

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING  
PORTSMOUTH, NEW HAMPSHIRE**

**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**March 20, 2012**

**MEMBERS PRESENT:** Vice-Chairman Arthur Parrott, Susan Chamberlin, Derek Durbin, Charles LeMay, Alternates: Patrick Moretti, Robin Rousseau

**EXCUSED:** Chairman David Witham

---

In the absence of Chairman Witham, Vice-Chairman Parrott served as Chair for the meeting.

---

**I. APPROVAL OF MINUTES**

A) Amendment to Approved Minutes for October 18, 2011

It was moved, seconded and passed by a majority voice vote to accept the Amendment to the Minutes as presented. Mr. Rousseau abstained as she had not been present at that meeting.

---

Ms. Rousseau asked if she would have the opportunity to ask the Planning Department a question regarding the memorandum that had been left for them. Mr. Parrott stated he would do some administrative things first and then she could do so.

---

**II. OLD BUSINESS**

A) Request for Rehearing – 860 State Street

Vice-Chairman Parrott asked if everyone had reviewed the mailing, which received an affirmative response.

Ms. Chamberlin made a motion to deny the request as she had not seen any new information. The motion was seconded by Mr. LeMay.

The motion to deny the request was passed by unanimous voice vote.

---

Vice-Chairman Parrott announced that there were six members sitting. If any member had a conflict so they had to recuse themselves, the Board would be down to five sitting members at which level applicants were given an opportunity to continue or postpone without prejudice. He noted that four votes were required to grant a petition.

---

Ms. Rousseau requested an announcement about the scheduling and subject of an upcoming work session. Vice-Chairman Parrott explained that the public hearing would be about the nature of staff reports to the Board.

Returning to her earlier request, Ms. Rousseau noted information they had been provided about various proposed Zoning Ordinance changes. She raised an issue with relevance to Case #3-5, noting that these types of requests had come before the Board where applicants just wanted to replace front stairs. She asked if it was on the Planning Department radar screen to look at that Ordinance. She opined that applicants shouldn't have to pay a fee to come before them to replace their front stairs.

Vice-Chairman Parrott stated that the answer was a strong “yes” and the Planning Department was looking at that issue. He added that the work session would be fully posted, including on the City's web site, so that the public would be informed.

---

### **III. PUBLIC HEARINGS**

1) Case # 3-1

Petitioners: Thomas J. Schladenhauffen & M. Longi

Property: 708 State Street

Assessor Plan 137, Lot 8

Zoning District: General Residence C

Description: Replace existing rear addition and decks with a 28'x21', 2-story addition.

Replace and relocate existing 14'4" x 22'4" garage, adding 3' in height.

Requests: 1. A dimensional Variance from Section 10.321 to allow a lawful nonconforming building to be extended or enlarged in a manner that is not in conformity with the Zoning Ordinance.

2. A dimensional Variance from Section 10.521 to permit a 3' side yard setback for the addition where 10' is the minimum allowed.

3. Dimensional Variances from Section 10.521 to permit a 4' side yard setback and a 4' rear yard setback for the garage where 10' and 20' respectively are allowed.

4. A dimensional Variance from Section 10.521 to increase the building coverage from 30.6% to 40.6%.

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

Mr. Thomas Schladenhoffen stated that he was the owner of the property and was there with Mr. Nick Gray, their builder, who would outline a correction to be made on the description of the garage.

Mr. Nick Gray stated that he lived in Rollinsford. The existing garage was 14'4" x 22'4". They were proposing to tear that down and build a 24'x24' garage. The lot coverage was correct at 30.6% going to 40.6%. He stated that the garage was currently on two property lines and they would pull it back from both while leaving open green space in the back yard.

Mr. Schladenhauffen stated that the addition would replace a small addition on the back and add needed living space which he described. He stated that it was difficult to follow the Ordinance as the addition would not make much sense if it had to be 10' off the property line. He maintained that the addition would be in conformance with and enhance the character of the neighborhood.

In response to a question from Ms. Rousseau, Mr. Gray reiterated that they want to tear down the existing garage, pull it 4' off both property lines so that it could be maintained without trespassing, and enlarge it to allow two inside off-street parking spots. Mr. Schladenhauffen added that the way the house sat, it was difficult to move in and out of the garage. The garage entrance would be lined up with the entrance to the nearby church and school so they could get in and out easily.

Mr. LeMay asked what percentage increase in lot coverage was due to the increase in the size of the garage. Mr. Gray stated that a good deal of what they were asking for above the 35% allowed was in the garage itself. Ms. Chamberlin asked if the addition would be brought up to the same level as the existing larger section of the house, so it would essentially be flat across, not higher. Mr. Gray replied that it was not going higher but the roof peaks would match in overall height and pitch. In response to a further question, he stated that the width would overtake the deck and go over about 4' more into what was currently shown as a brick walkway. Ms. Rousseau asked if the garage moving over would encompass that whole driveway space, Mr. Gray stated she was correct and then they would move the off-street parking slightly to the left. In response to further questions, Mr. Schladenhauffen stated the house was 160 years old. The garage was a traditional carriage house and this new design would look the same. The additional use would be strictly for storage. Mr. Gray added that the existing garage floor wouldn't take the weight of a vehicle and you couldn't excavate for a foundation without trespassing.

Mr. Parrott commented with respect to the description that the garage was not dimensioned and that it sounded like the garage was just going to be replaced. He felt the application was not complete as the 24' square garage was not dimensioned on the plan provided to the Board.

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

Mr. Jay Krupp stated that he lived at 375 Greenleaf Avenue and was representing Historic Portsmouth Holdings LLC. When he distributed a letter, Vice-Chairman Parrott commented that it would have been helpful to have it in advance.

Mr. Krupp requested that the variances be denied as the applicant had not met the burden of proof regarding the criteria. He stated that the intent of the Ordinance was to create conformity and consistence and he felt that this, with 4 variances, looked more like an application for rezoning. He felt the applicants had not shown that the value of surrounding properties would not be diminished. He had outlined in his letter what he felt was a safety issue with backing out into the entrance to the school as well as privacy issues due to reduced setbacks and a two story building next to his property. He felt the hardship was on his property not theirs. The group he represents

currently had the 718 State Street property under contract and felt granting this petition would negatively impact that contract.

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

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

Mr. Durbin made a motion to deny the petition, which was seconded by Ms. Chamberlin.

Mr. Durbin stated that granting the variances would be contrary to the public interest as the public had an interest where there would be a substantial nonconformity. The Spirit of the Ordinance was to protect light, air and green space as well as prevent overcrowding and he didn't think this test was met by the applicant. In the justice test, where the hardship to the applicant was weighed against any detriment to the public. He felt that the balance did not tip in favor of the applicant. Regarding the value of surrounding properties, Mr. Durbin stated that he was not sure the evidence justified a determination one way or the other. In terms of the unnecessary hardship test, he did not feel that a compelling argument had been heard other than a potential trespass onto neighbors' property. He felt that a two car garage was more of a luxury than a right. Easing the existing nonconformity would be a potential benefit except for the dimensions.

Ms. Chamberlin stated that she could appreciate the applicant wanting more living space but this was a big addition with a big change in lot coverage, which tended to affect the zoning of a residential area.

Mr. Rousseau stated that altering the property as proposed would be altering the essential character of the neighborhood.

Mr. LeMay stated that the relief for the project on the house was actually very small and an extension of the side yard setback. He could be on the fence for that, but not for the garage. He couldn't justify the increase in lot coverage.

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

- 
- 2) Case # 3-2  
Petitioner: Ghamami Revocable Trust of 2005, Sheila Grant, trustee  
Property: 371A Islington Street  
Assessor Plan 144, Lot 22-3  
Zoning District: Mixed Residential Business  
Description: Install a 30" x 36" projecting sign and a 60" x 30" attached sign.  
Request: 1. A dimensional Variance from Section 10.1251 to permit an aggregate signage of 59± s.f. where 40 s.f. is the maximum allowed.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Robert Marchewka stated that he represented the owner of the property, which had two commercial units on the first floor. Previously, the computer business had been allowed to put both projecting and attached signs on the building, which ended up taking all the signage available for the entire first floor. He stated that the owner was now requesting aggregate signage to allow 20 s.f. for a new tenant going in on the other side. The issue was that the existing attached signage was larger than what would now be allowed for two signs. Mr. Marchewka stated that he didn't know if there had been a mixup or misunderstanding previously but the new tenant was asking for a reasonable amount of signage. He suggested that, at a later date, if the computer operation moved, the next tenant would put up a smaller sign bringing the property into compliance.

Mr. Marchewka stated that they could look at the photographs of the proposed signs and see that this was not a billboard. It would be on the side of the building facing a former gas station so that the value of surrounding properties would not be diminished. He stated that signage was in the public interest and the amount requested for the new tenant was reasonable. Addressing the hardship criteria, Mr. Marchewka noted that it would be an unnecessary hardship to require that the existing sign be taken down and reconstructed, at an additional cost to the property owner and a hardship to the existing business. He felt it was reasonable to request 20 s.f. of signage and that justice would be served by granting the request. The sign would be in keeping with what could be seen on Islington Street and so would not be contrary to the spirit of the Ordinance. He emphasized that the request was for the sign on the side and not the projecting sign, which met the size requirements and would actually be smaller than what currently was there.

Ms. Rousseau asked if part of his hardship case would be the character of the building itself which was not a typical commercial building with a marquee. She added that he really had no other choice but to tack it on the side. Mr. Marchewka stated that was correct. Both signs were allowed but one was a bit larger than it should be. It was not extreme and, on Islington Street, you needed some visibility. In response to a further question, he stated that the computer company had been there for four or five years. Ms. Rousseau asked if he agreed that it would be a hardship to the small business owner in these times to make them replace their signage in order to be in compliance where they have a perfectly fine sign there now. Mr. Marchewka agreed.

Mr. Durbin noted that, obviously in the future, it would be good to have a provision in the lease, but asked if the owner had tried to work together with the computer tenant. He had seen the signs and they didn't seem tremendously expensive to replace or adjust. Mr. Marchewka stated that it would still be an expense of several thousand dollars, which would be a hardship to a tenant renting 700 s.f. of space, where the cost could represent four months rent.

Ms. Chamberlin asked if she was correct in understanding him to say that, if the computer sign met the current zoning requirement, this additional sign would then meet the requirements. Mr. Marchewka stated that the existing tenant took up all the square footage. The two projecting signs were a normal size and the one attached to the building for the computer company was larger than it would have been had the two signs just taken up the 20 s.f. now allowed for the tenant on each side. If you cut that size in half, it would all conform. Ms. Chamberlin wondered how he had arrived at that conclusion and if he had actually done the calculation. Mr. Marchewka stated that he had cut the allowed 40 s.f. in half and proposed the 20 s.f. for the new tenant. When she asked if the existing larger sign was 40 s.f., he said he didn't have the figures in front of him but the total

aggregate square footage of the two signs for the computer operation, the projecting and the one that was currently attached to the building was 39 s.f. For the new tenant, it was 20 s.f.

Ms. Rousseau stated that these were not going to be lit or neon signs. She asked Mr. Marchewka if it was correct that these were simple 20 s.f. signs. Mr. Marchewka stated that was correct.

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

Mr. Michael Roth stated that he lived at 401 Islington Street. He stated that the traffic on Islington Street was slow and there was heavy foot traffic. He felt there was no reason for a larger sign which, if approved, would be wanted by other businesses. He felt this was a dispute between the parties and there should be something written in their lease documents stating that a designated amount of signage was available to them as part of the lease. They shouldn't be allowed to have a larger amount of signage because they wanted to have a new business come in.

Ms. Rousseau asked if he rented or owned and he responded that he owned. She asked him to clarify that his issue was that he didn't want a 20 s.f. sign because, if allowed, everybody on the street would want it. Mr. Roth responded that he felt other businesses opening up might also want larger signs. Ms. Rousseau's asked how a couple of square feet of signage would personally impact his life. There was a brief discussion regarding the level of concern regarding the type of business, the window display and what might be on the sign. Mr. Roth concluded that he did not care about the type of business but did care about large signs and he felt the problem could be resolved if the computer company would reduce the size of their sign. Ms. Rousseau asked if he knew what 20 s.f. looked like. Mr. Roth stated that he understood her point, but felt that a variance for one person could have a chain effect. Ms. Rousseau responded that every property had a different character and he concluded that they were just voicing their concerns.

Ms. Virginia Vaughan stated that she lived at 366 Islington Street, directly across from the building. They strongly objected to any sign larger than the maximum allowed. She believed that more signage led to more distraction for drivers and perhaps more accidents, one of which had occurred that afternoon. She also felt signage should be in good taste, which was not the case with the oversize signage on the same building.

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

Mr. Marchewka stated that the business coming in had been an existing business on Deer Street for several years. There was no dispute between the landlord and either of the tenants. He noted that the sign would be ultimately approved by the City Council as to design and felt that the photograph showed that there was not a huge difference between what was allowed and what was proposed. He reiterated that it would be a hardship to go to the computer firm and say they had to get a new sign.

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

### **DECISION OF THE BOARD**

Ms. Rousseau made a motion to grant the petition, which did not receive a second.

Mr. LeMay then made a motion to deny the petition, which was seconded by Ms. Chamberlin.

Mr. LeMay stated that he had a hard time to see where the criteria were met in this case. Any justification for bigger signs went with the building and would end up being spot zoning.

Ms. Chamberlin stated that she understood the need for a sign to advertise the business but the problem was that the other tenant had used up too much space. They had to support all of the businesses in that zone and treat people as equally as possible so that granting the variance would be contrary to the public interest. She felt that the issue should have been covered in the lease but relief shouldn't come from this Board.

Ms. Rousseau stated that she was voting against the motion. This was an excellent example of how entrepreneurs could be helped. She felt they were talking about imposing unnecessary costs on a small entrepreneur trying to make a living. She thought it was wonderful that the landlord had been able to attract a tenant in this economy. There was no reason to deny them the opportunity of advertising their business for a couple of square feet. She stated that "this is an example of overreaching by a government entity. We can do better than that."

The motion to deny the petition was passed by a vote of 5 to 1, with Ms. Rousseau voting against the motion.

-----

3) Case # 3-3

Petitioner: Steven M. Noel

Property: 33 Hunters Hill Avenue

Assessor Plan 160, Lot 39

Zoning District: Business

Description: Add 1½ story addition to existing 24'6" square garage.

- Requests: 1. A dimensional Variance from Section 10.321 to allow a lawful nonconforming building to be extended or enlarged in a manner that is not in conformity with the Zoning Ordinance.
2. Variance from Section 10.531 to permit a 0' front yard setback where 20' is the minimum required.

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

Mr. Steven Noel stated that he was the owner of 33 Hunters Hill Avenue. They wanted to add an addition to the existing garage as it was not feasible to expand anywhere else on the property. He noted that the property was in the Business zone due to its proximity to the by-pass, although this was a residential structure on a dead end street.

Mr. Noel stated that the proposal would be consistent with the characteristics of the neighborhood. There would be no change in use on the property. Considering the spirit of the Ordinance, there was no setback that could be achieved where the existing structure was already 0'. He stated that justice would be served by increasing tax revenue. In terms of diminishing the value of surrounding properties, he described nearby properties which included a gas station and an adult video store. The hardship in the property was that the garage was already built with a 0' setback.

In response to questions from Ms. Rousseau, Ms. Chamberlin, Mr. LeMay and Mr. Moretti, Mr. Noel stated that he thought the existing square footage might be 1,500 s.f. but he wasn't sure if that included the garage. They would be adding some 400 s.f. The footprint would not be changed just extended upward and the upper story would not project any further. It was described as a one and a half story because of the roof line. This would be a 24' x 24' multi-purpose room with storage above.

Mr. Moretti stated that he saw a stairway and asked if it were existing. Mr. Noel stated it was not and was not critical to the project. They thought an exterior fire escape might be a good idea as there would only be one exit, back down through the garage, if they added the second floor. When Mr. Moretti asked if that would move them closer to the lot line, he replied that it would technically be going out but toward the bypass.

Vice-Chairman Parrott stated that what the Board members were getting at was that in the architectural rendering, the top part of the roof projected out where the bottom setback was zero. Mr. Noel stated that, if that were a problem, they could certainly eliminate it. Vice-Chairman Parrott stated that this would have to be discussed, if approved, with the Inspection Department.

**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. Chamberlin made motion to approve the petition, which was seconded by Mr. Moretti.

Ms. Chamberlin stated that due to the area's mixed use nature, as opposed to just residential, she felt that granting the variance would not be contrary to the public interest or the spirit of the Ordinance. It didn't appear that any of the neighbors would be affected and no shadows were going to be cast on anyone. In the justice test, she stated that this was a modest increase in space. Although she didn't like the 0' setback, it was already there. She stated that the special condition of the property was that this was a reasonable request for an extension in a neighborhood that had a lot of variations.

Mr. Moretti stated that he felt that part of the neighborhood would be improved.

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

- 
- 4) Case # 3-4  
Petitioners: Eastern Yacht Sales and Charters Inc., owner, Janette Desmond, applicant  
Property: 20 Congress Street #104  
Assessor Plan 117, Lot 37-104  
Zoning District: Central Business B

Description: A retail chocolate/ice cream store adding indoor tables, stools and dining areas with no off-street parking.

Request: 1. Variance from Section 10.1115.20 and the requirements of 10.1115.30 to allow no off-street parking spaces to be provided where 1 space per 100 s.f. Gross Floor Area is required.

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

Attorney Somers stated that she was representing the applicants who wished to set up a new store in Portsmouth called Kilwins serving ice cream and chocolate. She distributed several copies of a brochure outlining the operation, which had been in business at other locations for several years. They were proposing to move into 1770 s.f. at the former book store location, a space slightly larger than the usual Kilwins model, with 4 tables and 8 chairs. They needed relief from Section 10.1115.20 as the Zoning Ordinance described a restaurant as a location where food was prepared on site. The food would be largely prepared off-site but due to the on-site service of coffee, fudge and scooping ice cream, they had been deemed a restaurant on the ground floor which added the requirement to provide parking. Ms. Janette Desmond, the applicant, was also there along with Mr. Steve Titus from Kilwins to answer any questions.

Attorney Somers stated that there were no conflicts with basic Zoning Ordinance objectives. The sale of ice cream and chocolate would not alter the character of downtown or threaten the public health, safety or welfare. She stated that the purpose of the Ordinance and its focusing on pedestrian patterns lent itself to what was proposed, noting that customers would come briefly into the store and then go on their way. In the substantial justice balance test which weighed if denial would result in any public gain, Attorney Somers stated that, if this were denied, the store was functionally dead and would not be able to get a building permit. She maintained that the fee was too burdensome for someone starting up to move forward with a business plan so that a reputable operation would not be allowed to come into the area. She felt that Portsmouth always presented itself as a food service center whether full service restaurants, bakeries or coffee shops. Denying the variance would send a mixed message to the applicant and the public.

Attorney Somers described the mixed uses in the property and surrounding area, noting that the lot was a condominium and encompassed quite a lot of space. Mr. Titus would address the hours of operation, which would be typical for a retail ice cream store. There would be no obnoxious odors or any impact at all on abutting businesses as most of the food would be prepared off-site. She stated that the hardship and special condition in the property was that this was a large lot with no parking except for some basement spaces reserved for the residential condominiums. There was no means of providing parking. She stated that this was also distinguished from other similar locations as the designation of “restaurant” was applied solely because the definition of “restaurant” in the Ordinance was so broad. For that reason, there was no fair and substantial relationship between the purposes of the Ordinance and this application. Customers were simply going to come in to get an ice cream cone. This was a reasonable use as a restaurant use was allowed in the Central Business B district.

Attorney Somers stated that she would like to briefly address the context of this application. Since 2009, when this Ordinance was adopted with special requirements for a restaurant usage on the ground floor in the Downtown Overlay District. There had been much study and evaluation of the parking needs of the City and much controversy. As a result, the City Council had the previous

evening adopted parking principles for the City which she felt was important as background. One principle required that the City ensure an adequate supply of parking for retail/restaurant and office users in the downtown and that it be primarily a City responsibility rather than a private one. A second principle was that parking should support economic development including businesses, office, retail, restaurants. In addition, she stated, the City Council made a vote for the Community Improvement Project, a first step to having a concrete discussion about the parking garage. She noted that, on March 22<sup>nd</sup>, there would be a work session of the Planning Board which would discuss the possible repeal of this particular ordinance.

Attorney Somers stated that she had done some research and could only find one application before the Board since the Ordinance was passed. She referenced a variance granted for what she termed the Portsmouth Baking Company, also a condominium form of ownership, after a rehearing. She read from the letter of decision dated April 23, 2010 regarding existence of special conditions specifically that the “property was a condominium with no associated land so that parking spaces cannot be created.” She argued that presumed a certain level of precedent that the Board could use in making a decision. She also quoted from the rehearing request of Attorney Shaines where he maintained that the unnecessary hardship due to the special conditions of the property was that the property was unlike other restaurants which did not have to meet the same parking requirement. He had argued that the property itself made it impossible to comply with furnishing off-street parking and so could not be used in strict conformance with the Ordinance, necessitating a variance for its reasonable use. Attorney Somers concluded that she felt that all the variance criteria were met and asked that the context and previous application also be considered in making their decision.

Ms. Chamberlin asked how much the payment required of the applicant would be. Attorney Somers stated that it would be in the thousands. She referred to the Planning Department memorandum where it referenced the optional in-lieu payment for six spaces, which she didn't think was correct. She referred the matter to Mr. Steve Titus from Kilwins. Mr. Steve Titus identified himself as residing in St. Charles, Illinois. He clarified that the amount that would have to be paid was \$39,600. When Ms. Chamberlin asked if that were for 17 spaces, he clarified that it rounded to 18 spaces.

Mr Steve Scott stated that he lived in Portsmouth and was a commercial lender. He was looking at the definitions of restaurants and retail sales, which seemed to be where the difference lay. It seemed like this was considered a restaurant but would be sold as a retail project. There were multiple components of this operation but he felt penalizing them with a harsher description and a parking penalty was unfair.

Mr.Titus added that this was an impulse store. People didn't drive cross town to get an ice cream but someone walking by might treat themselves. He felt the ambiance, charm and product mix of their store would fit well in downtown Portsmouth.

### **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**

Minutes Approved May 15, 2012

Ms. Rousseau made a motion to grant the petition as presented and advertised which was seconded by Mr. Durbin.

Ms. Rousseau felt that this particular ordinance was restrictive and needed to be changed. This City welcomed restaurant owners and anyone would love to see this go in downtown. She stated that granting the variance would not be contrary to the public interest. She did not feel that it conflicted with the essential character of the neighborhood or affected the public health, safety, or welfare. A chocolate shop would be a wonderful addition to downtown Portsmouth. She stated that the spirit of the Ordinance was questionable right now to everyone in this community so they anticipated a change to that. Substantial justice was done in that there was benefit to the applicant and the general public to welcome this business with no harm to the community. She stated that the value of surrounding properties would not be diminished and to have the space rented helped maintain property values. Ms. Rousseau stated that there was no deeded parking with the condominium nor with any of the other commercial units so to require parking was a hardship to the applicant and the landlord. They should be reasonably able to rent the space to a business which fitted into the community. She felt it would definitely be a hardship to not be able to rent the space to this type of business and welcomed the business to the community.

Mr. Durbin stated that he agreed with most of the maker's comments. He added that, as far as his findings, he found that the applicant met at least four of the five criteria. Regarding whether or not this would diminish surrounding property values, they hadn't really heard any evidence one way or the other. With respect to special conditions, with a condominium or property of this nature, downtown parking space weren't going to magically pop up so he felt in that respect that there wasn't a fair and substantial relationship with the Zoning Ordinance and its purposes. In many respects as well, the definition of restaurants that distinguished them from other similar businesses, or businesses that draw people generally speaking, was somewhat arbitrary.

Ms. Chamberlin wanted to add that she didn't have the definition of a take-out restaurant applying to this business but the way the parking was calculated, to require 17 spaces didn't support the spirit of the Ordinance. If it required 1 or 2 spaces and they were making an in-lieu payment, but she didn't think the intent was to require a \$40,000 payment for this type of restaurant. That didn't make sense. Where the issue was on the agenda for the City in general, it needed to be tinkered with and fixed and, by granting this petition, the Board was supporting the spirit of the Ordinance and acting in the public interest.

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

- 
- 5) Case # 3-5  
Petitioner: Debra R. Goodwin, owner, John Pento, applicant  
Property: 255 Melbourne Street  
Assessor Plan 233, Lot 87  
Zoning District: Single Residence B  
Description: Replace existing stairs with 4' x 4' front landing with stairs.

- Requests:
1. A dimensional Variance from Section 10.321 to allow a lawful nonconforming building to be extended or enlarged in a manner that is not in conformity with the Zoning Ordinance.
  2. A dimensional Variance from Section 10.521 to allow a 13'± front yard setback where 17'± exists and a 30' front yard setback is required.

Ms. Debra Goodwin stated that she lived at 255 Melbourne Street and explained that they were only asking for a small landing at the top of the stairs so that they could open the front door from the outside.

**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. Moretti.

Mr. LeMay stated that the steps came right down from the front door and to move the steps forward with the end of the walkway still meeting the street was functionally reasonable and would allow a landing for safety and convenience. He stated that granting the variance would not be contrary to the public interest and was within the spirit of the Ordinance. There would not be a big change to the structure. In the justice balance test, he stated that this would allow an increase in functionality of the property without negatively impacting abutters. He noted that the setback of the house would not change, nor would there be a change in the essential character of the neighborhood. Mr. LeMay stated that there would be no impact on the value of surrounding properties. He did not feel that enforcing the strict letter of the zoning would represent any gain as compared to the benefit this small landing would provide to the owners.

Mr. Moretti stated that the stairway would increase safety and allow better access to the house without altering anything except for a few feet.

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

- 
- 6) Case # 3-6  
Petitioners: Michael's Realty Trust & ESUM Realty Trust, owners, 4 Amigos LLC,  
applicant  
Property: 1390 & 1400 Lafayette Road  
Assessor Plan 252, Lot 9 & 7  
Zoning District: Gateway  
Description: Construct two drive-through lanes in association with construction of  
a 2,500± s.f. bank.

- Requests:
1. Special Exception under Section 10.440, Use 19.40 to allow a two-lane drive-through facility as an accessory use to a 2,500 s.f. bank
  2. Variance from Section 10.836.22 to allow two drive-through lanes for a 2,500 s.f. facility where only one drive-through lane for each 5,000 s.f. of gross floor area is allowed.

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

Attorney Richard Uchida stated that he was with the firm of Orr and Reno in Corcord, representing the applicant. Also with him were Jeff Durke from Vanasse Associates and Mr. Frank Montero from MHF Design Consultants the engineers and traffic engineers for the project. He noted that the applicants had come to the Board in November regarding a five acre site in the northwest corner of Route One and Peverly Hill Road. They were looking again at that site as well as an additional parcel at the front formerly containing a gas station. Their current plan was for 2,500 s.f. of retail, 2,500 s.f. for a bank, a 4,500 s.f. mixed use retail and restaurant building and the pharmacy that had previously come before them. In November, without the gas station parcel, they planned a 5,200 s.f. bank and a pharmacy for which they were granted Special Exceptions for drive-throughs. Under their current plan, the bank would be half the size and would move into the former gas station site. As the bank was now smaller, it would only qualify for one drive-through without a variance. He introduced Mr. Frank Montero.

Mr. Montero stated that he was with MHF Design Consultants. He pointed out on the displayed site plan presented in November the three proposed uses. After they received the Special Exceptions for drive-throughs for the pharmacy and bank, the owners negotiated an option to purchase the corner lot. The bank would move over allowing another use between that structure and the pharmacy which, along with the rear building would stay in the original locations. He noted that there would still be two drive-throughs for the bank but they would be associated with a smaller building.

Addressing the fifth and sixth standards for granting a Special Exception, Mr. Montero stated that there would be no excessive demand on municipal services. All of the utilities were available and the site would not generate a high water or sewer demand. Regarding storm water runoff, the paved surface would be less than the 95% on the existing site and there were planned site improvements to further reduce runoff.

Jeffrey Durke stated that with the size of the bank cut in half, traffic would go down. Citing working meetings with the Planning Board, he stated that there would be no adverse impact on the public health, safety and welfare. There would be significant off-site improvements and they were addressing pedestrian access to this and other area sites. He described how the addition of the corner parcel would improve the traffic flow and access. They were also looking at vehicle queuing on Peverly Hill Road and he outlined possible solutions. A safe pedestrian crosswalk would be added and he pointed out the proposed extension of the median to discourage u-turns and extensions of sidewalks. Their internal site design was designed to link up with pedestrian access and allow safe movement on-site between buildings. Mr. Durke stated that, for the bank, they expected 60 vehicle trips during peak hours on a Saturday, 30 in, 30 out. Half went through over the course of an hour during peak time resulting in a queue of about 4 vehicles maximum at peak traffic flow. The drive-through facility could accommodate 8 to 10 and there was also a bypass lane for safety.

In response to questions from Ms. Chamberlin, Mr. Durke indicated how traffic coming from the south and north would enter, proceed to the drive-through and then exit. Vice-Chairman Parrott asked about studies regarding the average load on the parking lot during the business week in terms of spaces. Mr. Durke stated that spoke to peak traffic volume, noting that the parking requirement were met. Compared to the previous use, he stated that the major difference would be the duration of stay, which was much longer for a restaurant than a bank or pharmacy. In response to a further question from Vice-Chairman Parrott, he confirmed there would also be a high turnover restaurant which he pointed out on the revised plan, noting that it was new since the original plan.

Ms. Rousseau stated that 2,500 s.f. sounded like a satellite bank, not a major office and asked if he would say that maybe 90% of satellite banks had two drive-throughs. Mr. Montero responded that most had three, with one sometimes providing access to a teller or an ATM. Ms. Rousseau asked if he would say that it would be hardship to not have two lines as they would not be able to provide service and customers would go elsewhere. He replied, “absolutely,” adding that they now had a specific tenant who had indicated that the previously presented size was larger than they would want to construct and it would be a hardship to them to have to build a larger structure.

Attorney Uchida stated that this was a modification of the previously granted Special Exception. He noted that the drive-through was permitted by Special Exception in the Gateway District as an accessory to a bank use. There would be no hazard to the public or adjacent property on account of fire, explosion or release of toxic materials. There would be no detriment to property values or change in the essential character of the neighborhood. He noted that, in previously approving the Special Exception, the Board had observed that this district was designed to encourage redevelopment. They were improving the site for professional kinds of uses consistent with others in the area and a drive-through facility was not something novel on Lafayette Road. Attorney Uchida stated that there would be no smoke, odors, glare or pollutants and removing the gas station would remove a use that might have introduced those issues. There would be no creation of a traffic safety hazard or increase in traffic congestion. As Mr. Montero mentioned, there would be no excessive demand on municipal services and an actual improvement in the storm water runoff situation with better drainage. He stated that the level of service at the traffic intersections would be the same or better than previously and Mr. Durke had indicated the traffic situation would improve on-site as well as on adjacent roads.

Attorney Uchida stated that, with regard to their variance request, as noted by Ms. Rousseau, banks were going to smaller facilities due to on-line banking and more vehicle-driven banking transactions. An informal survey of banks in Portsmouth indicated that half had two drive-throughs, a numberwith three. He noted that the City was contemplating a chance to eliminate the gross floor area requirement and allow up to three drive-throughs with a conditional use permit from the Planning Board. They could not afford to wait to see if this would be adopted as they had a very limited window in which to acquire these properties, particularly the gas station parcel. Attorney Uchida reiterated some of their reasons for seeking two drive-through lanes, noting that one of the situations where the number might be limited would be in a location where idling or lights might create a problem for adjacent properties. The nearest abutter to this site was a roadway. The site was also a large one, so that traffic could be routed through the site.

Attorney Uchida stated that the bank would be smaller in terms of structure but larger in terms of convenience such as the drive-throughs. The drive-throughs would not interrupt sidewalks, enhancing safety. He felt that the design, the parcel size, and the capacity to drive through to sensible access points rather than directly onto the street was in keeping with the public interest and what the Ordinance was trying to protect. He felt they had demonstrated that this was a unique setting where strict compliance with the Ordinance was not necessary given their plan to accommodate this second drive-through. He stated that the value of surrounding properties would not be diminished. Denial would result in the loss of the bank and impair the redevelopment opportunities for the entire site with no gain to the general public.

Mr. David Choate stated that he was a principal of Grubb and Ellis, the listing agent for the former Samuels property. He wanted to emphasize that the proposed change in drive-throughs went to the Planning Board and had been referred to the City Council. With this change, this would be one of the cases where a drive-through would not have to come before this Board, seeking only a conditional use permit. He noted that they had tried to market the corner property for months and granting this request would be a win-win situation, cleaning up that corner. This was only one step in the process and if, for some reason, the development did not go forward, they would sell the parcel as a gas station. He referred the Board to the People's Bank location across the street, with three lanes, noting that he didn't feel anyone would say that created a traffic problem.

#### **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. Durbin made a motion to grant the Special Exception and Variance as presented and advertised, which was seconded by Mr. LeMay

Mr. Durbin stated that he commended the well articulated presentation of a rather complex issue. Addressing the criteria for a Special Exception, he stated that this was a use permitted by Special Exception and that there would be no hazard to the public or adjacent properties from fire, explosion or toxic materials. There would be no detriment to property values in the vicinity. If anything, there should be an improvement with the redevelopment of the site. He stated that there would be no creation of a traffic safety hazard or increase in the level of traffic. From the representation made by the applicant, it would appear that the traffic numbers would remain relatively stable. They might go down slightly from the previous presentation made to the Board due to some off-site improvements that would improve vehicle and pedestrian traffic conditions. Mr. Durbin stated that there would be no excessive demand on municipal services, certainly no greater demand than the previous use. There would be no increase in storm water runoff as there would be less impervious area than currently existed.

Addressing the variance criteria, Mr. Durbin stated that granting the variance would not be contrary to the public interest. If anything, the public would gain by seeing the site used in a beneficial manner offering services. As he interpreted the spirit of the Ordinance, it was to maintain traffic flow patterns and not create an over-intensification of a commercial lot. As presented, that would not appear to be the case. Traffic flow patterns would be improved and

congestion would not be an issue. In the justice balance test, he stated that the applicant would suffer a detriment if the variance were not granted which would not be outweighed by any public gain. He noted that he had spoken to the value of surrounding properties in his remarks regarding the Special Exception and incorporated them here. Regarding the special conditions distinguishing this property from any other and resulting in a hardship, Mr. Durbin stated that the lot was challenging due to its orientation and the intersection where it was located where there already was a bit of congestion from nearby residential developments. He felt that the applicants had met the hardship test.

Mr. LeMay stated that the petition was well thought out and well presented. Essentially, the site would be its own little neighborhood, a microcosm of the nearby area, which answered a lot of the considerations. He felt that the development would have a positive impact.

Ms. Chamberlin stated that this was an improvement over the last application because the gas station site was included. The traffic flow could be incorporated and, with pedestrian access considered, it all made the entire site work. She felt it would be a great improvement to the area.

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

- 
- 7) Case # 3-7  
Petitioners: Robert R. & Mary E. Threeton  
Property: 476 Ocean Road  
Assessor Plan 294, Lot 7  
Zoning District: Single Residence A  
Description: Install generator and LPG to the rear of existing structure.  
Requests: 1. A dimensional Variance from Section 10.321 to allow a lawful nonconforming building to be extended or enlarged in a manner that is not in conformity with the Zoning Ordinance.  
2. A dimensional Variance from Section 10.521 to allow building coverage of 10.7.± % where 10.58.± % exists and 10% is the maximum allowed.

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

Mr. Bob Threeton stated that they would like to install a generator. He had a sleep apnea problem and had to use a c-pap machine. They had been out of power five times in the past ten years and, when it went out, he was struggling to breathe. He indicated that the lot coverage would only be exceeded by half a percent and noted that they were 70' from the church on Ocean Road on the generator side so there would be no noise problem. The neighbor on the other side was 200' from them and the unit would be behind the house so it would not interfere with the neighbors across the street.

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

With no one rising, the public hearing was closed.

Minutes Approved May 15, 2012

**DECISION OF THE BOARD**

Ms. Chamberlin made a motion to grant the petition as presented and advertised, which was seconded by Mr. Moretti.

Ms. Chamberlin noted that the generator would represent a modest change to the structure for an important medical reason. She stated that granting the petition would not be contrary to the public interest and the neighbors would not be affected. She noted that no one was at the meeting to speak against the petition. She felt that granting the variance would observe the spirit of the Ordinance and substantial justice would be served as this was a small change for an important reason. There had been no evidence presented that the value of surrounding properties would be reduced. She felt that the special condition resulting in a hardship was the medical condition that the applicant had discussed.

Mr. Moretti noted that this particular unit produced very little sound and would probably be the least of all the various sounds in the neighborhood.

Mr. LeMay stated that he was not comfortable, as a matter of precedent, with the hardship being a personal one. He felt that the hardship was more along the line that this was right at the edge for the size. It would not be reasonable to deny it for this small incremental amount.

Vice-Chairman Parrott agreed that there would be minimal impact with respect to the Ordinance.

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

-----

- 8) Case # 3-8
  - Petitioners: Peter H. Jarvis & Sons LLC & Simeon P. Rev. Trust 1999, owners, Rudi’s Restaurant, LLC, applicant
  - Property: 1 Congress Street (5 Congress Street)
  - Assessor Plan 117, Lot14
  - Zoning District: Central Business B
  - Description: 600 s.f. addition to existing restaurant with no on-site parking.
  - Requests: 1. Variance from Section 10.1115.20 and the requirements of 10.1115.30 to allow no off-street parking spaces to be provided where 1 space per 100 s.f. Gross Floor Area is required.
  - 2. Special Exception under Section 10.1113.112 to allow 6 off-street parking spaces to be provided on another lot in the same ownership and within 300’ of the property line of the lot in question.

**SPEAKING IN FAVOR OF THE PETITION**

Vice-Chairman Parrott asked that the speaker cover in his remarks why there were two addresses for this petition.

Mr. Keith Prince identified himself as one of the owners of Rudi's in downtown Portsmouth. They were expanding from the 20 High Street side to the Congress Street side, adding another lounge. There were two parcels, one of which was a parking lot which he also leased and the other was the property itself. While he did have a parking lot for the restaurant, it was not required that he do so as it was grandfathered so he was the only restaurant in the downtown who had a parking lot that didn't need it. He would like to use 6 of those parking spots for the addition to the restaurant to satisfy the parking requirement in lieu of paying the \$13,200.

Vice-Chairman Parrott asked if he would describe the basic addition, how it was oriented and why they needed, or were proposing to use, the spaces. Mr. Prince stated that the door would actually be on Congress Street as an additional entrance to the restaurant and an additional lounge. There would be a sign on Congress Street and a door. In response to questions from Mr. LeMay and Vice-Chairman Parrott, Mr. Prince stated that there would be the same ownership and name. He confirmed that the addition would be connected internally.

### **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**

Vice-Chairman Parrott asked if anyone wished any explanation from the Planning Department.

Mr. LeMay asked why they needed a variance to provide no off-street parking and then an exception to allow that to be in a different lot.

Vice-Chairman Parrott asked if it would be acceptable to the Board to have Mr. Cracknell explain it to the Board, receiving an affirmative response.

Mr. Nick Cracknell stated that he believed the application requested a variance from the off-street parking requirements and, if the variance was denied, the fall-back would be a special exception. In this particular case, they had the 6 available off-street parking spaces on an abutting property within 300'. He thought they needed to vote, first, based on the application for a variance on providing the 6 spaces. If that were granted, they were done. If denied, then the Board would act on the second component of the application which was the special exception to use 6 of the 24 spaces that abut the property in common ownership within 300'. If that were also denied, the applicant either would not do what they were proposing or they would have to pay the in-lieu parking contribution.

Ms. Rousseau made a motion to grant the variance as advertised which was seconded by Mr. LeMay.

Ms. Rousseau stated that she would not go through the special exception criteria. She stated that the variance request was reasonable because it was her understanding that there was no deeded parking for this space, as was the case with most buildings in the neighborhood. She stated that was their hardship. She stated that this was an existing restaurant looking to expand. It was a wonderful restaurant that people in the neighborhood liked and they wanted to encourage them to

do business in the downtown area. She stated that the variance would not be contrary to the public interest and would not change the essential character of the neighborhood or affect the health, safety and welfare of the public. Commenting that the Ordinance itself was under advisement right now, she stated that the spirit of the Ordinance would be observed by allowing the property owner to use the space in a reasonable manner. Substantial justice would be done as the benefit to the applicant would not be outweighed by any harm to the general public. She stated that it was a positive situation to have this restaurant expand in the downtown area and there was no evidence that the value of surrounding properties would be diminished. Ms. Rousseau stated that she had already listed the hardship criteria for the property. They should allow restaurants to occupy spaces in the downtown area where there was no deeded parking with the building and not subject them to a ridiculous parking related fine or fee to have their business exist. She maintained that it was a hardship on any business owner to deal with that. It was a very reasonable expansion which they welcomed.

Mr. LeMay stated that he had nothing to add.

The motion to grant the variance as presented and advertised was passed by a unanimous vote of 6 to 0. With the granting of the variance, the Board did not act on the special exception.

-----

9) Case # 3-9

Petitioner: Commerce Way, LLC

Property: Commerce Way & Woodbury Avenue

Assessor Plan 216, Lot 1

Zoning District: General Business

Description: Modify existing free-standing sign and add a second free-standing sign.

Requests: 1. Variance from Section 10.1243 to permit two free-standing signs on a lot where only one free-standing sign is allowed.

2. A dimensional Variance from Section 10.1251.20 to permit a free-standing sign with a sign area of 124.4± s.f. where 100 s.f. in sign area is the maximum allowed.

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

Mr. Dan Fallon stated that they were trying to update the current Hesser College sign by refacing it and also add a sign for the 24-hour veterinary hospital, noting that, if someone were racing down the road looking for it, it currently would be hard to spot where to turn.

Ms. Rousseau stated that she saw proposed sign “a” on the plan. She asked if she was correct that the sign would replace what was shown as existing sign #6. Mr. Fallon stated she was correct. She asked if that was the one on which they needed a variance and what the issue was. Mr. Fallon stated that, from what he understood, the regulations were changed after that sign was installed so, in order to reface it, they needed a variance. Ms. Rousseau asked if he would agree that it would be substantially expensive to have to replace that whole sign. Mr. Fallon stated that was exactly it. They were working within the current square footage of the sign. Ms. Rousseau stated this was similar to a same footprint situation, keeping the same signage. The Ordinance changed from

when it originally went in and it would be a hardship financially for the property owner to have to do something smaller when they already had an existing sign structure there. Mr. Fallon agreed.

Ms. Chamberlin asked if the signs would be side by side. Mr. Fallon responded that they would, with the veterinary sign closer to the road. In response to further questions, he stated that the veterinary sign would have a similar width but be smaller and lower with no flashing lights.

Mr. LeMay asked if the aggregate signage was only the addition of the “b” sign. He was confused as to what was happening. There was a sign “a” that was there now, the Hesser College sign, and he asked the size of the sign. Mr. Fallon stated it was 151” x 120”, noting that they were not proposing to change the surface area, just reface it. Mr. LeMay stated that was over the 100 s.f. to begin with and Mr. Fallon agreed. Mr. LeMay stated that they wanted, in addition, room for the other 42 s.f. sign. Mr. Fallon stated it was about 30 s.f. Mr. LeMay stated that what was confusing him was that the variance request was asking for 124± s.f. where 100 s.f. was the maximum allowed. A brief discussion followed regarding the discrepancy. Vice-Chairman Parrott noted that the petition could be postponed for clarification of what was existing and what they were voting on.

Ms. Rousseau made a motion to postpone the petition to the following month, which was seconded by Mr. LeMay.

The motion to postpone the petition to the following month was passed by unanimous voice vote.

---

#### **IV. OTHER BUSINESS**

No other business was presented.

---

#### **V. ADJOURNMENT**

It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 9:55 p.m.

Respectfully submitted,

Mary E. Koepenick  
Administrative Clerk