

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

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**April 22, 2014, To Be  
Reconvened April 29, 2014**

**MEMBERS PRESENT:** Chairman David Witham; Vice-Chairman Arthur Parrott;  
Susan Chamberlin; Derek Durbin; Charles LeMay\*; Christopher  
Mulligan; David Rheume

\*Delayed arrival

**MEMBERS EXCUSED:** Alternate: Patrick Moretti

**ALSO PRESENT:** Jessa Berna, Planning Department

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**I. APPROVAL OF MINUTES**

A) June 18, 2013

*It was moved, seconded and **passed** by unanimous voice vote to approve the Minute as presented..*

B) August 20, 2013

*It was moved, seconded and **passed** by unanimous voice vote to approve the Minutes with minor corrections.*

C) October 15, 2013 (This item was postponed to the April 29, 2014 meeting).

D) October 22, 2013

*It was moved, seconded and **passed** by unanimous voice vote to approve the Minutes with minor corrections.*

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**II. PUBLIC HEARINGS - OLD BUSINESS**

A) Motion for Rehearing by Applicants regarding the overturning of a Certificate of Approval for property located at 173 – 175 Market Street.

Chairman Witham announced that a procedural error or new information would be required to justify a rehearing.

Mr. Rheume said he looked at the information provided by the requestor for the motion for rehearing, which suggested that the Board of Adjustment applied the wrong review standards in conducting the *de novo* review of the application, however, the same applicant urged the Board to precede with a *de novo* hearing for the Conditional Use Permit. He said they reviewed all the packages that were presented from both sides and there were a large number of quotes from the Historic District Commission meetings leading up to the appeal so, while primarily performing a *de novo* review, they were still given information about what had happened at the HDC. Mr. Rheume said they saw both thought processes and the conflict that was going on within the HDC on the matter. He said some of those same concerns and conflict came forward in the review of this appeal and with the decision for it.

Mr. Rheume said there was a lot of talk about the 45 minutes for presentations. He said that under the circumstances he thought they granted a significant amount of time to both parties and there was a lot of additional time for questions, which in turn lengthened the 45 minutes to increase the amount of discussion for both sides. He said everyone spent a lot of time reviewing the very thick package that came from both sides and he thought they had a good understanding of what was presented.

Mr. Rheume said there was a question about the standing to appeal or not. The appellants had that opportunity. There were some appellants that were direct abutters that would have the opportunity to appeal this under any circumstances and there was some consideration that some of the other appellants had a right to be included in the appeal on this decision as well. Lastly, there was a question of the Board's understanding of the Historic District Commission Ordinance requirements, which he believed they did understand very well and they made their findings based on what the HDC was trying to accomplish with this property.

*Mr. Mulligan made a motion to deny the request for a rehearing and Mr. Rheume seconded.*

Mr. Mulligan agreed with Mr. Rheume and said the motion did not identify any new evidence that was not presented originally and he did not think the motion pointed out any technical error of law or procedure leading to the conclusion that the Board had come to the wrong decision.

Mr. Rheume reemphasized some of the specific items that were brought forward by the requestor for granting the rehearing and agreed that there was not enough to indicate the Board made an error that would require a rehearing.

Vice-Chair Parrott said the *de novo* argument applied to the totality of the project, from the beginning with a fresh look from a completely new board that had no connection with the project whatsoever. He said it was not an insignificant point because the Board was comprised of people who were experienced with land use issues in general and were looking at something, which they had not considered previously. He said that should add an extra layer of confidence to those who were looking at it and trying to decide whether the applicants got fair treatment. He said it was a long and thorough hearing and in the end, they had a near unanimous vote.

Mr. Rheume noted again the comments that the 45 minutes were not enough and that there were several HDC work sessions and meetings, yet the Board was reviewing the proposal all in one meeting. He said the Board of Adjustment did review everything in one meeting, but there should be recognition that they were looking at the final product of the developer and the HDC.

Their process, starting with an embryonic idea of what the developer would like to do with the property and all those work sessions, were really refining it and developing it to that final product. The HDC decided what was an acceptable solution for their requirements by a close vote and this Board was able to give it a fair hearing because they were looking at what the developer was coming up with as their best and final solution.

Chairman Witham said that he too supported the motion to deny the request for rehearing and even though he voted in the minority during the appeal, he did not think there was a strong case to rehear it. Concerning the time limitation, it seemed like half the allotted time was spent discussing the condition of the brick. He said it was an issue, but he thought the most contentious part of the proposal was the size of the rear addition and the glazing and felt that was brushed over in the presentation.

*The motion to deny the petition passed unanimously by a vote of 7-0.*

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B) Motion for Rehearing by Appellants regarding the granting of a Conditional Use Permit for property located at 173 – 175 Market Street.

Mr. Rheume stated that he had reviewed the request for rehearing which he felt came down to one major argument which was essentially that the Planning Board had been bypassed in the conditional use permit process. When the Board had considered conditional use permit, an issue had been raised of a conditional use permit going through the Planning Board before the Historic District Commission. There was an unusual situation where a new revision to the Zoning Ordinance dealing with this had not yet been fully approved by the City Council. At the same time state statute apparently said that the statute became law as long as the revision was in the first reading. This conditional use permit fell into that grey area and the Board had an extensive discussion with City Attorney Sullivan to receive some guidance as all the implications of a change in the law at that point in time were not fully understood.

Mr. Rheume stated that he had taken a look at all the issues, one of which was the timeliness of the information that was being put forward by the presenters where it wasn't part of their appeal of the project but was subsequently provided. He did not feel they were timely in presenting this information. The other issue was that had the Board of Adjustment sent the issue back to the Planning Board, comments would have been made, which then would have to be answered and the Board would have more conflicting information to consider. He did not feel that additional process would have made a substantial difference in the Board's deliberations. While there may have been a procedural error in the process, he felt the Planning Department would ensure it would not occur again and he did not feel their decision on the conditional use permit had been invalidated.

Mr. Durbin commented that the motion for rehearing was arguing the same points as argued before and suggesting they remand the review back to the Planning Board. He felt it was rehashing old arguments, which was why there was a procedure in place to limit discussion for rehearing. He stated that there was no new information provided or any errors in the law or procedural errors of which they Board had not already been aware of and discussed at the hearing.

*Mr. Durbin made a motion to **deny** the request for a rehearing and Mr. LeMay seconded.*

Mr. Durbin said he had nothing further to add except to confirm his comments for the record. Mr. LeMay said they discussed, understood and decided on the issue. He saw no new information and was comfortable with denying the request.

*The motion to **deny** the petition **passed** unanimously by a vote of 7-0.*

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Mr. Rheume recused himself from the following petition.

C) Case # 3-4

Petitioner: 303 Islington Street LLC

Property: 303 Islington Street

Assessor Plan 144, Lot 11

Zoning District: General Residence C

Description: Convert three office use units to dwelling units with an increase in required off-street parking spaces.

Requests: The Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Special Exception under Section 10.440, Use #1.52 to allow conversion of a building existing on January 1, 1980 to four dwelling units with less than the required minimum lot area per dwelling unit.
2. A Variance from Section 10.812.12 to allow a dwelling existing on January 1, 1980 to be converted to additional dwelling units without complying with the minimum open space, maximum building coverage requirements, and off-street parking requirements.
3. A Variance from Section 10.1111.10 and 10.1112.30 to permit a change of use that provides 8 off-street parking spaces where 12 are required.
4. A Variance from Section 10.1114 to allow off-street parking spaces and access ways that do not comply with the off-street parking dimensional requirements.

*(This petition, postponed from the March 18, 2014 meeting, has been revised by the addition of Request #2.)*

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernie Pelech appeared before the Board on behalf of the owner and applicant, Mr. Ed Benway, principal of 303 Islington Street. Attorney Pelech noted that the advertisement was not exactly correct, saying that they required an increase in parking when the revision actually reduced the onsite parking requirements from 14 to 12. He said he reviewed the plan with Ms. Walker in the Planning Department. He said currently there were three offices and an apartment, but the new plan would remove two office spaces and add three residential units.

Attorney Pelech said it was a unique property that sat between the Central Business District and the Residential Business District on the left side of Olde Port Traders. He said there were letters from abutters in the packet with one that was under the impression that they were abolishing

the building but the principal, Mr. Benway, actually had his office in the building and was not a developer. He said General Residence C was an apartment district, businesses were not allowed, and the offices there were a result of variances. They intended to take away the offices and replace them with residential units, which would make them more conforming. He said they were not proposing changes to the exterior of the structure, the open space, lot coverage, or the parking lot with eight spaces that had been there many years and predated the Ordinance. Attorney Pelech said there was a shortage of affordable work force housing in Portsmouth and their purpose was to provide additional residences, and take away the commercial use.

Attorney Pelech reviewed the variance criteria and said the proposal would not be contrary to the public interest because it would not alter the character of the neighborhood because there would be no exterior changes except for the removal of the office space signs. Attorney Pelech said granting the variance would not threaten the health, safety or welfare of the general public because it would be built to code. In regard to parking spaces, the residential units required seven spaces, and the 9 a.m. to 5 p.m. business would be in operation while the residents were at work so there would be no interference. He said substantial justice would be done considering the property evolved from offices and back to residential from the granting of variances by prior boards.

Attorney Pelech said there would be no benefit to the public by denying because granting the request would allow the property to become more conforming and three additional housing units would become available. He said the abutting property in the Central Business District had no parking requirements, or along Islington Street and there were letters from abutters that said the proposal would not exacerbate parking issues. Attorney Pelech said the special conditions that distinguished it from other properties in the area were that it was a 5,000 square foot lot, with a 2,000 square foot building that was in existence prior to zoning and could not meet the current open space and parking requirements. He said the second part of the hardship test was that it was a reasonable use because it was allowed by the Ordinance in an area with a variety of uses and they were removing two uses that were not allowed.

Attorney Pelech said there was no fair and substantial relationship between the general public purposes of the Ordinance and the application of that provision to the property because the parking requirements were established to keep parking off the street and they were trying to get the parking closer to the site. He said twelve spaces were required, but they could only provide eight spaces. He said the 9 a.m. to 5 p.m. office use would be combined with working residents and they were becoming more conforming.

Vice-Chair Parrott asked what the means of access would be to the converted two-bedroom apartment on the third floor. Mr. Ed Benway said there was an internal set of stairs to the large third floor through a hallway. Vice-Chair Parrott said the Board of Adjustment Rules and Regulations required floor plans for renovations, but he only saw the basement floor plans and nothing for the third floor. Attorney Pelech said he submitted plans to Ms. Walker who said they were satisfactory and the staff memo indicated that they had submitted all the necessary materials. Vice-Chair Parrott said it was a clear-cut requirement and he did not feel the application was complete.

**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 suggested the Board deal with all the variance requests at once.

*Ms. Chamberlin made a motion to **grant** the petition as presented and advertised and Mr. Mulligan seconded.*

Ms. Chamberlin reviewed the criteria, noting that granting the variance would not be contrary to the public interest because the new proposal would be less non-conforming and there would be no changes to outside or lot coverage. She said it was on the border of the residential and commercial zone and was an accommodation of office and residential space.

Ms. Chamberlin said the spirit of the Ordinance would be observed because the parking was adequate for the use proposed and it would also be less non-conforming. She said substantial justice would be done for similar reasons. Ms. Chamberlin said the values of surrounding properties would not be diminished because the proposal fit in with the neighborhood, it was a change for the better, and they were removing the variance for office space. Ms. Chamberlin said the special conditions that distinguished this building from other properties in the area was that it was a large building on a small lot and required variances, but the proposal was to make it less non-conforming making it easier to meet those conditions.

Mr. Mulligan said the Special Exception request was to allow a conversion within the zone. He reviewed the standards, noting that the use was permitted in the zone. He stated that the proposal would not result in any hazards, nor would there be any detriment to property values as it appeared the exterior would remain the same. He said no odors would be generated that there were not already there, nor would there be any creation of a traffic hazard. There should be a net decrease in traffic. Although increasing the number of residents in the area could have some impact, he could not say there would be an excessive demand on municipal services. He said without any changes to the building or parking area, there was no indication there would be any increase in storm runoff.

Addressing the criteria for granting the variances, Mr. Mulligan stated that the building would remain the same on the outside so the essential character of the neighborhood would not be changed. The health, safety or welfare of the general public would not be threatened so that granting the variances would not be contrary to the public interest. He said it would not be contrary to the spirit of the Ordinance because it was in keeping with the purpose of General Residence C District to promote moderate to high-density residential uses. He said denying the variance would result in substantial injustice by preventing the owner from using his property in a reasonable way while there would be no benefit to the public. He said there would be no diminution in the surrounding property values and agreed with Ms. Chamberlin's assessment that there would be an unnecessary hardship because it was a larger building on small lot that distinguished it from others and the property abutted an incompatible zone creating a special condition.

Mr. LeMay shared Vice-Chair Parrot’s concerns regarding the adequacy of the application. He said despite the variance request making it less non-conforming, he was not entirely comfortable with the application, but he would still support the motion.

Chairman Witham said they had discussed updating the Rules and Regulations, which had been approved recently, but he was not sure when this application first came in and was postponed, but he thought it was around the same time.

Mr. LeMay said he understood things sometimes fell between the cracks and so he would grant the benefit of the doubt, but he still wanted to be sure they had plenty of information whenever there was a change of use.

Vice-Chair Parrott said the parking sketch showed head to toe parking for two vehicles at 8½’ x 18’, but the actual requirement was 8½’ x 20’. He said there was another requirement that all parking spaces should be dimensioned fully, but parking spaces labeled 1-6 were only dimensioned by width, but not by length. He said 20’ was required for the maneuvering aisle, but this plan only left 14½’, which would not leave enough room to back out. He said that proper plans should have been submitted.

Chairman Witham said that variance request #4 stated that it did not meet the dimensional requirement. Vice-Chair Parrott said he understood, but the information on the sheet was missing or not correct.

Mr. Mulligan said the applicant was entitled to rely on the Planning Department staff and it was not fair at this point to say the proposal would not be heard if the applicant did not read the rules thoroughly. He said they knew what the applicant was asking for and the proposal had not changed significantly. He said he did not think it appropriate to require fully engineered plans because of a new procedure had not been pursued by the Planning Department.

Chairman Witham said he was on the fence, but he thought Attorney Pelech made a good case, and all the parking spots were assigned, with one space for office use, and one or two on street parking spaces. He said they were 30 feet from the Commercial zone, which did not require parking spaces so he was not convinced it would be a problem.

*The motion passed by a vote of 6-0.*

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Mr. Rheume resumed his seat. Mr. Durbin recused himself from the following petition.

D) Case # 3-6

Petitioner: PF Jax Real Estate, LLC, owner, Bryan Pappas, applicant

Property: 159 Middle Street

Assessor Plan 127, Lot 4

Zoning District: Mixed Residential Office

Description: Install a 2’ x 5’ free-standing sign.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1253.40, to allow a front setback of 1'6" ± where 5' is required.
2. A Variance from Section 10.1253.30 to allow a sign height of 10'± where 7' was the maximum allowed.

*(This petition was postponed from the March 18, 2014 meeting)*

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

Mr. Bryan Pappas, one of property owners, appeared before the Board. He said there were a couple of corrections on the request because the sign was not 2' x 5' but would be 3' x 7' and installed the sign on a 16" raised bed, which needed to be added to the sign height.

Mr. Pappas said he purchased the property in the beginning of December 2013 with one tenant on the first floor and the remaining two-thirds of the building was currently unoccupied. He said they received requests for signage visible from the road while they were interviewing tenants. He said adding or subtracting from the current tenant's signage would not work.

Mr. Pappas reviewed the five criteria, saying that the proposal would not be contrary to the public interest and the spirit of the Ordinance would be observed. He said it would not deter from the surrounding properties. He said the sign would be behind a wrought iron fence and face away from the public right of way and would not be a threat to the public health, safety or welfare. He said they were trying to utilize the property to its potential. He said there would be no detriment to surrounding property values and the signage could increase property values by enhancing the professional image of the building. Mr. Pappas said the property did not conform to the current setbacks Ordinance and literal enforcement would cause financial hardship because it would hinder his ability to rent to professionals requiring road signage.

Chairman Witham said the lettering would go on the 2' x 5' part of the sign, but the total dimensions would be 3' x 7' with the post and top bracket.

Mr. Pappas said they would apply a style and aesthetic to fit in with the surrounding properties. Chairman Witham asked if they would go before the Historic District Commission and Mr. Pappas said they would.

Ms. Chamberlin stated that it appeared the sign would go behind the bush and Mr. Pappas said two of the bushes would be replaced with lower shrubs for visibility. Ms. Chamberlin asked if the sign would be turned to its side and Mr. Pappas said that was correct.

Mr. Rheume asked about if there would be exterior lighting and Mr. Pappas said there were no plans for exterior lighting at this time.

Mr. Rheume said he looked around at other signs in the neighborhood and he thought that the height would stand out. He asked if the floor listings would be included on the directory and if they could be put on another sign closer to the building or if the sign could be lowered. Mr. Pappas said he probably would remove the floor lettering.

Mr. LeMay asked how far the building setback was from the road and Mr. Pappas said it was 5' from the sidewalk. Mr. LeMay said the abutter's setback appeared to be greater and more in



compliance with the zoning. Mr. Pappas said the sign would block one of windows if they set it back any further. The abutter's signage was about 3' from the sidewalk, but they had similar issues. Mr. Rheume said he understood that a sideways oriented sign might not work for the line of sight in traffic.

### **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. Rheume said he compared the application to other signs in the neighborhood and he was okay with this sign sticking out into right of way, but he was concerned with the height considering it was 16" above grade and he would be more comfortable if they could meet the 7' requirement. He understood wanting to get a lot of information on the sign, but said they had several options to squeeze the letters in or leave one or two offices off and provide a discount.

Vice-Chair Parrott thought the sign was fine except that he agreed with Mr. Rheume's concern for height. He said the top sign replicated what was already there and was more than twice the size of all the other signs on the pylon. He said this was a handsome building as were all of the buildings around it. It was located near the start of the downtown district and a large sign, no matter how well designed, was never an attractive addition to a property. He said in this particular case, there was slow automobile traffic or walking traffic along that section of the roadway so he did not think it had to be overly high.

Chairman Witham said they had to decide if it was a valid argument that the height was driven by the wrought iron fence and the number of potential offices. Vice-Chair Parrott said the site and the choice of the individual signs was also a factor.

*Mr. Rheume made a motion to **grant** the petition as presented and advertised with the stipulation that the total height of the sign as recognized by the code be no greater than 7', or 84". Vice-Chair Parrott seconded.*

Chairman Witham said they could do that or they could just grant the first variance request and not approve the second.

*Mr. Rheume amended the stipulation to be that they grant request # 1 and allow a front setback of 1'6" where 5' was required, but not grant a variance from Section 10.1253.30 so that the sign must conform with the 7' maximum permitted in that zone. Vice-Chair Parrott seconded.*

Mr. Rheume reviewed the criteria, noting that granting the variance would not be contrary to the public interest because they were trying to keep an overall look to the general area. He said there were similar signs that were also closer to the road than what the Ordinance called for in the area, but that was driven by nature of the buildings on Middle Street with common setbacks to the road and public right of way. He said the spirit of the Ordinance would be observed and although 1'6" was less than the 5' required, the requirement was designed for signs to be a

respectful distance from the road. In this case, the buildings were fairly close to the road, but there was a need for visible signs. He said substantial justice would be done by allowing the property owner to make full use of their property, and advertising for tenants in their building was a basic expectation.

Mr. Rheume said granting the variance would not alter the character of the neighborhood nor threaten the health, safety or welfare of the general public. He said the values of surrounding properties would not be diminished because the sign was similar in nature to those on other properties. He said literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship because there were special conditions that distinguished it from other properties in the area. He said a 5' setback from the right of way was not physically possible, so the proposal was reasonable. He said there was no public interest that would outweigh the negative consequences of moving closer to the road than what the Ordinance required.

Vice-Chair Parrott concurred with Mr. Rheume's comments.

*The motion passed by a vote of 5-1 with Mr. LeMay voting against the motion.*

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Mr. Durbin resumed his seat.

### **III. PUBLIC HEARINGS – NEW BUSINESS**

1) Case # 4-1

Petitioners: Summit 501 Islington LLC and Todd Baker Winslown Property Management

Property: 501 Islington Street, #1A-2

Assessor Plan 157, Lot 6-2

Zoning District: Business

Description: Install a 58"± x 102"±, 10'± high free-standing sign.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1253.10 to allow a front yard setback of 10'± where 20' was the minimum required.

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

Mr. Todd Baker appeared before the Board on behalf of the applicant. Mr. Baker said the building had a 0' setback and was built before the Ordinances were in effect. He said there were two existing signs within the setback, and the Ordinance required a 20' setback from the property line, which would make the sign observable. He said one sign was half a foot off the property line and the other was 6' back. He said they were proposing to replace the two signs with a single, taller sign that would have enough space for each tenant. He said it would have the same square footage in same footprint, but would be further from the property line to make it less non-conforming.

Mr. Baker reviewed the criteria for granting the request, stating that it would not be contrary to the public interest and would observe the spirit of the Ordinance. He said it was an appropriate use in a commercial area that already had a sign advertising a business. He said the new sign would have space for each tenant in the building. He said it would not alter the essential character of the neighborhood or threaten public health, safety or welfare. He said they spent time and money to make the building more attractive and appealing to the neighborhood. He said substantial justice would be done, as the sign would be more attractive and appealing with better visibility. He listed the tenants including a bank, an insurance company, a title and escrow business and a marketing company all of which, he stated, served the community. He said the value of surrounding properties would not be diminished and they would be providing a more attractive, externally lit sign in place of two internally lit plastic and metal signs. He said there was a hardship as a result of special conditions on the property in that it was built on the property line and trying to enforce the literal language of the ordinance would be unreasonable. He said setting the sign further back would be inside the building, which would not serve its purpose. He said there would be no fair and substantial justice in denying the petition.

Mr. Rheume asked if the intent was to replace the entrance and location signs and replace them with a single sign. Mr. Baker agreed. Mr. Rheume asked if the exit sign for the bank drive-through would remain and Mr. Baker said it would.

Mr. Rheume noted that the handwritten application listed 10' for the setback, but the variance request listed a 6' setback from the property line and asked which was correct. Mr. Baker said he first estimated 10' from the curb, but it was actually 6½' from the property line, which was on the inside of the curb.

Mr. Rheume asked if any consideration was given to not adding a top piece. Mr. Baker said they changed the trim and added a crown to the building on the outside of the building so they thought the top piece tied in the sign to the rest of the building and was important. He said the 10' was within the ordinance. Mr. Rheume said the front yard setback was advertised as 10', plus or minus and now they were asking for 6½' and wondered if that was acceptable for the plus or minus. Chairman Witham said it was a big plus or minus, but it was in the same spot so even though there was a discrepancy, the rest of the documentation was clear.

Ms. Barbara DeStefano of 99 Hanover Street said she worked for the insurance company on the third floor and when their parent company, People's United Bank moved out from the first floor, they lost their street signs. She said this proposal would do away with the smaller sign close to the road that blocked the line of sight when exiting. She said the new sign would not create a problem because it was in line with the building. She added that she would like to see the 501 Islington Street business listed on top of the sign.

### **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 and Mr. Durbin seconded.

Mr. LeMay said it was a straightforward request to move the sign back and improve the view from Dunkin Donuts. Mr. LeMay then went on to review the criteria, noting that granting the variance would not be contrary to the public interest because it would be in the same location as the existing sign and the setback would be improved. He said the sign would not change the nature of the neighborhood and allowed advertising for the tenants. He said the same arguments applied to observance of the spirit of the Ordinance.

Mr. LeMay said substantial justice would be done with a new and attractive sign that benefited the applicant and community and no harm would be caused. He said the values of surrounding properties would not be diminished because they were not substantially altering the neighborhood and they would be clearing up sign clutter by reducing the number of signs by one. Mr. LeMay said literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship because of the siting of the building on the lot and the short frontage. The proposal was a reasonable compromise for setback and visibility.

Mr. Durbin said the proposal was reasonable considering how large the structure was and how many businesses could fit in the building.

Mr. Rheume said he would support the motion. He said the zoning changed from Business to Mixed Residential and there was a Business District across the street, which allowed a 5’ setback which was what the applicant was requesting, although the MRB district only allowed a sign height of 7’ instead of 20’. He said other businesses on this side of the street had signs that were higher so he was okay with the 10’ height limit.

*The motion passed unanimously by a vote of 7-0.*

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2) Case # 4-2

Petitioners: Richard D. Bournival, Jr. and Alissa C. Bournival

Property: Adjoining 2355 Lafayette Road

Assessor Plan 272, Lot 9-6

Zoning District: Gateway

Description: Install an 8’± x 4’±, 8’± high free-standing sign.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1530 to allow a free-standing sign for an accessory use on a lot adjacent to the lot containing the principal use or building.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Michael LeClaire, representing the applicants, said they came before the Board for approval of their special test track last year and now they were asking approval for a sign to identify the test track being there and open. He said the sign would be perpendicular to the road and would not be illuminated.

Mr. Rheume asked what the reasoning was for placing a sign on the test track lot instead of at the dealership. Mr. LeClaire said they tried to keep the test track natural looking without cutting trees, but it was not very visible to customers at the dealership. Mr. Rheume said he understood trying to attract business, but he would be concerned with attracting passersby to look through the woods. Mr. LeClaire said they were trying to increase business and get exposure as the only test track in New England. He said there was a vacant lot with a huge wood line between the dealership and the test track and this was the strongest location for the sign. Mr. Rheume said this was similar to the variance request for the test track and asked what the rationale was for keeping the two lots separate. Mr. LeClaire said it was in case they wanted to divest that lot in the future.

Ms. Alissa Bournival said she would be happy with any signage, even on the Jeep property. Mr. LeClaire said that would be a different project on a different piece of property. Mr. Rheume said being on an accessory use lot was what drove the variance. He said they would need to look at the dealership lot, but it looked like there would be a suitable spot. Chairman Witham agreed that they would need to do an analysis so they could not venture down that path at this point.

### **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 said he was somewhat uncomfortable with the request. He said even though it was a sign to identify Bournival's test track, there was no access and so he was not comfortable with people looking for the test track entrance.

Mr. Rheume said he had the same uneasiness with the sign being a distraction. He said it was an odd placement for a sign and he hoped they could figure something out that would work better.

Vice-Chair Parrott said the more he looked at the sign the more it resembled a billboard to him. He said billboards usually gave directions indicating how far away something was, but this was in a section of woods. He said signs were usually located at entrances if not giving directions. He said those living in the area understood where Bournival was, but he was concerned with driver confusion for out-of-towners who were not familiar with the business.

Vice-Chair Parrott *made a motion to deny the petition as presented and advertised and Mr. LeMay seconded.*

Vice-Chair Parrott reviewed the criteria, noting that granting the variance would be contrary to the public interest, which was to keep the traffic flowing and to follow signs for turning, which this sign did not do. He said the spirit of the Ordinance was to promote the health, safety and welfare of the general public, which fell short in this request. He said the request had to meet all five criteria and it did not meet the first two.

Mr. LeMay added that the Board might be more amenable to a sign closer to the business driveway.

Chairman Witham said he would support the motion to deny. He said even if the wording on was changed to say “Entrance 500’ feet ahead” it wouldn’t change his mind because a variance was needed to use the lot as an accessory use and now they needed a variance for a sign on a lot that was separated by another lot. He agreed that he would not have a problem if the sign were at the dealership.

*The motion to deny the petition passed unanimously by a vote of 7-0.*

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3) Case # 4-3

Petitioner: 4 Amigos LLC  
Property: 1390/1400 Lafayette Road  
Assessor Plan 252, Lots 9 and 7  
Zoning District: Gateway

Description: Install two free-standing signs, one with animation.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1251.20 to allow a 204 s.f. ± free-standing sign where 100 s.f. was the maximum allowed.
2. A Variance from Section 10.1243 to allow multiple free-standing signs on a lot where only one free-standing sign was permitted.
3. A Variance from Section 10.1223.20 to allow signs that move, flash or give the appearance of motion where such signs are prohibited.
4. Variances from Section 10.1253.10 to allow a sign 22’ in height where 20’ was the maximum allowed and Section 10.1253.20 to allow a sign between 2.5’ and 10’ above grade within 20’ of an intersection.

**SPEAKING IN FAVOR OF THE PETITION**

Chairman Witham identified the sign as the former Yokens restaurant sign.

Attorney Richard Uchida and Mr. Jim Mitchell with 4 Amigos LLC appeared before the Board. Attorney Uchida said there was some repetition to the application since some variances were the same as the approval granted in October 2013, which was specific about location, but the location ended up moving after they went through site plan approval. He said at the urging of the public and Planning Board they were encouraged to do a full restoration of the sign, including movement of the fin, tail and spout lights, but the ordinance did not allow animation.

Attorney Uchida said the former Yokens restaurant site was redeveloped into a retail center housing Five Guys, Rite Aid, and the Newburyport Bank with two and a half acres to the rear yet to be developed. He said they were asking affirmation of the variances granted in October 2013 for freestanding signs, a variance in excess of 100 square feet to allow the Yokens sign and also a variance for a sign in excess of 20’ high with the spout and tail coming to 22’. He said they needed two new variances because of the animation and the location change.

Attorney Uchida showed the original sign location proposed at the corner and the new location, which was closer to the driveway and 80' down the road to avoid blocking the line of sight. Attorney Uchida said the Planning staff expressed concern that the location could be obscured by landscaping, and so they reworked landscaping and received site plan approval in March 2014. Attorney Uchida said there was no concern with traffic coming from the north and there would be no traffic coming from the south because Lafayette Road was divided. He said the stop bar was 10-12' from the road so pedestrians would still be visible because the sign was set back.

Attorney Uchida said they would not be asking for a variance request for the animation if they had not received requests to preserve the authenticity of the original Yokens whale sign. He said they estimated that it would cost \$40,000 to \$45,000 to restore the original sign with electronic animation. Attorney Uchida said neither variance request would decrease surrounding property values or bring about any danger or harm to the public by the placement of the signs. He said the Ordinance intended that there be reasonable and visible signage.

Chairman Witham noted that they had received approval for the height variance, the number of signs and square footage last time, but they lost their vested variance because the sign moved 80'.

Mr. Rheume said there was still old information along with new information in the application and he wanted to be sure everything was correct. He asked if the Rite Aid and Yokens signs were the only two signs on the lot that abutted Lafayette Road. Attorney Uchida said there was a third free standing sign on Peverly Hill Road signifying an entrance to the lot. Mr. Rheume noted that sign was on a separate lot and there was room on that sign for additional information for whatever was built there. Attorney Uchida said he did not think it was a separate lot, but that sign was 300' to 400' down Peverly Hill Road. Mr. Rheume said there was a tree on the median at the entryway and exit. He asked if the Planning Board required the tree to be there. Attorney Uchida said they lost a tree during construction that had to be replaced and the Planning Board asked that they place it so the tree canopy didn't block the view or get too large for emergency vehicles so they selected a slim species. Mr. Rheume said he would also be concerned a tree would suffer from salt damage.

### **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 petition as presented and advertised and Mr. Rheume seconded.*

Mr. Durbin said the applicant was asking for a reaffirmation of a variance that was already essentially approved. He said during the site plan review they were asked to move the Yokens sign closer to the original location near an entrance. The Board's main concern would be the obstruction of visibility and the amount of signage, which was driven by the number of entrances, but it seemed reasonable considering the size of the lot and number of buildings. He

said they were before the Board because they were asked by the public and the Planning Board to restore a sign with cultural and historical significance.

Mr. Durbin reviewed the criteria, noting that granting the variance would not be contrary to the public interest and in the spirit of the Ordinance because members of the public would not be in danger with an obstruction or allowing over clustering of signage. He said substantial justice would be done by weighing any hardship to the applicant against any benefits to the public if they were to deny request. He said the hardship to the applicant would be significant in terms of time and expense and bringing a piece of property that had fallen into waste back into a productive property that was beneficial to the community. He said he did not think restoring the Yokens sign would have any negative impact on the values of surrounding properties considering this lot took up an extensive area on the corner of Lafayette Road and Peverly Hill Road. He said there were special conditions that distinguished the property from other properties in the area because it was a large lot with several building structures and access points. He said owing to those special conditions there was no fair and substantial relationship between the general public purposes of the Ordinance and their application to this property because the main concern would be the obstruction of view at the entrance and exit and he did not feel it was an issue. Mr. Durbin stated that the proposed use was a reasonable one.

Mr. Rheume concurred with Mr. Durbin's points. He emphasized that it was in the public interest to restore a Portsmouth icon to its original condition. He said most people he spoke with liked it but he saw it as a plus for the community and applauded the owners for their effort. He added that they addressed concerns with traffic and pedestrians and it would be in the spirit of the Ordinance to move the sign away from the intersection.

Mr. LeMay said he recalled they had some stipulations that applied to the Yokens sign when they approved the variance request for the first time. Although he did not remember the exact wording, Mr. LeMay felt they should also apply to this request.

Chairman Witham said they could add stipulations, but he thought it fell under presented and advertised.

Mr. Rheume said he thought the added emphasis that this animation was an exception was important because he did not want to set a precedent for someone else to use this variance as permission for another animated sign with flashing colored lights that would be more objectionable.

Chairman Witham asked how he wanted to word that stipulation. Mr. LeMay read from the previous stipulation with the exception of the dimensions, "The variances are approved for the specific sign as presented in this application. This sign incorporates the restored Yokens sign formerly installed on the site plus a lower panel represented on the submitted plan as 60" high x 96" wide. Any modifications to the design and content, or replacement of all or portions of the sign, shall require a new variance."

Chairman Witham asked if the maker of the motion and the second of the motion agreed with carrying over the stipulation. Mr. Rheume said his one concern would be addressing the lower panel sign so no one would think they could animate that. Chairman Witham said the stipulation would be that the animation and height only applied to the Yokens sign. Mr. LeMay



suggested they could strike the last sentence. Mr. Rheume and Mr. Durbin both agreed to the stipulation.

Vice-Chair Parrott said the new business was already there and was a credit to the city, but it was his view was that signs should be accurate and informative and this one was not. He said though the Yokens sign was iconic, the Yokens seafood restaurant was no longer there and he was concerned that the sign would mislead. He said this was one of the better animated signs, but he still felt blinking lights would be distracting and annoying, adding a carnival atmosphere to the area. He said he agreed, however that the proposed new sign location was better than the previous location near the intersection.

- The variances for height and animation are approved for the specific sign as presented, with the animation added solely to the restored “Yokens” sign and not the proposed 60” x 96” lower panel.

*The motion passed with the stipulation that the variances for height and animation were approved for the specific sign as presented, with the animation added solely to the restored “Yokens” sign portion. The motion passed by a vote of 6-1, with Mr. Parrott voting against the motion..*

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4) Case # 4-4

Petitioner: 402 State Street, LLC

Property: 402 State Street

Assessor Plan 116, Lot 12

Zoning Districts: Central Business B and Downtown Overlay

Description: Allow a residential use on the ground floor.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.642 to allow a residential use on the ground floor in the Downtown Overlay District.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Timothy Phoenix appeared before the Board with his request for the building that was owned by his three law partners and was the former location of their law firm. He said the building was built in 1840 as a residence and they were hoping to preserve the interior period detailing with office or residential use, instead of retail use. He said at some point between 1840 and 1993 the residential use turned to office use. He said they bought the building in 1993, then moved to Parrott Avenue last year.

Attorney Phoenix stated that the building was across from Saint John’s Church, the John Paul Jones House, the Library Restaurant and the Rockingham, which were mostly condominiums. He said they had been trying to sell or lease the building for the last year and had interest in commercial use and residential use. He said the building was located in the Downtown Overlay District and the first floor could not be used residentially, yet it was abutting the Mixed Residential Office District, which did allow first floor residential use. He said the idea of the Downtown Overlay District was to promote economic vitality downtown, but the businesses in

the area were mostly offices or professional businesses. He said it was remote from retail establishments on Congress and Pleasant Streets with very little pedestrian traffic in this area that would benefit from retail space.

Attorney Phoenix said granting the variance would meet the spirit and intent of the Ordinance and would not be contrary to the public interest, noting that there would be no conflict as was cited in case law with the Chester Rod and Gun Club case. He said the variance would not alter the essential character of the neighborhood, threaten the health, safety or welfare of the general public or diminish the surrounding property values. He said none of the abutters were present to object to the request. Attorney Phoenix said the 1840's building exterior and interior were essentially as they had been and he was concerned that allowing retail use would cause harm.

Attorney Phoenix said there was no fair and substantial relationship between the general purpose of the Ordinance for the Downtown Overlay District, which was to promote the economic vitality of the Central Business District, and this location which was different. There was no reason to apply strict application of that Ordinance. He said substantial justice would not be served by a loss to the individual that would not be outweighed by any gain to the public. He said they had tried to sell the building, but there was more interest in a residential use than commercial. There were residential uses surrounding it and therefore it was reasonable for them to find a use that was compatible with the spirit and intent of the Ordinance. He said the public would not gain from a retail use in an out of the way location.

Mr. Rheume asked if they had a particular buyer in mind and Attorney Phoenix said they did not at this time.

Mr. Rheume noted that there were only two parking spots for the building. Attorney Phoenix said he asked Mr. Eric Weinrieb of Altus Engineering to make a parking plan. He said Ordinance section 10.11.250 required 1½ spaces per unit. He said he could not speculate how many units there might be, but he thought up to four would be plenty of parking. Any more would have to come back to the Board for a change of use.

Mr. Rheume asked if the first floor arrangement was residential. Attorney Phoenix said the layout was the same as when it was built, except the office did not require a full kitchen and bath so there was only a shower in the basement.

Mr. Mulligan asked for clarification on professional office space not being encouraged in the Overlay District as opposed to retail space and restaurants. Attorney Phoenix said he meant retail was mostly encouraged on the first floor to draw pedestrian traffic and most of the professional offices were on the upper floors. Mr. Mulligan asked if it was not also true to have a vibrant downtown, they would want a mixed use or professionals. Attorney Phoenix said he was not suggesting they eliminate professional office use, but was just asking that residential be added. Mr. Mulligan said four electric meters appeared to be on the side of the building. Attorney Phoenix said he only paid one bill, but perhaps there were several businesses there at one time.

Mr. David Choate, marketing agent for the property for the last year and a half said the purpose of the application was to increase flexibility to sell the building. He said they received an offer for 100% residential use as well as mixed office and residential use, but no one wanted it for

100% office use and at this point, he had to tell them residential use was not allowed on the first floor of the Overlay District. He said he was around when the Overlay District was created in reaction to residential dark spaces on first floor units of Daniel Street. He said he did not think it was ever intended to apply to State Street and the issue would not apply if the building was one street over. He said they could not say for certain what a potential buyer's ultimate intentions would be, but right now they were severely handcuffed. He said it was a fairly substantial building of 5,000 usable square feet on three floors, but many business uses want all 5,000 square feet on one floor with wide open floor spaces, which were available at Pease Development.

### **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. Rheume made a motion to **grant** the petition as presented and advertised and Vice-Chair Parrott seconded.*

Mr. Rheume said he thought allowing a residential use for this particular property was the right answer despite its being included in the Overlay District. He said this row of buildings always had a residential feel despite occasional office use. He said he would be concerned with removing the historic walls that had been preserved for business or retail use. He said law offices did not attract passersby and did not generate foot traffic for shopping or dining associated with first floor businesses.

Mr. Rheume reviewed the criteria, noting that granting the variance would not be contrary to the public interest because there was an interest in keeping the overall look and feel of buildings in the area that were mostly residential or non-pedestrian business oriented offices. He said he reviewed another request regarding a building on Chapel Street that was not a business so he thought there was some precedent. He said a good case could be made that the spirit of the Ordinance would be observed as a result of various first floor businesses in the surrounding area still operating, but this area of State Street was on the edge of the Overlay District and more residential and open as opposed to other parts of downtown.

Mr. Rheume said substantial justice would be done because it appeared the applicants made efforts to use the building in compliance with the Overlay District, but were not successful and allowing first floor residential use would give them additional options. He said the values of surrounding properties would not be diminished because many of the surrounding properties were also residential looking in nature and using this property exclusively as residential would be more beneficial than converting the use to a restaurant, which could be more of a detraction. He said literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship because it was a residential looking structure that created a special condition that distinguished it from other properties in the Overlay District. He said it was not suited to first floor business or commercial use and there was no fair and substantial relationship between the general public purposes of the Ordinance and their application to this property, which would be conducive to foot traffic. He said the proposed use was a reasonable one.

Vice-Chair Parrott said the property was in a mixed use and residential zone so that a residential use on the first floor was logical and would not seem out of place. He said there had been an honest effort to market the property as it was and it was unlikely that retail would spread in this direction due to the constraints in parking and other concerns. He said the building itself and the others nearby seemed to have aged well so he was in favor of allowing a residential use that would preserve the building. He said downtown visitors had other areas to wander and probably would not wander in that direction.

*The motion passed unanimously by a vote of 7-0.*

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5) Case # 4-5

Petitioner: KWA, LLC, owner, Tanya Hart, applicant

Property: 165 Court Street

Assessor Plan 116, Lot 27

Zoning District: Mixed Residential Office

Description: Establish new salon.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance under Section 10.440, Use #7.20 to allow a personal services use in a district where this use was prohibited.
2. A Variance from Sections 10.1111.10 and 10.1112.30 to allow a change to a personal service use without providing the required parking.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Tanya Hart stated that she was the applicant and wanted to open a salon that specialized in color, which was a low traffic specialty with three to four chairs and a maximum of 15-20 by-appointment only clients per day. She said the staff would consist of herself and two others and possibly a part-time apprentice. She said the hours would be limited, closed Sundays and Mondays, open 10 a.m. to 8 p.m. on Tuesdays and Thursdays; 10 a.m. to 6 p.m. on Wednesday; 10 a.m. to 4 p.m. on Fridays and 10 a.m. to 3 p.m. on Saturdays.

Ms. Hart said the business would fit in with the character of the neighborhood that housed other personal service providers and all would benefit by sharing clients.

Ms. Hart said the area was currently zoned for mixed residential and office and the property currently did not allow for parking and there was nowhere to park nearby. She said the property was a short distance from the dog park that had ample free parking and was half a block outside the Central Business Zone that allowed parking. She said the property was formerly used as retail in 1997, and then again in 2010 but there was nothing on file with the Board for that business. Ms. Hart provided photos and a letter from another business in the area stating how her business would be of benefit.

Ms. Hart said there would be no major changes to the property except for new flooring and shampoo sinks. Ms. Chamberlin asked if there would be any special waste disposal process for

washing dyes down the sewer and the Ms. Hart said there were no special requirements except the State required them to provide an air purification system.

Mr. Rheume asked which municipal lot was a block away and Ms. Hart said it was the Parrott Avenue lot near the Citizens. Mr. Rheume also asked where the dog park was and Ms. Hart said it was across the bridge coming toward City Hall near the tennis courts.

Mr. LeMay asked how long customers usually visited and Ms. Hart said appointments were usually for two hours. Mr. LeMay asked if she knew if the metered parking a block away was good for that time and Ms. Hart said the meter parking lot across the street allowed four hours of parking.

Mr. Mulligan asked if she knew how long the space was unoccupied and Ms. Hart said she was not sure, but there was an insurance agency in the space for twenty years and the current landlord was using the unit next door for an office, but the rest of the building was vacant.

### **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-Chair Parrott made a motion to **grant** the petition as presented and advertised and Mr. Mulligan seconded.*

Vice-Chair Parrott said the building had been used as commercial space for a long time with several different uses. He said this use would fit in the mixed use neighborhood with similar uses in the area and would not interfere with neighbors. She stated that the use was confined in the building and parking was available at the free public lot as well as nearby meters.

Vice-Chair Parrott reviewed the criteria, noting that granting the variance would not be contrary to the public interest because it would be served by such a facility and the impact on traffic would be minimal. He said the spirit of the Ordinance would be observed by encouraging new businesses and this was a reuse of a building that was currently vacant.

Vice-Chair Parrott said substantial justice would be done by granting the variance because there was no overriding public concern arguing against the use. He said granting the variance would not diminish the values of surrounding properties because it would fit into the mixed use area and be confined within the building with no changes to the exterior.

Vice-Chair Parrott said literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship because there were special conditions that distinguished the property from others in the area such as being on a corner and only certain businesses would find it useful and this was one. He said no fair and substantial relationship existed between the general public purposes of the Ordinance and their application to the property. He said he could not think of any valid arguments to say it was not a reasonable use of the property.

Mr. Mulligan agreed with Vice-Chair Parrott’s review and just noted that the proposed use was similar to other personal services in the area. He said that substantial justice would be done by granting the variances and there would be no gain to the public in denying them that would outweigh the resulting burden on the applicant. He said none of surrounding properties were likely to be affected. He also agreed that there was a hardship for business placement on a small corner lot with no parking and the use fit well with others in the area so the parking restriction was not necessary to achieve the purposes of the Ordinance.

Mr. Rheaume said requests for uses were generally something they were careful about granting, but he thought in this case it was reasonable to grant a variance rather than a special exception. He said the Central Business B District allowed this use and perhaps that should have been extended on both sides of Fleet Street. He said the property was used for business for many years, which established precedents in close proximity of similar uses so there was a hardship specific to the characteristics of this property. He said in regard to the parking, he had some concern that the referenced parking spaces were at quite a distance, but he did the math and there was only one space different and he thought that was reasonable as well.

*The motion passed unanimously by a vote of 7-0.*

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Vice-Chair Parrott and Mr. Mulligan recused themselves from the following petition.

6) Case # 4-6

Petitioners: AHI Holdings, LLC, owner, Daniel E. Innis and Doug Palardy, applicants.

Property: 40 Court Street

Assessor Plan 127, Lot 1

Zoning District: Mixed Residential Office

Description: Establish beer and wine service in hotel lounge.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance under Section 10.440, Use #9.51 to allow a restaurant with an occupant load of less than 250 in a district where this use was prohibited.
2. A Variance from Sections 10.1111.10 and 10.1112.30 to allow a change of use with 32 off-street parking spaces where 38 parking spaces are required.

**SPEAKING IN FAVOR OF THE PETITION**

Chairman Witham informed the applicant that there would be only five members sitting and they would need four positive votes to grant the petition. It was up to their comfort level if they wanted to proceed. The applicant said they would go forward with the hearing.

Owners, Daniel E. Innis and Mr. Doug Palardy, stated that they wanted to establish beer and wine service in the lounge of the Hotel Portsmouth, formerly known as the Sise Inn, which had been in operation since the mid-1980s. They had purchased the property in November of 2013 and had upgraded it, adding a limited food service in the morning with a continental breakfast for guests. He said they were proposing to open the old lounge in the lower level. He said it was operated as a lounge approximately ten years ago with seating for twenty people and would operate from 3 p.m. to 8 p.m. each day as an amenity for guests. He said they would not

require a full restaurant license to serve limited food service with beer, wine, small sandwiches, salads, cheese and crackers from the limited catering kitchen. He said it was not visible from the street or adjacent properties and there would be no separate signage directing people from the street to the location.

Mr. Innis said they did not believe the proposal would alter the essential character of the neighborhood which was a mix of commercial enterprises and residences. He said the lounge would be located in an existing space that was previously used for a similar purpose. He said there would be no harm to the public health, safety or welfare from the proposal. He said substantial justice would be done with a benefit to their guests. He said they could not legally deny public access, but they were not seeking to reach the public. Given the nature of the commercial operation of a 32-room hotel, he did not feel adding a lounge to an existing space that was designed for that purpose would diminish the value of surrounding properties. He said their objective was to enhance the value of properties in the neighborhood by creating a unique experience in Portsmouth, similar to what they did at the Ale House Inn, but on a larger scale. He said they wanted the property to become an asset to the neighborhood and would work hard as the owners that lived in the neighborhood and would insure that they did it in the right way. He said literal enforcement would result in an unnecessary hardship because a restriction for a reasonable use that had been applied to the property previously would be different than other hotels in the downtown area, which had lounges.

Ms. Chamberlin asked if they planned to have hot food or deep fryers. Mr. Innis said they only had a convection and microwave oven. Ms. Chamberlin asked if the food would be made on site or brought in. Mr. Innis said the salads and cheese plates would be made there.

Mr. Rheume asked for clarification on the layout of the building. Mr. Innis said the front of the building faced Court Street and the lounge was below the lower level of the front, but the access stairs were halfway down the building and not visible from the front entry. He said the parking lot was at the backside where most guests entered at the lower level and took the elevator up to register for their stay. He said the lounge was at the back of that entrance corridor. Mr. Rheume asked if the back entrance was the access that they were required to keep by law and Mr. Innis said that was correct and conceivably someone could come in the front door and go down the stairs to the lounge, but no one would know it was there so it was unlikely.

Mr. Rheume noted that the application referred to 32 off street parking spaces currently, but the diagram showed 35 parking spaces. Mr. Innis said they changed some landscaping that allowed three more parking spaces. Mr. Rheume said the zoning requirement calculations for parking were complicated and he was trying to understand what the requirement would be with and without the lounge compared to what they currently had. Mr. Innis said he did not know the answer, but he knew they previously had 28 spaces and now there were 35 spaces.

A resident of a nearby condominium said she went down to the Inn after she received the abutters notice and was invited by the owner to tour the facility. She said she could not tell the lounge was there until she was shown. She said they did a great job improving the exterior and interior of building. She said she liked the idea that there would be a lounge in the hotel so they could control alcohol consumption rather than guests going in and out for liquor.

Mr. Rheume said he wanted to make it clear that he was still concerned with the calculations of the current parking requirements, the proposed parking, and how the parking layout worked behind the building as well as the dimension of spaces. He said he wondered if the applicant could provide that information. He said it was not a fatal flaw, but it was of a concern to him.

Chairman Witham said the lounge triggered the additional parking spaces because it was open to the public. Ms. Jessa Berna from the Planning Department said she did not have all the figures in front of her, but she and Ms. Walker reviewed the Ordinance and calculated the parking. She said the parking was based on one space per guest room plus one space per 500 feet of common area and any amenities such as the bar area, which would be one space per 100 square feet. Ms. Berna said she was not sure of the square footage of the proposed bar, but that would still add a few parking spots. Mr. Durbin said the added spaces were due to the perceived intensification of use. Ms. Berna that was correct because public access was required even though that was not the intent of the use. Mr. Rheume asked if she and Ms. Walker were confident that the 35 parking spaces met all the requirements. Ms. Berna said she did not review the application specifications and was not positive especially since the application listed 32 and then added 3 more during the landscaping. Mr. Innis said they had 32 spaces for the 32 rooms and added 3 additional spaces for the expansion. He said staff parked at the church next door during the day.

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

Mr. Paul Mannle of 1490 Islington Street asked the Board to deny both variances. Mr. Mannle said the Board recently reviewed an application from the Chandler's Loft that had a dozen residents support the business, but there was one resident that pointed out that the use was not permitted. He said this was the same situation where the applicant was in the MRO District that was supposed to be a buffer between downtown businesses and residents. He said the MRO District didn't allow bars or restaurants with the exception of Mambo, which was previously the Dunaway Restaurant before that area was designated MRO. He said the two abutters to this site were the Portsmouth Baptist Church on Middle Street and the Portsmouth Middle School. He said the owners did a great job in their renovation, but they knew where they were when they went in and there was no hardship. He said establishing a bar between a church and a school was not in the public interest and granting would set a bad precedent for the MRO. Mr. Mannle read and submitted a petition from twelve local residents.

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

With no one rising, the public hearing was closed.

### **DECISION OF THE BOARD**

Chairman Witham commented that he did not think a lounge for hotel guests was the same as a bar that stayed open until 1 a.m., but they could add a stipulation on the hours. He said a hotel use was allowed. He said it appeared that the lounge area triggered three more parking spaces, but a case had been made that the lounge was for guests and not for public use and the 35 parking spaces met the requirements for their guests. He said it was being treated as an amenity.



Mr. LeMay said it seemed a reasonable use for a hospitality business. He agreed that if they had adequate for parking for their guests, then they had adequate parking for their captive audience that was not being advertised to the public.

Chairman Witham said the last thing a hotel wanted was to tell a guest there was not enough parking. He said his observation was that even full hotels never used all their parking spaces and the lounge floor plan was not laid out to attract the public, adding that anyone looking for a bar scene would go somewhere else.

*Mr. Durbin made a motion to **grant** the petition as presented and advertised and Mr. LeMay seconded.*

Mr. Durbin reviewed the criteria, noting that granting the variance would not be contrary to the public interest and the request was within the spirit of the Ordinance. He said if they were putting in a traditional bar, they would need additional parking and there would be an intensification of use, which would impact the neighborhood, but this was a true accessory use for members. He said there would be a greater hardship on the applicant if the request was denied than any perceived benefit to the public.

Mr. Durbin said the applicants had invested a lot in the hotel and had done a nice job on their other business. He said granting the variance would discourage guests from going in and out for alcohol so the value of surrounding property values would not be diminished as a result. He said there would be no fair and substantial relationship between the general public purposes of the Ordinance and their application to this property. He said there would be no intensification of use. He said the special conditions of the property that distinguished it from other properties in the area was its unique design as a hotel.

Mr. LeMay agreed and had nothing further to add.

Mr. Rheume said he would like to add a **stipulation** that would limit the maximum number of seats to 25. He said potential future restaurant use could allow up to a sizeable number of 250 seats and he wanted to preclude that possibility in this area. He said the applicant proposed 20 seats, but they could make it 25 which would be one tenth of the maximum allowed.

*Mr. Durbin said he would be fine with amending the motion to include a stipulation to limit a maximum seating to twenty-five and Mr. LeMay seconded*

Mr. Rheume said he was a stickler regarding granting variances for uses because it was a slippery slope, but this was more complicated because the Section 9 of Article 10.440 in the Zoning Ordinance referenced larger restaurants as the primary business and not an adjunct to a hotel. He said he could see the hardship viewpoint where this hotel had been allowed in this location and the proposal of a place for people to gather for light refreshments was really an adjunct to what would be a standard of services offered by a hotel. He said he was still a little concerned with parking, but based on the information provided by the Planning Department, there were only a couple of spaces difference which was not significant.

Chairman Witham commented to the member of the public who spoke in opposition and presented a petition that he took petitions seriously as the voice of the public, but he noted in

this case the addresses of the signers were not limited to the neighborhood, but were scattered throughout the city. He said they were asked how a bar could be allowed next to a church in a residential district. He said he would not be able to support a request for a bar open to the public, but he did not think this was that type of situation.

*The motion **passed** by a vote of 5-0.*

Vice-Chair Parrott and Mr. Mulligan returned to their seats.

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

No other business was heard.

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#### **V. ADJOURNMENT**

*It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 10:45 p.m.*

Respectfully submitted,

Jane K. Kendall  
Acting Secretary

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

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**April 22, 2014, To Be  
Reconvened April 29, 2014**

**MEMBERS PRESENT:** Chairman David Witham; Vice-Chairman Arthur Parrott;  
Susan Chamberlin; Derek Durbin; Charles LeMay\*; Christopher  
Mulligan; David Rheume

\*Delayed arrival

**MEMBERS EXCUSED:** Alternate: Patrick Moretti

**ALSO PRESENT:** Jessa Berna, Planning Department

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**I. APPROVAL OF MINUTES**

A) June 18, 2013

*It was moved, seconded and **passed** by unanimous voice vote to approve the Minute as presented..*

B) August 20, 2013

*It was moved, seconded and **passed** by unanimous voice vote to approve the Minutes with minor corrections.*

C) October 15, 2013 (This item was postponed to the April 29, 2014 meeting).

D) October 22, 2013

*It was moved, seconded and **passed** by unanimous voice vote to approve the Minutes with minor corrections.*

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**II. PUBLIC HEARINGS - OLD BUSINESS**

A) Motion for Rehearing by Applicants regarding the overturning of a Certificate of Approval for property located at 173 – 175 Market Street.

Chairman Witham announced that a procedural error or new information would be required to justify a rehearing.

Mr. Rheume said he looked at the information provided by the requestor for the motion for rehearing, which suggested that the Board of Adjustment applied the wrong review standards in conducting the *de novo* review of the application, however, the same applicant urged the Board to precede with a *de novo* hearing for the Conditional Use Permit. He said they reviewed all the packages that were presented from both sides and there were a large number of quotes from the Historic District Commission meetings leading up to the appeal so, while primarily performing a *de novo* review, they were still given information about what had happened at the HDC. Mr. Rheume said they saw both thought processes and the conflict that was going on within the HDC on the matter. He said some of those same concerns and conflict came forward in the review of this appeal and with the decision for it.

Mr. Rheume said there was a lot of talk about the 45 minutes for presentations. He said that under the circumstances he thought they granted a significant amount of time to both parties and there was a lot of additional time for questions, which in turn lengthened the 45 minutes to increase the amount of discussion for both sides. He said everyone spent a lot of time reviewing the very thick package that came from both sides and he thought they had a good understanding of what was presented.

Mr. Rheume said there was a question about the standing to appeal or not. The appellants had that opportunity. There were some appellants that were direct abutters that would have the opportunity to appeal this under any circumstances and there was some consideration that some of the other appellants had a right to be included in the appeal on this decision as well. Lastly, there was a question of the Board's understanding of the Historic District Commission Ordinance requirements, which he believed they did understand very well and they made their findings based on what the HDC was trying to accomplish with this property.

*Mr. Mulligan made a motion to deny the request for a rehearing and Mr. Rheume seconded.*

Mr. Mulligan agreed with Mr. Rheume and said the motion did not identify any new evidence that was not presented originally and he did not think the motion pointed out any technical error of law or procedure leading to the conclusion that the Board had come to the wrong decision.

Mr. Rheume reemphasized some of the specific items that were brought forward by the requestor for granting the rehearing and agreed that there was not enough to indicate the Board made an error that would require a rehearing.

Vice-Chair Parrott said the *de novo* argument applied to the totality of the project, from the beginning with a fresh look from a completely new board that had no connection with the project whatsoever. He said it was not an insignificant point because the Board was comprised of people who were experienced with land use issues in general and were looking at something, which they had not considered previously. He said that should add an extra layer of confidence to those who were looking at it and trying to decide whether the applicants got fair treatment. He said it was a long and thorough hearing and in the end, they had a near unanimous vote.

Mr. Rheume noted again the comments that the 45 minutes were not enough and that there were several HDC work sessions and meetings, yet the Board was reviewing the proposal all in one meeting. He said the Board of Adjustment did review everything in one meeting, but there should be recognition that they were looking at the final product of the developer and the HDC.

Their process, starting with an embryonic idea of what the developer would like to do with the property and all those work sessions, were really refining it and developing it to that final product. The HDC decided what was an acceptable solution for their requirements by a close vote and this Board was able to give it a fair hearing because they were looking at what the developer was coming up with as their best and final solution.

Chairman Witham said that he too supported the motion to deny the request for rehearing and even though he voted in the minority during the appeal, he did not think there was a strong case to rehear it. Concerning the time limitation, it seemed like half the allotted time was spent discussing the condition of the brick. He said it was an issue, but he thought the most contentious part of the proposal was the size of the rear addition and the glazing and felt that was brushed over in the presentation.

*The motion to deny the petition passed unanimously by a vote of 7-0.*

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B) Motion for Rehearing by Appellants regarding the granting of a Conditional Use Permit for property located at 173 – 175 Market Street.

Mr. Rheume stated that he had reviewed the request for rehearing which he felt came down to one major argument which was essentially that the Planning Board had been bypassed in the conditional use permit process. When the Board had considered conditional use permit, an issue had been raised of a conditional use permit going through the Planning Board before the Historic District Commission. There was an unusual situation where a new revision to the Zoning Ordinance dealing with this had not yet been fully approved by the City Council. At the same time state statute apparently said that the statute became law as long as the revision was in the first reading. This conditional use permit fell into that grey area and the Board had an extensive discussion with City Attorney Sullivan to receive some guidance as all the implications of a change in the law at that point in time were not fully understood.

Mr. Rheume stated that he had taken a look at all the issues, one of which was the timeliness of the information that was being put forward by the presenters where it wasn't part of their appeal of the project but was subsequently provided. He did not feel they were timely in presenting this information. The other issue was that had the Board of Adjustment sent the issue back to the Planning Board, comments would have been made, which then would have to be answered and the Board would have more conflicting information to consider. He did not feel that additional process would have made a substantial difference in the Board's deliberations. While there may have been a procedural error in the process, he felt the Planning Department would ensure it would not occur again and he did not feel their decision on the conditional use permit had been invalidated.

Mr. Durbin commented that the motion for rehearing was arguing the same points as argued before and suggesting they remand the review back to the Planning Board. He felt it was rehashing old arguments, which was why there was a procedure in place to limit discussion for rehearing. He stated that there was no new information provided or any errors in the law or procedural errors of which they Board had not already been aware of and discussed at the hearing.

*Mr. Durbin made a motion to **deny** the request for a rehearing and Mr. LeMay seconded.*

Mr. Durbin said he had nothing further to add except to confirm his comments for the record. Mr. LeMay said they discussed, understood and decided on the issue. He saw no new information and was comfortable with denying the request.

*The motion to **deny** the petition **passed** unanimously by a vote of 7-0.*

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Mr. Rheume recused himself from the following petition.

C) Case # 3-4

Petitioner: 303 Islington Street LLC

Property: 303 Islington Street

Assessor Plan 144, Lot 11

Zoning District: General Residence C

Description: Convert three office use units to dwelling units with an increase in required off-street parking spaces.

Requests: The Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Special Exception under Section 10.440, Use #1.52 to allow conversion of a building existing on January 1, 1980 to four dwelling units with less than the required minimum lot area per dwelling unit.
2. A Variance from Section 10.812.12 to allow a dwelling existing on January 1, 1980 to be converted to additional dwelling units without complying with the minimum open space, maximum building coverage requirements, and off-street parking requirements.
3. A Variance from Section 10.1111.10 and 10.1112.30 to permit a change of use that provides 8 off-street parking spaces where 12 are required.
4. A Variance from Section 10.1114 to allow off-street parking spaces and access ways that do not comply with the off-street parking dimensional requirements.

*(This petition, postponed from the March 18, 2014 meeting, has been revised by the addition of Request #2.)*

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernie Pelech appeared before the Board on behalf of the owner and applicant, Mr. Ed Benway, principal of 303 Islington Street. Attorney Pelech noted that the advertisement was not exactly correct, saying that they required an increase in parking when the revision actually reduced the onsite parking requirements from 14 to 12. He said he reviewed the plan with Ms. Walker in the Planning Department. He said currently there were three offices and an apartment, but the new plan would remove two office spaces and add three residential units.

Attorney Pelech said it was a unique property that sat between the Central Business District and the Residential Business District on the left side of Olde Port Traders. He said there were letters from abutters in the packet with one that was under the impression that they were abolishing

the building but the principal, Mr. Benway, actually had his office in the building and was not a developer. He said General Residence C was an apartment district, businesses were not allowed, and the offices there were a result of variances. They intended to take away the offices and replace them with residential units, which would make them more conforming. He said they were not proposing changes to the exterior of the structure, the open space, lot coverage, or the parking lot with eight spaces that had been there many years and predated the Ordinance. Attorney Pelech said there was a shortage of affordable work force housing in Portsmouth and their purpose was to provide additional residences, and take away the commercial use.

Attorney Pelech reviewed the variance criteria and said the proposal would not be contrary to the public interest because it would not alter the character of the neighborhood because there would be no exterior changes except for the removal of the office space signs. Attorney Pelech said granting the variance would not threaten the health, safety or welfare of the general public because it would be built to code. In regard to parking spaces, the residential units required seven spaces, and the 9 a.m. to 5 p.m. business would be in operation while the residents were at work so there would be no interference. He said substantial justice would be done considering the property evolved from offices and back to residential from the granting of variances by prior boards.

Attorney Pelech said there would be no benefit to the public by denying because granting the request would allow the property to become more conforming and three additional housing units would become available. He said the abutting property in the Central Business District had no parking requirements, or along Islington Street and there were letters from abutters that said the proposal would not exacerbate parking issues. Attorney Pelech said the special conditions that distinguished it from other properties in the area were that it was a 5,000 square foot lot, with a 2,000 square foot building that was in existence prior to zoning and could not meet the current open space and parking requirements. He said the second part of the hardship test was that it was a reasonable use because it was allowed by the Ordinance in an area with a variety of uses and they were removing two uses that were not allowed.

Attorney Pelech said there was no fair and substantial relationship between the general public purposes of the Ordinance and the application of that provision to the property because the parking requirements were established to keep parking off the street and they were trying to get the parking closer to the site. He said twelve spaces were required, but they could only provide eight spaces. He said the 9 a.m. to 5 p.m. office use would be combined with working residents and they were becoming more conforming.

Vice-Chair Parrott asked what the means of access would be to the converted two-bedroom apartment on the third floor. Mr. Ed Benway said there was an internal set of stairs to the large third floor through a hallway. Vice-Chair Parrott said the Board of Adjustment Rules and Regulations required floor plans for renovations, but he only saw the basement floor plans and nothing for the third floor. Attorney Pelech said he submitted plans to Ms. Walker who said they were satisfactory and the staff memo indicated that they had submitted all the necessary materials. Vice-Chair Parrott said it was a clear-cut requirement and he did not feel the application was complete.

**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 suggested the Board deal with all the variance requests at once.

*Ms. Chamberlin made a motion to **grant** the petition as presented and advertised and Mr. Mulligan seconded.*

Ms. Chamberlin reviewed the criteria, noting that granting the variance would not be contrary to the public interest because the new proposal would be less non-conforming and there would be no changes to outside or lot coverage. She said it was on the border of the residential and commercial zone and was an accommodation of office and residential space.

Ms. Chamberlin said the spirit of the Ordinance would be observed because the parking was adequate for the use proposed and it would also be less non-conforming. She said substantial justice would be done for similar reasons. Ms. Chamberlin said the values of surrounding properties would not be diminished because the proposal fit in with the neighborhood, it was a change for the better, and they were removing the variance for office space. Ms. Chamberlin said the special conditions that distinguished this building from other properties in the area was that it was a large building on a small lot and required variances, but the proposal was to make it less non-conforming making it easier to meet those conditions.

Mr. Mulligan said the Special Exception request was to allow a conversion within the zone. He reviewed the standards, noting that the use was permitted in the zone. He stated that the proposal would not result in any hazards, nor would there be any detriment to property values as it appeared the exterior would remain the same. He said no odors would be generated that there were not already there, nor would there be any creation of a traffic hazard. There should be a net decrease in traffic. Although increasing the number of residents in the area could have some impact, he could not say there would be an excessive demand on municipal services. He said without any changes to the building or parking area, there was no indication there would be any increase in storm runoff.

Addressing the criteria for granting the variances, Mr. Mulligan stated that the building would remain the same on the outside so the essential character of the neighborhood would not be changed. The health, safety or welfare of the general public would not be threatened so that granting the variances would not be contrary to the public interest. He said it would not be contrary to the spirit of the Ordinance because it was in keeping with the purpose of General Residence C District to promote moderate to high-density residential uses. He said denying the variance would result in substantial injustice by preventing the owner from using his property in a reasonable way while there would be no benefit to the public. He said there would be no diminution in the surrounding property values and agreed with Ms. Chamberlin's assessment that there would be an unnecessary hardship because it was a larger building on small lot that distinguished it from others and the property abutted an incompatible zone creating a special condition.



Mr. LeMay shared Vice-Chair Parrot’s concerns regarding the adequacy of the application. He said despite the variance request making it less non-conforming, he was not entirely comfortable with the application, but he would still support the motion.

Chairman Witham said they had discussed updating the Rules and Regulations, which had been approved recently, but he was not sure when this application first came in and was postponed, but he thought it was around the same time.

Mr. LeMay said he understood things sometimes fell between the cracks and so he would grant the benefit of the doubt, but he still wanted to be sure they had plenty of information whenever there was a change of use.

Vice-Chair Parrott said the parking sketch showed head to toe parking for two vehicles at 8½’ x 18’, but the actual requirement was 8½’ x 20’. He said there was another requirement that all parking spaces should be dimensioned fully, but parking spaces labeled 1-6 were only dimensioned by width, but not by length. He said 20’ was required for the maneuvering aisle, but this plan only left 14½’, which would not leave enough room to back out. He said that proper plans should have been submitted.

Chairman Witham said that variance request #4 stated that it did not meet the dimensional requirement. Vice-Chair Parrott said he understood, but the information on the sheet was missing or not correct.

Mr. Mulligan said the applicant was entitled to rely on the Planning Department staff and it was not fair at this point to say the proposal would not be heard if the applicant did not read the rules thoroughly. He said they knew what the applicant was asking for and the proposal had not changed significantly. He said he did not think it appropriate to require fully engineered plans because of a new procedure had not been pursued by the Planning Department.

Chairman Witham said he was on the fence, but he thought Attorney Pelech made a good case, and all the parking spots were assigned, with one space for office use, and one or two on street parking spaces. He said they were 30 feet from the Commercial zone, which did not require parking spaces so he was not convinced it would be a problem.

*The motion passed by a vote of 6-0.*

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Mr. Rheume resumed his seat. Mr. Durbin recused himself from the following petition.

D) Case # 3-6

Petitioner: PF Jax Real Estate, LLC, owner, Bryan Pappas, applicant

Property: 159 Middle Street

Assessor Plan 127, Lot 4

Zoning District: Mixed Residential Office

Description: Install a 2’ x 5’ free-standing sign.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1253.40, to allow a front setback of 1'6" ± where 5' is required.
2. A Variance from Section 10.1253.30 to allow a sign height of 10'± where 7' was the maximum allowed.

*(This petition was postponed from the March 18, 2014 meeting)*

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

Mr. Bryan Pappas, one of property owners, appeared before the Board. He said there were a couple of corrections on the request because the sign was not 2' x 5' but would be 3' x 7' and installed the sign on a 16" raised bed, which needed to be added to the sign height.

Mr. Pappas said he purchased the property in the beginning of December 2013 with one tenant on the first floor and the remaining two-thirds of the building was currently unoccupied. He said they received requests for signage visible from the road while they were interviewing tenants. He said adding or subtracting from the current tenant's signage would not work.

Mr. Pappas reviewed the five criteria, saying that the proposal would not be contrary to the public interest and the spirit of the Ordinance would be observed. He said it would not deter from the surrounding properties. He said the sign would be behind a wrought iron fence and face away from the public right of way and would not be a threat to the public health, safety or welfare. He said they were trying to utilize the property to its potential. He said there would be no detriment to surrounding property values and the signage could increase property values by enhancing the professional image of the building. Mr. Pappas said the property did not conform to the current setbacks Ordinance and literal enforcement would cause financial hardship because it would hinder his ability to rent to professionals requiring road signage.

Chairman Witham said the lettering would go on the 2' x 5' part of the sign, but the total dimensions would be 3' x 7' with the post and top bracket.

Mr. Pappas said they would apply a style and aesthetic to fit in with the surrounding properties. Chairman Witham asked if they would go before the Historic District Commission and Mr. Pappas said they would.

Ms. Chamberlin stated that it appeared the sign would go behind the bush and Mr. Pappas said two of the bushes would be replaced with lower shrubs for visibility. Ms. Chamberlin asked if the sign would be turned to its side and Mr. Pappas said that was correct.

Mr. Rheume asked about if there would be exterior lighting and Mr. Pappas said there were no plans for exterior lighting at this time.

Mr. Rheume said he looked around at other signs in the neighborhood and he thought that the height would stand out. He asked if the floor listings would be included on the directory and if they could be put on another sign closer to the building or if the sign could be lowered. Mr. Pappas said he probably would remove the floor lettering.

Mr. LeMay asked how far the building setback was from the road and Mr. Pappas said it was 5' from the sidewalk. Mr. LeMay said the abutter's setback appeared to be greater and more in

compliance with the zoning. Mr. Pappas said the sign would block one of windows if they set it back any further. The abutter's signage was about 3' from the sidewalk, but they had similar issues. Mr. Rheume said he understood that a sideways oriented sign might not work for the line of sight in traffic.

### **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. Rheume said he compared the application to other signs in the neighborhood and he was okay with this sign sticking out into right of way, but he was concerned with the height considering it was 16" above grade and he would be more comfortable if they could meet the 7' requirement. He understood wanting to get a lot of information on the sign, but said they had several options to squeeze the letters in or leave one or two offices off and provide a discount.

Vice-Chair Parrott thought the sign was fine except that he agreed with Mr. Rheume's concern for height. He said the top sign replicated what was already there and was more than twice the size of all the other signs on the pylon. He said this was a handsome building as were all of the buildings around it. It was located near the start of the downtown district and a large sign, no matter how well designed, was never an attractive addition to a property. He said in this particular case, there was slow automobile traffic or walking traffic along that section of the roadway so he did not think it had to be overly high.

Chairman Witham said they had to decide if it was a valid argument that the height was driven by the wrought iron fence and the number of potential offices. Vice-Chair Parrott said the site and the choice of the individual signs was also a factor.

*Mr. Rheume made a motion to **grant** the petition as presented and advertised with the stipulation that the total height of the sign as recognized by the code be no greater than 7', or 84". Vice-Chair Parrott seconded.*

Chairman Witham said they could do that or they could just grant the first variance request and not approve the second.

*Mr. Rheume amended the stipulation to be that they grant request # 1 and allow a front setback of 1'6" where 5' was required, but not grant a variance from Section 10.1253.30 so that the sign must conform with the 7' maximum permitted in that zone. Vice-Chair Parrott seconded.*

Mr. Rheume reviewed the criteria, noting that granting the variance would not be contrary to the public interest because they were trying to keep an overall look to the general area. He said there were similar signs that were also closer to the road than what the Ordinance called for in the area, but that was driven by nature of the buildings on Middle Street with common setbacks to the road and public right of way. He said the spirit of the Ordinance would be observed and although 1'6" was less than the 5' required, the requirement was designed for signs to be a

respectful distance from the road. In this case, the buildings were fairly close to the road, but there was a need for visible signs. He said substantial justice would be done by allowing the property owner to make full use of their property, and advertising for tenants in their building was a basic expectation.

Mr. Rheume said granting the variance would not alter the character of the neighborhood nor threaten the health, safety or welfare of the general public. He said the values of surrounding properties would not be diminished because the sign was similar in nature to those on other properties. He said literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship because there were special conditions that distinguished it from other properties in the area. He said a 5' setback from the right of way was not physically possible, so the proposal was reasonable. He said there was no public interest that would outweigh the negative consequences of moving closer to the road than what the Ordinance required.

Vice-Chair Parrott concurred with Mr. Rheume's comments.

*The motion passed by a vote of 5-1 with Mr. LeMay voting against the motion.*

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Mr. Durbin resumed his seat.

### **III. PUBLIC HEARINGS – NEW BUSINESS**

1) Case # 4-1

Petitioners: Summit 501 Islington LLC and Todd Baker Winslown Property Management

Property: 501 Islington Street, #1A-2

Assessor Plan 157, Lot 6-2

Zoning District: Business

Description: Install a 58"± x 102"±, 10'± high free-standing sign.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1253.10 to allow a front yard setback of 10'± where 20' was the minimum required.

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

Mr. Todd Baker appeared before the Board on behalf of the applicant. Mr. Baker said the building had a 0' setback and was built before the Ordinances were in effect. He said there were two existing signs within the setback, and the Ordinance required a 20' setback from the property line, which would make the sign observable. He said one sign was half a foot off the property line and the other was 6' back. He said they were proposing to replace the two signs with a single, taller sign that would have enough space for each tenant. He said it would have the same square footage in same footprint, but would be further from the property line to make it less non-conforming.

Mr. Baker reviewed the criteria for granting the request, stating that it would not be contrary to the public interest and would observe the spirit of the Ordinance. He said it was an appropriate use in a commercial area that already had a sign advertising a business. He said the new sign would have space for each tenant in the building. He said it would not alter the essential character of the neighborhood or threaten public health, safety or welfare. He said they spent time and money to make the building more attractive and appealing to the neighborhood. He said substantial justice would be done, as the sign would be more attractive and appealing with better visibility. He listed the tenants including a bank, an insurance company, a title and escrow business and a marketing company all of which, he stated, served the community. He said the value of surrounding properties would not be diminished and they would be providing a more attractive, externally lit sign in place of two internally lit plastic and metal signs. He said there was a hardship as a result of special conditions on the property in that it was built on the property line and trying to enforce the literal language of the ordinance would be unreasonable. He said setting the sign further back would be inside the building, which would not serve its purpose. He said there would be no fair and substantial justice in denying the petition.

Mr. Rheume asked if the intent was to replace the entrance and location signs and replace them with a single sign. Mr. Baker agreed. Mr. Rheume asked if the exit sign for the bank drive-through would remain and Mr. Baker said it would.

Mr. Rheume noted that the handwritten application listed 10' for the setback, but the variance request listed a 6' setback from the property line and asked which was correct. Mr. Baker said he first estimated 10' from the curb, but it was actually 6½' from the property line, which was on the inside of the curb.

Mr. Rheume asked if any consideration was given to not adding a top piece. Mr. Baker said they changed the trim and added a crown to the building on the outside of the building so they thought the top piece tied in the sign to the rest of the building and was important. He said the 10' was within the ordinance. Mr. Rheume said the front yard setback was advertised as 10', plus or minus and now they were asking for 6½' and wondered if that was acceptable for the plus or minus. Chairman Witham said it was a big plus or minus, but it was in the same spot so even though there was a discrepancy, the rest of the documentation was clear.

Ms. Barbara DeStefano of 99 Hanover Street said she worked for the insurance company on the third floor and when their parent company, People's United Bank moved out from the first floor, they lost their street signs. She said this proposal would do away with the smaller sign close to the road that blocked the line of sight when exiting. She said the new sign would not create a problem because it was in line with the building. She added that she would like to see the 501 Islington Street business listed on top of the sign.

### **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 and Mr. Durbin seconded.

Mr. LeMay said it was a straightforward request to move the sign back and improve the view from Dunkin Donuts. Mr. LeMay then went on to review the criteria, noting that granting the variance would not be contrary to the public interest because it would be in the same location as the existing sign and the setback would be improved. He said the sign would not change the nature of the neighborhood and allowed advertising for the tenants. He said the same arguments applied to observance of the spirit of the Ordinance.

Mr. LeMay said substantial justice would be done with a new and attractive sign that benefited the applicant and community and no harm would be caused. He said the values of surrounding properties would not be diminished because they were not substantially altering the neighborhood and they would be clearing up sign clutter by reducing the number of signs by one. Mr. LeMay said literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship because of the siting of the building on the lot and the short frontage. The proposal was a reasonable compromise for setback and visibility.

Mr. Durbin said the proposal was reasonable considering how large the structure was and how many businesses could fit in the building.

Mr. Rheume said he would support the motion. He said the zoning changed from Business to Mixed Residential and there was a Business District across the street, which allowed a 5’ setback which was what the applicant was requesting, although the MRB district only allowed a sign height of 7’ instead of 20’. He said other businesses on this side of the street had signs that were higher so he was okay with the 10’ height limit.

*The motion passed unanimously by a vote of 7-0.*

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2) Case # 4-2

Petitioners: Richard D. Bournival, Jr. and Alissa C. Bournival

Property: Adjoining 2355 Lafayette Road

Assessor Plan 272, Lot 9-6

Zoning District: Gateway

Description: Install an 8’± x 4’±, 8’± high free-standing sign.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1530 to allow a free-standing sign for an accessory use on a lot adjacent to the lot containing the principal use or building.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Michael LeClaire, representing the applicants, said they came before the Board for approval of their special test track last year and now they were asking approval for a sign to identify the test track being there and open. He said the sign would be perpendicular to the road and would not be illuminated.

Mr. Rheume asked what the reasoning was for placing a sign on the test track lot instead of at the dealership. Mr. LeClaire said they tried to keep the test track natural looking without cutting trees, but it was not very visible to customers at the dealership. Mr. Rheume said he understood trying to attract business, but he would be concerned with attracting passersby to look through the woods. Mr. LeClaire said they were trying to increase business and get exposure as the only test track in New England. He said there was a vacant lot with a huge wood line between the dealership and the test track and this was the strongest location for the sign. Mr. Rheume said this was similar to the variance request for the test track and asked what the rationale was for keeping the two lots separate. Mr. LeClaire said it was in case they wanted to divest that lot in the future.

Ms. Alissa Bournival said she would be happy with any signage, even on the Jeep property. Mr. LeClaire said that would be a different project on a different piece of property. Mr. Rheume said being on an accessory use lot was what drove the variance. He said they would need to look at the dealership lot, but it looked like there would be a suitable spot. Chairman Witham agreed that they would need to do an analysis so they could not venture down that path at this point.

### **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 said he was somewhat uncomfortable with the request. He said even though it was a sign to identify Bournival's test track, there was no access and so he was not comfortable with people looking for the test track entrance.

Mr. Rheume said he had the same uneasiness with the sign being a distraction. He said it was an odd placement for a sign and he hoped they could figure something out that would work better.

Vice-Chair Parrott said the more he looked at the sign the more it resembled a billboard to him. He said billboards usually gave directions indicating how far away something was, but this was in a section of woods. He said signs were usually located at entrances if not giving directions. He said those living in the area understood where Bournival was, but he was concerned with driver confusion for out-of-towners who were not familiar with the business.

Vice-Chair Parrott *made a motion to deny the petition as presented and advertised and Mr. LeMay seconded.*

Vice-Chair Parrott reviewed the criteria, noting that granting the variance would be contrary to the public interest, which was to keep the traffic flowing and to follow signs for turning, which this sign did not do. He said the spirit of the Ordinance was to promote the health, safety and welfare of the general public, which fell short in this request. He said the request had to meet all five criteria and it did not meet the first two.

Mr. LeMay added that the Board might be more amenable to a sign closer to the business driveway.

Chairman Witham said he would support the motion to deny. He said even if the wording on was changed to say “Entrance 500’ feet ahead” it wouldn’t change his mind because a variance was needed to use the lot as an accessory use and now they needed a variance for a sign on a lot that was separated by another lot. He agreed that he would not have a problem if the sign were at the dealership.

*The motion to deny the petition passed unanimously by a vote of 7-0.*

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3) Case # 4-3

Petitioner: 4 Amigos LLC  
Property: 1390/1400 Lafayette Road  
Assessor Plan 252, Lots 9 and 7  
Zoning District: Gateway

Description: Install two free-standing signs, one with animation.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.1251.20 to allow a 204 s.f. ± free-standing sign where 100 s.f. was the maximum allowed.
2. A Variance from Section 10.1243 to allow multiple free-standing signs on a lot where only one free-standing sign was permitted.
3. A Variance from Section 10.1223.20 to allow signs that move, flash or give the appearance of motion where such signs are prohibited.
4. Variances from Section 10.1253.10 to allow a sign 22’ in height where 20’ was the maximum allowed and Section 10.1253.20 to allow a sign between 2.5’ and 10’ above grade within 20’ of an intersection.

**SPEAKING IN FAVOR OF THE PETITION**

Chairman Witham identified the sign as the former Yokens restaurant sign.

Attorney Richard Uchida and Mr. Jim Mitchell with 4 Amigos LLC appeared before the Board. Attorney Uchida said there was some repetition to the application since some variances were the same as the approval granted in October 2013, which was specific about location, but the location ended up moving after they went through site plan approval. He said at the urging of the public and Planning Board they were encouraged to do a full restoration of the sign, including movement of the fin, tail and spout lights, but the ordinance did not allow animation.

Attorney Uchida said the former Yokens restaurant site was redeveloped into a retail center housing Five Guys, Rite Aid, and the Newburyport Bank with two and a half acres to the rear yet to be developed. He said they were asking affirmation of the variances granted in October 2013 for freestanding signs, a variance in excess of 100 square feet to allow the Yokens sign and also a variance for a sign in excess of 20’ high with the spout and tail coming to 22’. He said they needed two new variances because of the animation and the location change.



Attorney Uchida showed the original sign location proposed at the corner and the new location, which was closer to the driveway and 80' down the road to avoid blocking the line of sight. Attorney Uchida said the Planning staff expressed concern that the location could be obscured by landscaping, and so they reworked landscaping and received site plan approval in March 2014. Attorney Uchida said there was no concern with traffic coming from the north and there would be no traffic coming from the south because Lafayette Road was divided. He said the stop bar was 10-12' from the road so pedestrians would still be visible because the sign was set back.

Attorney Uchida said they would not be asking for a variance request for the animation if they had not received requests to preserve the authenticity of the original Yokens whale sign. He said they estimated that it would cost \$40,000 to \$45,000 to restore the original sign with electronic animation. Attorney Uchida said neither variance request would decrease surrounding property values or bring about any danger or harm to the public by the placement of the signs. He said the Ordinance intended that there be reasonable and visible signage.

Chairman Witham noted that they had received approval for the height variance, the number of signs and square footage last time, but they lost their vested variance because the sign moved 80'.

Mr. Rheume said there was still old information along with new information in the application and he wanted to be sure everything was correct. He asked if the Rite Aid and Yokens signs were the only two signs on the lot that abutted Lafayette Road. Attorney Uchida said there was a third free standing sign on Peverly Hill Road signifying an entrance to the lot. Mr. Rheume noted that sign was on a separate lot and there was room on that sign for additional information for whatever was built there. Attorney Uchida said he did not think it was a separate lot, but that sign was 300' to 400' down Peverly Hill Road. Mr. Rheume said there was a tree on the median at the entryway and exit. He asked if the Planning Board required the tree to be there. Attorney Uchida said they lost a tree during construction that had to be replaced and the Planning Board asked that they place it so the tree canopy didn't block the view or get too large for emergency vehicles so they selected a slim species. Mr. Rheume said he would also be concerned a tree would suffer from salt damage.

### **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 petition as presented and advertised and Mr. Rheume seconded.*

Mr. Durbin said the applicant was asking for a reaffirmation of a variance that was already essentially approved. He said during the site plan review they were asked to move the Yokens sign closer to the original location near an entrance. The Board's main concern would be the obstruction of visibility and the amount of signage, which was driven by the number of entrances, but it seemed reasonable considering the size of the lot and number of buildings. He

said they were before the Board because they were asked by the public and the Planning Board to restore a sign with cultural and historical significance.

Mr. Durbin reviewed the criteria, noting that granting the variance would not be contrary to the public interest and in the spirit of the Ordinance because members of the public would not be in danger with an obstruction or allowing over clustering of signage. He said substantial justice would be done by weighing any hardship to the applicant against any benefits to the public if they were to deny request. He said the hardship to the applicant would be significant in terms of time and expense and bringing a piece of property that had fallen into waste back into a productive property that was beneficial to the community. He said he did not think restoring the Yokens sign would have any negative impact on the values of surrounding properties considering this lot took up an extensive area on the corner of Lafayette Road and Peverly Hill Road. He said there were special conditions that distinguished the property from other properties in the area because it was a large lot with several building structures and access points. He said owing to those special conditions there was no fair and substantial relationship between the general public purposes of the Ordinance and their application to this property because the main concern would be the obstruction of view at the entrance and exit and he did not feel it was an issue. Mr. Durbin stated that the proposed use was a reasonable one.

Mr. Rheume concurred with Mr. Durbin's points. He emphasized that it was in the public interest to restore a Portsmouth icon to its original condition. He said most people he spoke with liked it but he saw it as a plus for the community and applauded the owners for their effort. He added that they addressed concerns with traffic and pedestrians and it would be in the spirit of the Ordinance to move the sign away from the intersection.

Mr. LeMay said he recalled they had some stipulations that applied to the Yokens sign when they approved the variance request for the first time. Although he did not remember the exact wording, Mr. LeMay felt they should also apply to this request.

Chairman Witham said they could add stipulations, but he thought it fell under presented and advertised.

Mr. Rheume said he thought the added emphasis that this animation was an exception was important because he did not want to set a precedent for someone else to use this variance as permission for another animated sign with flashing colored lights that would be more objectionable.

Chairman Witham asked how he wanted to word that stipulation. Mr. LeMay read from the previous stipulation with the exception of the dimensions, "The variances are approved for the specific sign as presented in this application. This sign incorporates the restored Yokens sign formerly installed on the site plus a lower panel represented on the submitted plan as 60" high x 96" wide. Any modifications to the design and content, or replacement of all or portions of the sign, shall require a new variance."

Chairman Witham asked if the maker of the motion and the second of the motion agreed with carrying over the stipulation. Mr. Rheume said his one concern would be addressing the lower panel sign so no one would think they could animate that. Chairman Witham said the stipulation would be that the animation and height only applied to the Yokens sign. Mr. LeMay

suggested they could strike the last sentence. Mr. Rheume and Mr. Durbin both agreed to the stipulation.

Vice-Chair Parrott said the new business was already there and was a credit to the city, but it was his view was that signs should be accurate and informative and this one was not. He said though the Yokens sign was iconic, the Yokens seafood restaurant was no longer there and he was concerned that the sign would mislead. He said this was one of the better animated signs, but he still felt blinking lights would be distracting and annoying, adding a carnival atmosphere to the area. He said he agreed, however that the proposed new sign location was better than the previous location near the intersection.

- The variances for height and animation are approved for the specific sign as presented, with the animation added solely to the restored “Yokens” sign and not the proposed 60” x 96” lower panel.

*The motion passed with the stipulation that the variances for height and animation were approved for the specific sign as presented, with the animation added solely to the restored “Yokens” sign portion. The motion passed by a vote of 6-1, with Mr. Parrott voting against the motion..*

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4) Case # 4-4

Petitioner: 402 State Street, LLC

Property: 402 State Street

Assessor Plan 116, Lot 12

Zoning Districts: Central Business B and Downtown Overlay

Description: Allow a residential use on the ground floor.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance from Section 10.642 to allow a residential use on the ground floor in the Downtown Overlay District.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Timothy Phoenix appeared before the Board with his request for the building that was owned by his three law partners and was the former location of their law firm. He said the building was built in 1840 as a residence and they were hoping to preserve the interior period detailing with office or residential use, instead of retail use. He said at some point between 1840 and 1993 the residential use turned to office use. He said they bought the building in 1993, then moved to Parrott Avenue last year.

Attorney Phoenix stated that the building was across from Saint John’s Church, the John Paul Jones House, the Library Restaurant and the Rockingham, which were mostly condominiums. He said they had been trying to sell or lease the building for the last year and had interest in commercial use and residential use. He said the building was located in the Downtown Overlay District and the first floor could not be used residentially, yet it was abutting the Mixed Residential Office District, which did allow first floor residential use. He said the idea of the Downtown Overlay District was to promote economic vitality downtown, but the businesses in

the area were mostly offices or professional businesses. He said it was remote from retail establishments on Congress and Pleasant Streets with very little pedestrian traffic in this area that would benefit from retail space.

Attorney Phoenix said granting the variance would meet the spirit and intent of the Ordinance and would not be contrary to the public interest, noting that there would be no conflict as was cited in case law with the Chester Rod and Gun Club case. He said the variance would not alter the essential character of the neighborhood, threaten the health, safety or welfare of the general public or diminish the surrounding property values. He said none of the abutters were present to object to the request. Attorney Phoenix said the 1840's building exterior and interior were essentially as they had been and he was concerned that allowing retail use would cause harm.

Attorney Phoenix said there was no fair and substantial relationship between the general purpose of the Ordinance for the Downtown Overlay District, which was to promote the economic vitality of the Central Business District, and this location which was different. There was no reason to apply strict application of that Ordinance. He said substantial justice would not be served by a loss to the individual that would not be outweighed by any gain to the public. He said they had tried to sell the building, but there was more interest in a residential use than commercial. There were residential uses surrounding it and therefore it was reasonable for them to find a use that was compatible with the spirit and intent of the Ordinance. He said the public would not gain from a retail use in an out of the way location.

Mr. Rheume asked if they had a particular buyer in mind and Attorney Phoenix said they did not at this time.

Mr. Rheume noted that there were only two parking spots for the building. Attorney Phoenix said he asked Mr. Eric Weinrieb of Altus Engineering to make a parking plan. He said Ordinance section 10.11.250 required 1½ spaces per unit. He said he could not speculate how many units there might be, but he thought up to four would be plenty of parking. Any more would have to come back to the Board for a change of use.

Mr. Rheume asked if the first floor arrangement was residential. Attorney Phoenix said the layout was the same as when it was built, except the office did not require a full kitchen and bath so there was only a shower in the basement.

Mr. Mulligan asked for clarification on professional office space not being encouraged in the Overlay District as opposed to retail space and restaurants. Attorney Phoenix said he meant retail was mostly encouraged on the first floor to draw pedestrian traffic and most of the professional offices were on the upper floors. Mr. Mulligan asked if it was not also true to have a vibrant downtown, they would want a mixed use or professionals. Attorney Phoenix said he was not suggesting they eliminate professional office use, but was just asking that residential be added. Mr. Mulligan said four electric meters appeared to be on the side of the building. Attorney Phoenix said he only paid one bill, but perhaps there were several business there at one time.

Mr. David Choate, marketing agent for the property for the last year and a half said the purpose of the application was to increase flexibility to sell the building. He said they received an offer for 100% residential use as well as mixed office and residential use, but no one wanted it for

100% office use and at this point, he had to tell them residential use was not allowed on the first floor of the Overlay District. He said he was around when the Overlay District was created in reaction to residential dark spaces on first floor units of Daniel Street. He said he did not think it was ever intended to apply to State Street and the issue would not apply if the building was one street over. He said they could not say for certain what a potential buyer's ultimate intentions would be, but right now they were severely handcuffed. He said it was a fairly substantial building of 5,000 usable square feet on three floors, but many business uses want all 5,000 square feet on one floor with wide open floor spaces, which were available at Pease Development.

### **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. Rheume made a motion to **grant** the petition as presented and advertised and Vice-Chair Parrott seconded.*

Mr. Rheume said he thought allowing a residential use for this particular property was the right answer despite its being included in the Overlay District. He said this row of buildings always had a residential feel despite occasional office use. He said he would be concerned with removing the historic walls that had been preserved for business or retail use. He said law offices did not attract passersby and did not generate foot traffic for shopping or dining associated with first floor businesses.

Mr. Rheume reviewed the criteria, noting that granting the variance would not be contrary to the public interest because there was an interest in keeping the overall look and feel of buildings in the area that were mostly residential or non-pedestrian business oriented offices. He said he reviewed another request regarding a building on Chapel Street that was not a business so he thought there was some precedent. He said a good case could be made that the spirit of the Ordinance would be observed as a result of various first floor businesses in the surrounding area still operating, but this area of State Street was on the edge of the Overlay District and more residential and open as opposed to other parts of downtown.

Mr. Rheume said substantial justice would be done because it appeared the applicants made efforts to use the building in compliance with the Overlay District, but were not successful and allowing first floor residential use would give them additional options. He said the values of surrounding properties would not be diminished because many of the surrounding properties were also residential looking in nature and using this property exclusively as residential would be more beneficial than converting the use to a restaurant, which could be more of a detractor. He said literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship because it was a residential looking structure that created a special condition that distinguished it from other properties in the Overlay District. He said it was not suited to first floor business or commercial use and there was no fair and substantial relationship between the general public purposes of the Ordinance and their application to this property, which would be conducive to foot traffic. He said the proposed use was a reasonable one.

Vice-Chair Parrott said the property was in a mixed use and residential zone so that a residential use on the first floor was logical and would not seem out of place. He said there had been an honest effort to market the property as it was and it was unlikely that retail would spread in this direction due to the constraints in parking and other concerns. He said the building itself and the others nearby seemed to have aged well so he was in favor of allowing a residential use that would preserve the building. He said downtown visitors had other areas to wander and probably would not wander in that direction.

*The motion passed unanimously by a vote of 7-0.*

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5) Case # 4-5

Petitioner: KWA, LLC, owner, Tanya Hart, applicant

Property: 165 Court Street

Assessor Plan 116, Lot 27

Zoning District: Mixed Residential Office

Description: Establish new salon.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance under Section 10.440, Use #7.20 to allow a personal services use in a district where this use was prohibited.
2. A Variance from Sections 10.1111.10 and 10.1112.30 to allow a change to a personal service use without providing the required parking.

**SPEAKING IN FAVOR OF THE PETITION**

Ms. Tanya Hart stated that she was the applicant and wanted to open a salon that specialized in color, which was a low traffic specialty with three to four chairs and a maximum of 15-20 by-appointment only clients per day. She said the staff would consist of herself and two others and possibly a part-time apprentice. She said the hours would be limited, closed Sundays and Mondays, open 10 a.m. to 8 p.m. on Tuesdays and Thursdays; 10 a.m. to 6 p.m. on Wednesday; 10 a.m. to 4 p.m. on Fridays and 10 a.m. to 3 p.m. on Saturdays.

Ms. Hart said the business would fit in with the character of the neighborhood that housed other personal service providers and all would benefit by sharing clients.

Ms. Hart said the area was currently zoned for mixed residential and office and the property currently did not allow for parking and there was nowhere to park nearby. She said the property was a short distance from the dog park that had ample free parking and was half a block outside the Central Business Zone that allowed parking. She said the property was formerly used as retail in 1997, and then again in 2010 but there was nothing on file with the Board for that business. Ms. Hart provided photos and a letter from another business in the area stating how her business would be of benefit.

Ms. Hart said there would be no major changes to the property except for new flooring and shampoo sinks. Ms. Chamberlin asked if there would be any special waste disposal process for

washing dyes down the sewer and the Ms. Hart said there were no special requirements except the State required them to provide an air purification system.

Mr. Rheume asked which municipal lot was a block away and Ms. Hart said it was the Parrott Avenue lot near the Citizens. Mr. Rheume also asked where the dog park was and Ms. Hart said it was across the bridge coming toward City Hall near the tennis courts.

Mr. LeMay asked how long customers usually visited and Ms. Hart said appointments were usually for two hours. Mr. LeMay asked if she knew if the metered parking a block away was good for that time and Ms. Hart said the meter parking lot across the street allowed four hours of parking.

Mr. Mulligan asked if she knew how long the space was unoccupied and Ms. Hart said she was not sure, but there was an insurance agency in the space for twenty years and the current landlord was using the unit next door for an office, but the rest of the building was vacant.

### **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-Chair Parrott made a motion to **grant** the petition as presented and advertised and Mr. Mulligan seconded.*

Vice-Chair Parrott said the building had been used as commercial space for a long time with several different uses. He said this use would fit in the mixed use neighborhood with similar uses in the area and would not interfere with neighbors. She stated that the use was confined in the building and parking was available at the free public lot as well as nearby meters.

Vice-Chair Parrott reviewed the criteria, noting that granting the variance would not be contrary to the public interest because it would be served by such a facility and the impact on traffic would be minimal. He said the spirit of the Ordinance would be observed by encouraging new businesses and this was a reuse of a building that was currently vacant.

Vice-Chair Parrott said substantial justice would be done by granting the variance because there was no overriding public concern arguing against the use. He said granting the variance would not diminish the values of surrounding properties because it would fit into the mixed use area and be confined within the building with no changes to the exterior.

Vice-Chair Parrott said literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship because there were special conditions that distinguished the property from others in the area such as being on a corner and only certain businesses would find it useful and this was one. He said no fair and substantial relationship existed between the general public purposes of the Ordinance and their application to the property. He said he could not think of any valid arguments to say it was not a reasonable use of the property.

Mr. Mulligan agreed with Vice-Chair Parrott’s review and just noted that the proposed use was similar to other personal services in the area. He said that substantial justice would be done by granting the variances and there would be no gain to the public in denying them that would outweigh the resulting burden on the applicant. He said none of surrounding properties were likely to be affected. He also agreed that there was a hardship for business placement on a small corner lot with no parking and the use fit well with others in the area so the parking restriction was not necessary to achieve the purposes of the Ordinance.

Mr. Rheume said requests for uses were generally something they were careful about granting, but he thought in this case it was reasonable to grant a variance rather than a special exception. He said the Central Business B District allowed this use and perhaps that should have been extended on both sides of Fleet Street. He said the property was used for business for many years, which established precedents in close proximity of similar uses so there was a hardship specific to the characteristics of this property. He said in regard to the parking, he had some concern that the referenced parking spaces were at quite a distance, but he did the math and there was only one space different and he thought that was reasonable as well.

*The motion passed unanimously by a vote of 7-0.*

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Vice-Chair Parrott and Mr. Mulligan recused themselves from the following petition.

6) Case # 4-6

Petitioners: AHI Holdings, LLC, owner, Daniel E. Innis and Doug Palardy, applicants.

Property: 40 Court Street

Assessor Plan 127, Lot 1

Zoning District: Mixed Residential Office

Description: Establish beer and wine service in hotel lounge.

Requests: The Variances necessary to grant the required relief from the Zoning Ordinance, including the following:

1. A Variance under Section 10.440, Use #9.51 to allow a restaurant with an occupant load of less than 250 in a district where this use was prohibited.
2. A Variance from Sections 10.1111.10 and 10.1112.30 to allow a change of use with 32 off-street parking spaces where 38 parking spaces are required.

**SPEAKING IN FAVOR OF THE PETITION**

Chairman Witham informed the applicant that there would be only five members sitting and they would need four positive votes to grant the petition. It was up to their comfort level if they wanted to proceed. The applicant said they would go forward with the hearing.

Owners, Daniel E. Innis and Mr. Doug Palardy, stated that they wanted to establish beer and wine service in the lounge of the Hotel Portsmouth, formerly known as the Sise Inn, which had been in operation since the mid-1980s. They had purchased the property in November of 2013 and had upgraded it, adding a limited food service in the morning with a continental breakfast for guests. He said they were proposing to open the old lounge in the lower level. He said it was operated as a lounge approximately ten years ago with seating for twenty people and would operate from 3 p.m. to 8 p.m. each day as an amenity for guests. He said they would not



require a full restaurant license to serve limited food service with beer, wine, small sandwiches, salads, cheese and crackers from the limited catering kitchen. He said it was not visible from the street or adjacent properties and there would be no separate signage directing people from the street to the location.

Mr. Innis said they did not believe the proposal would alter the essential character of the neighborhood which was a mix of commercial enterprises and residences. He said the lounge would be located in an existing space that was previously used for a similar purpose. He said there would be no harm to the public health, safety or welfare from the proposal. He said substantial justice would be done with a benefit to their guests. He said they could not legally deny public access, but they were not seeking to reach the public. Given the nature of the commercial operation of a 32-room hotel, he did not feel adding a lounge to an existing space that was designed for that purpose would diminish the value of surrounding properties. He said their objective was to enhance the value of properties in the neighborhood by creating a unique experience in Portsmouth, similar to what they did at the Ale House Inn, but on a larger scale. He said they wanted the property to become an asset to the neighborhood and would work hard as the owners that lived in the neighborhood and would insure that they did it in the right way. He said literal enforcement would result in an unnecessary hardship because a restriction for a reasonable use that had been applied to the property previously would be different than other hotels in the downtown area, which had lounges.

Ms. Chamberlin asked if they planned to have hot food or deep fryers. Mr. Innis said they only had a convection and microwave oven. Ms. Chamberlin asked if the food would be made on site or brought in. Mr. Innis said the salads and cheese plates would be made there.

Mr. Rheume asked for clarification on the layout of the building. Mr. Innis said the front of the building faced Court Street and the lounge was below the lower level of the front, but the access stairs were halfway down the building and not visible from the front entry. He said the parking lot was at the backside where most guests entered at the lower level and took the elevator up to register for their stay. He said the lounge was at the back of that entrance corridor. Mr. Rheume asked if the back entrance was the access that they were required to keep by law and Mr. Innis said that was correct and conceivably someone could come in the front door and go down the stairs to the lounge, but no one would know it was there so it was unlikely.

Mr. Rheume noted that the application referred to 32 off street parking spaces currently, but the diagram showed 35 parking spaces. Mr. Innis said they changed some landscaping that allowed three more parking spaces. Mr. Rheume said the zoning requirement calculations for parking were complicated and he was trying to understand what the requirement would be with and without the lounge compared to what they currently had. Mr. Innis said he did not know the answer, but he knew they previously had 28 spaces and now there were 35 spaces.

A resident of a nearby condominium said she went down to the Inn after she received the abutters notice and was invited by the owner to tour the facility. She said she could not tell the lounge was there until she was shown. She said they did a great job improving the exterior and interior of building. She said she liked the idea that there would be a lounge in the hotel so they could control alcohol consumption rather than guests going in and out for liquor.

Mr. Rheume said he wanted to make it clear that he was still concerned with the calculations of the current parking requirements, the proposed parking, and how the parking layout worked behind the building as well as the dimension of spaces. He said he wondered if the applicant could provide that information. He said it was not a fatal flaw, but it was of a concern to him.

Chairman Witham said the lounge triggered the additional parking spaces because it was open to the public. Ms. Jessa Berna from the Planning Department said she did not have all the figures in front of her, but she and Ms. Walker reviewed the Ordinance and calculated the parking. She said the parking was based on one space per guest room plus one space per 500 feet of common area and any amenities such as the bar area, which would be one space per 100 square feet. Ms. Berna said she was not sure of the square footage of the proposed bar, but that would still add a few parking spots. Mr. Durbin said the added spaces were due to the perceived intensification of use. Ms. Berna that was correct because public access was required even though that was not the intent of the use. Mr. Rheume asked if she and Ms. Walker were confident that the 35 parking spaces met all the requirements. Ms. Berna said she did not review the application specifications and was not positive especially since the application listed 32 and then added 3 more during the landscaping. Mr. Innis said they had 32 spaces for the 32 rooms and added 3 additional spaces for the expansion. He said staff parked at the church next door during the day.

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

Mr. Paul Mannle of 1490 Islington Street asked the Board to deny both variances. Mr. Mannle said the Board recently reviewed an application from the Chandler's Loft that had a dozen residents support the business, but there was one resident that pointed out that the use was not permitted. He said this was the same situation where the applicant was in the MRO District that was supposed to be a buffer between downtown businesses and residents. He said the MRO District didn't allow bars or restaurants with the exception of Mambo, which was previously the Dunaway Restaurant before that area was designated MRO. He said the two abutters to this site were the Portsmouth Baptist Church on Middle Street and the Portsmouth Middle School. He said the owners did a great job in their renovation, but they knew where they were when they went in and there was no hardship. He said establishing a bar between a church and a school was not in the public interest and granting would set a bad precedent for the MRO. Mr. Mannle read and submitted a petition from twelve local residents.

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

With no one rising, the public hearing was closed.

### **DECISION OF THE BOARD**

Chairman Witham commented that he did not think a lounge for hotel guests was the same as a bar that stayed open until 1 a.m., but they could add a stipulation on the hours. He said a hotel use was allowed. He said it appeared that the lounge area triggered three more parking spaces, but a case had been made that the lounge was for guests and not for public use and the 35 parking spaces met the requirements for their guests. He said it was being treated as an amenity.

Mr. LeMay said it seemed a reasonable use for a hospitality business. He agreed that if they had adequate for parking for their guests, then they had adequate parking for their captive audience that was not being advertised to the public.

Chairman Witham said the last thing a hotel wanted was to tell a guest there was not enough parking. He said his observation was that even full hotels never used all their parking spaces and the lounge floor plan was not laid out to attract the public, adding that anyone looking for a bar scene would go somewhere else.

*Mr. Durbin made a motion to **grant** the petition as presented and advertised and Mr. LeMay seconded.*

Mr. Durbin reviewed the criteria, noting that granting the variance would not be contrary to the public interest and the request was within the spirit of the Ordinance. He said if they were putting in a traditional bar, they would need additional parking and there would be an intensification of use, which would impact the neighborhood, but this was a true accessory use for members. He said there would be a greater hardship on the applicant if the request was denied than any perceived benefit to the public.

Mr. Durbin said the applicants had invested a lot in the hotel and had done a nice job on their other business. He said granting the variance would discourage guests from going in and out for alcohol so the value of surrounding property values would not be diminished as a result. He said there would be no fair and substantial relationship between the general public purposes of the Ordinance and their application to this property. He said there would be no intensification of use. He said the special conditions of the property that distinguished it from other properties in the area was its unique design as a hotel.

Mr. LeMay agreed and had nothing further to add.

Mr. Rheume said he would like to add a **stipulation** that would limit the maximum number of seats to 25. He said potential future restaurant use could allow up to a sizeable number of 250 seats and he wanted to preclude that possibility in this area. He said the applicant proposed 20 seats, but they could make it 25 which would be one tenth of the maximum allowed.

*Mr. Durbin said he would be fine with amending the motion to include a stipulation to limit a maximum seating to twenty-five and Mr. LeMay seconded*

Mr. Rheume said he was a stickler regarding granting variances for uses because it was a slippery slope, but this was more complicated because the Section 9 of Article 10.440 in the Zoning Ordinance referenced larger restaurants as the primary business and not an adjunct to a hotel. He said he could see the hardship viewpoint where this hotel had been allowed in this location and the proposal of a place for people to gather for light refreshments was really an adjunct to what would be a standard of services offered by a hotel. He said he was still a little concerned with parking, but based on the information provided by the Planning Department, there were only a couple of spaces difference which was not significant.

Chairman Witham commented to the member of the public who spoke in opposition and presented a petition that he took petitions seriously as the voice of the public, but he noted in

this case the addresses of the signers were not limited to the neighborhood, but were scattered throughout the city. He said they were asked how a bar could be allowed next to a church in a residential district. He said he would not be able to support a request for a bar open to the public, but he did not think this was that type of situation.

*The motion **passed** by a vote of 5-0.*

Vice-Chair Parrott and Mr. Mulligan returned to their seats.

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

No other business was heard.

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#### **V. ADJOURNMENT**

*It was moved, seconded and passed by unanimous voice vote to adjourn the meeting at 10:45 p.m.*

Respectfully submitted,

Jane K. Kendall  
Acting Secretary