human occupancy (corridors, bathrooms and kitchens) with a structure height of 59'8" where 50' is the maximum structure height allowed.

Variance from Section 10.531 to permit a structure height of 52'8" (parapet and railing extending more than 2' above the roof surface) where 50' is the maximum structure height allowed.

Variance from Section 10.535.10 to allow a portion of a building within 10 feet of a street right of way line in the CBA district with a height of 52 feet where 40 feet is the maximum height allowed.

SPEAKING IN FAVOR OF THE PETITION

Chairman Witham recapped for the Board the variances that were needed and for which section of the building.

Attorney Timothy Phoenix stated that he was appearing on behalf of the petitioners. Along with the principals were Carla Goodknight, the architect and John Chagnon, who could address technical issues. He noted that Chairman Witham had identified the four variances. He indicated on the rendering on display all the spots where the variances would be needed. Attorney Phoenix stated that the lot was at the corner of Vaughan and Green Streets and was the first lot on the northern tier on this side of the railroad tracks. He noted that on this side, the building height was 50' and on the other it was 60'. The project involved a complete tear down and rebuilding. They would take down the old warehouse style buildings and turn them into what they saw on display. He noted that the lower level would be parking. The original project through 2009 had exterior parking but the new plan was proposed in anticipation of the new Ordinance. The first floor would be commercial, with offices on the second and then residential units. The fourth floor had two residential units and the rooftop was personal space for the residential unit owners with access and bathrooms. Most importantly, there would be a green area.

Attorney Phoenix referenced another rendering on display where he had outlined the areas which required variances. He mentioned an existing elevator and the need for a variance for a vestibule as an exit from the elevator. There was also a structure on the roof housing bathrooms, utility rooms, mechanical rooms, etc. While a variance was needed, he stated that some of these would be allowed on the rooftop if there were no humans in the area. The lower left area of the plan was green area which would be designed and planted with greenery. The railing around the parapet for which a variance was required was needed for aesthetics and to provide some height for people on the roof. Finally, there was an area where the building was the same but there was a little overhang which was a part of the roof which infringed and for which a variance was needed. Referring to page 3.0 of the plans, Attorney Phoenix stated that they showed the height needed and listed what appurtenances would be allowed and where they could be located if there was no human occupancy. He outlined further features and other positive characteristics of the site. He noted that site plan approval had been granted in May for essentially this project. They did not believe at the time that variances would be needed because then there were not to be residences on the third floor requiring mechanicals and access for bathrooms. Once they decided in October to make the third floor residential and had the plans reviewed, they realized they now needed variances.

In response to a request from Mr. LeBlanc, Attorney Phoenix pointed out the third floor on the exhibit. He referenced plan 2.5 which identified the areas on the roof, including mechanical and utility rooms and bathrooms, that went with those units. He stated that the Planning Department memorandum had made some reference to kitchens, but there were no kitchens there. Chairman

Witham stated he was trying to determine how the area would be used. It looked like each unit had a bathroom or kitchenette. Attorney Phoenix deferred to Ms. Goodnight.

Ms. Carla Goodknight referred to the plan on display and in the packets. Their intention was to provide egress to the center area. She pointed out the planters and area for use by each of the fourth floor units and another area to be shared by the third floor units. The entire roof had the ability to be green as owners had the ability to expand on plantings and create their own space. Mr. Witham noted that it had been indicated that owners could outfit the space as they liked and asked how she saw the areas labeled utility. Ms. Goodknight stated that she had meant the surface area. The utility areas were designated as storage with doors to close off to the roof in inclement weather and winterization. In summer, there would be a covered area to service the rooftop. Ms. Eaton asked if there were two private elevators besides the lobby one and Ms. Goodknight confirmed there were private, residential grade elevators coming up from the fourth floor to the roof and that the third floor people would have to use the public elevator. When Mr. LeBlanc asked about stairs, she stated that there would be no access to the public, only to the owners of units on the third and fourth floors

Attorney Phoenix stated that this zone was new for the Board and City. The primary reason they needed the height at that level was that the project worked economically but the water table height required that the parking had to be higher. Due to the necessity to have the parking under, the level of each floor was raised from that. Their request was not simply a design function but design function given a small triangular lot and the effect of the water table. Given the master plan and going green, people want to be able to use the rooftop in place of a yard and it was necessary to create value. Attorney Phoenix stated that, from the street level, the elevator wouldn't be seen or the little roof overhang. The railing was much lower than the rest of what they were requesting. He felt there was precedent because in 2009 for Harbor Place, at 70 something feet, the Board granted a request for a railing and a storage shed. He believed that the Board had made the right decision given city living and the relatively minor nature of the violations. Looking at the areas in question here, they were less than 25% of the roof and it was not like the applicant was trying to jam in another story. They were just trying to make the space more functional and usable.

Attorney Phoenix stated that he would address the variance requirements in general as he assumed the Board would not want them addressed for each. He stated that it would be in the public interest to have a reasonable use of the property, allow redevelopment and clean up a site. Creating an inviting place for living and business would also help tax revenues and this type of building would help attract the type of development wanted for the northern tier. The height wouldn't hurt the public interest by creating shadows or other issues and the project would not be overly massed or create the appearance of another floor. Keeping in mind not only the master plan but the green features, Attorney Phoenix stated that contributing to the health, safety and general welfare would be in keeping with the spirit and intent of the Ordinance. Individual unit owners would be served but the green areas would contribute to all. The Ordinance also provided for sustainable development and he mentioned various features which would be in keeping with that aim. He stated that in the Chester Rod & Gun case, the Supreme Court addressed public interest and the spirit of the Ordinance. It found that to be contrary to the public interest, basic zoning objectives would have to be violated. They also considered whether the essential character of the locality would be altered. Attorney Phoenix stated that this would alter the essential character in a positive way. This applicant had put time into the project, which the Historic District Commission had

approved, so that substantial justice would be done by approving the variances. There would be no benefit to the public in denying the variances. Attorney Phoenix stated that the value of surrounding properties would not be diminished. The opposite would happen as the project would upgrade the whole area. He read the requirements under the hardship criteria. The special conditions were that this was a relatively small triangular lot between the street and the railroad tracks in an area of old warehouse type buildings. It was also in the vicinity of a tidal area which created a high water table so that everything on the building had to be built up. The purpose of the restriction as to height was to ensure light and air and prevent overbuilding. He failed to see any relationship between the general purposes of the Ordinance and the application of the restrictions to these additions at the top of the building which caused no harm. Attorney Phoenix added that the uses were permitted so by law the uses themselves were reasonable. It was reasonable to have a railing to hold in the green area. It was reasonable to construct a building that had a small overhang that was no closer to the street than the rest of the building but was technically a violation. It was not like there was a whole building that continued to go up another story which would create the problems the Ordinance was trying to avoid. It was reasonable for the developer to find a way to use that third floor and it was reasonable to have the uses up top so that the owners could have this area in lieu of a yard.

Mr. LeBlanc asked if there were only 5 residents and Attorney Phoenix confirmed there were 3 on the third floor and 2 on the fourth. He also noted that the height of the first and fourth floors was 12' and the others 10'8". He wondered why they couldn't be reduced to drop the height. Ms. Goodnight stated that those heights were based primarily on marketing decisions in that the commercial space on the first floor with an extremely low ceiling height would limit the marketability and flexibility of the space as well as its appeal to buyers. It would also limit the flexibility in the layout of the mechanical equipment. Also, in the Historic District Commission work sessions, they were encouraged to develop a more substantial base and presence at street level so they tended to assign a little more height to the first floor. The height at the upper level was because of the price point. Each unit occupied half of the footprint so to have an 8' or 8½' ceiling would not be comfortable. Mr. Parrott asked what the exact finished floor level of the garage was with respect to the street and Ms. Goodnight said 7'. He asked what the depth was relative to the outside grade and what the basement situation was in the building now on that spot. Mr. John Chagnon responded that the building as it sat now was flat on grade with no basement. There was a discussion among Mr. Chagnon, Mr. Parrott and Mr. Jousse about height off grade and elevation levels as they related to the effect of rising water levels with Mr. Chagnon describing a check valve system to hold off the water. Mr. Parrott asked if there were windows in the garage level to the outside and, noting an illustration was available, Ms. Goodnight stated not in the lower level.

Ms. Eaton asked if they could address the hardship requirement in not removing the fourth floor and going down to the Ordinance level. Attorney Phoenix stated that he believed that one of the elements was economic and the project just wouldn't work if they removed this floor. When Mr. LeBlanc stated so that the hardship came down to an economic factor, Attorney Phoenix stated that he didn't believe that. Essentially the building had to be higher than would be needed due to the water table. Economically, it was tied in with the overall factors of what was there and what the applicants wanted to do in keeping with what was wanted for the northern tier. He didn't see where this should be a problem for the Board.

Ms. Goodknight added that they did extensively study the building height relative to the parking garage and the limitations put on them by Mr. Chagnon. They originally had the parking level situated at a much lower elevation. Then John did his evaluation and John Turner Consulting, who did their soil testing and analysis, told them that the water table would not allow them to proceed as planned and the building had to come up several feet in order to get the parking underneath.

Attorney Phoenix had another thought in response to Ms. Eaton's question. It seemed unreasonable and unfair to suggest that, if you took the floor off as suggested, now you had a building which was three quarters of the allowable height, that had been reduced in size and scope for the purpose only of the technical compliance with an Ordinance when what would be on top of that would be these things such as the elevator turret top and the mechanical and bathrooms etc. It seemed to him like that was the "tail wagging the dog" to say, "take the whole project down a floor," which would have a significant impact on the look of the project and would probably make some of these things more visible. Ms. Eaton responded that the elevator turret was actually a lobby. It was not an elevator shaft that required access to the roof and, in her opinion, the bathrooms and the utility center were really fifth floor living. Also, the ground water conditions that were described as being pertinent to this project were pertinent to every project in downtown Portsmouth. The tidal condition was not atypical and she didn't think this lot had a hardship because of it. Attorney Phoenix stated that he did not think you found that everywhere in Portsmouth, although you did in certain areas that were affected by tidal conditions. He would argue that the property next door, if it were affected that way, would have the same argument, whereas as you got further away from the water in this zone you were not specially affected by this condition. He thought it was unreasonable to hold this project to the same as anyone else in the zone when they might not have this condition. He respectfully disagreed with the depiction of this as living space. It was related to living space as a yard would be. The elevator area was both aesthetic and, yes, was designed so that people could be in it and out of the elements for a period rather than walk right out of the elevator door into the weather. He would let Ms. Goodknight follow up as the designer.

Ms. Eaton stated she had one more comment. She felt that they were asking for rezoning and she would like them to address why it would not be when the property was clearly in a zone which was set up not so long ago. Attorney Phoenix responded that this was no more rezoning than any other application. It should not be hindered because it happened to be the first project in a new zone. In fact, he argued that it was the opposite. A building 40' away could be 60' high and many of them in downtown were 70' and more. He suggested that this building was more entitled to consideration of something in between the 60' plus that could be right next door and the 50' that was allowed there. He noted that 10' above the existing roof level was permitted by the Ordinance for those mechanicals and only a part of the project was like 2' more than that 10'. He was also reminded of a conversation with Attorney Pelech who pointed out that when the Ordinance was changed some years ago, in zones like the Garden Apartment Zone, etc., it provided for an additional 8' in height if you could put parking underneath. He would argue that the same type of thing applied here.

Ms. Goodknight had an additional comment in response to Ms. Eaton. They had reconfigured the building to eliminate the on-grade parking that they originally had on Vaughan Street because the new zoning did not allow parking between a principal building and the street frontage. On their lot, they had two street frontages and a railroad track. Unlike some other properties which might have another option to meet the requirement, they had to go underground as everything was between the building and the street on this lot.

**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

Chairman Witham stated that the crux of the matter was the Board's view on the use of the rooftop which was driving these variances. He outlined the relief requested and stated that he felt that the essential concept respected the height requirement. He noted that the Ordinance did allow for smaller elements to go up higher but they had to decide on the nature of those elements. He felt the geothermal aspect was an exciting prospect and expected that, in this price range, they could expect to see owners wanting to use the roof. They just had to decide on the use. His only concern was the continuation of the glass tower, which brought up the scale of the building and was what the Ordinance was trying to protect.

Mr. LeBlanc made a motion to deny the petition as presented and advertised, which was seconded by Ms. Eaton.

Mr. LeBlanc stated that granting the variances would be contrary to the public interest. They were setting a new area within the northern tier and, to start off with something above what was expected in that area did in fact, he felt, set a precedent. A former Board member had maintained that little changes had a way of changing the entire area in which they were located. He felt that the public interest would be served by keeping within the bounds of what the Ordinance was seeking. Specifically regarding the spirit of the Ordinance, Mr. LeBlanc stated that there were 5 residences that were going to benefit and, for this, to grant a variance for four different sections of the structure was a little hard to swallow. He did not think that substantial justice would be served. The benefit sought was for a limited number of people and it was the general public that would suffer because incremental changes had a way of expanding themselves. He did agree with the application regarding no diminution in property values. He felt there was nothing much in that area to be devalued so he would grant that. He would also grant the hardship, however, in granting variances, all of the five criteria must be met and he felt the project failed to meet three of the five.

Ms. Eaton stated that she agreed that the one criteria that might be met was the diminution in the value of surrounding properties. There was a special condition of the property in the way it had a triangular shape and had streets on both sides and the railroad tracks, but she didn't think, even under those conditions, that it would warrant this type of variance request for going up in height. She felt that it came down to a zoning question and it was not the Board's purview to rezone areas that had been under a lot of study by those in charge of that job who understood the needs of the City. The other three criteria were clearly not met, particularly the spirit of the Ordinance. This was request was for a height that was quite bit above what was allowed and it was very specific that this whole district was set with a 50' height limitation. They couldn't grant the variances unless all of the five criteria were met and she thought it, possibly, met one.

Chairman Witham stated that he could not support the motion although he didn't support all the requests. This was the first major project in this area and he didn't think that a railing that was 2'

higher changed the essential character of the area. He felt that it met the spirit of the Ordinance. He felt the 5' that jogged out was minor and not a problem for him. The section in the middle which contained the mechanicals and then some was probably up for discussion with regard to bathrooms and other areas. He might like to see it smaller but it was set back and visually from the street, this did not have the appearance of a building that was a full story higher. He noted that most of the building met the height requirement. Chairman Witham stated that he could not support the circular glass tower for the elevator and thought that might just be a nice lounge area. He was comfortable with the other aspects like trying to address green elements and allowing people to enjoy the rooftop and have garden areas. He was comfortable with three of the four requests and didn't feel they were asking for another floor. Breaking it down, most of it was reasonable.

Mr. Parrott stated that he shared some of the comments just made. He also had a particular problem with the glass tower. An elevator should be functional and making it into a major design element which required a large variance to accomplish was illogical. They could get the same functionality without the glass tower. He also had a problem with saying you were going to have bathrooms and space to host people and visit and so forth in a closed structure, and requiring a substantial variance to do it, but maintaining you were not creating any additional people space. For those reasons, he would support the motion. He added that he didn't feel that, if the petition were denied, nothing could be done on the lot. There was plenty that could be done and he would hope that the first step would be to comply with all the Ordinance requirements or at least get as close as possible and he didn't see that a major effort had been made to do that. The major effort had been to marketing which was not bad but not what this Board should be considering. With respect to a particular test, he felt this didn't come close to meeting the test which required that there be hardship in the land.

Mr. Jousse stated that he would support the motion. Considering the public interest test, the only interest being met was that of the five residences and the public would be gaining nothing by granting the variances. The public interest was to uphold the City Ordinances as set by the City Council and nothing here convinced him to deviate from what the Ordinance required. To have three sets of bathrooms on a roof structure was beyond his comprehension. It was like setting up a bathroom facility in his garden. He would not have had a problem with granting the variance for the parapet but felt anything else was out of scale.

Mr. LeMay stated that there was value in most of the comments made. He agreed primarily with Mr. Witham that most of this had some redeeming value. He thought the glass tower was a little excessive but, other than that, he felt it was a nice project with a lot to recommend it.

Mr. Grasso stated that his comments had been already put forth by Mr. Parrott. This was going to be vacant land when they started building and he could not support a proposal that needed variances in height from a new zoning Ordinance that was barely a year old.

Mr. LeBlanc stated that there were ways to shrink the size of the building, while they might not be the most beneficial or cost effective from a sales point of view. The amount of variances sought could be closer to what was required, but that was not what was before them that evening. He felt this was out of proportion to what they could grant variances for.

The motion to deny the petition as presented and advertised was passed by a vote of 5 to 2, with Mr. LeMay and Chairman Witham voting against the motion.

V. OTHER BUSINESS

A) Superior Court Decision, Witch Cove Marina Dev., LLC, et al v. City of Portsmouth

Mr. Feldman stated that this court decision supported a decision made by the Board of Adjustment.

B) December 6, 2010 Amendment to the Zoning Ordinance Effective January 1, 2010, Section 10.517, Roof Appurtenances and Other Rooftop Features.

It was noted that the Amendment to the Zoning Ordinance had been distributed to the Board.

Mr. LeBlanc stated that this would, hopefully, be in fact his last meeting and he wanted to state that the past 22 years had been enlightening to him. He felt that the spirit of the Board that they had was very good, where all opinions were welcome even though you might not agree. He wished the Board well. Chairman Witham thanked him for covering them for the last few meetings and hoped that his beard did not look like Mr. LeBlanc's when he was done.

VI. ADJOURNMENT

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 9:30 p.m.

Respectfully submitted,

Mary E. Koepenick
Administrative Clerk