

**MINUTES**

**PLANNING BOARD  
PORTSMOUTH, NEW HAMPSHIRE**

**CITY HALL, MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**7:00 P.M.**

**FEBRUARY 20, 2014**

**MEMBERS PRESENT:** John Ricci, Chairman; John Rice, Vice-Chairman; Jack Thorsen, City Council Representative; David Allen, Deputy City Manager; Richard Hopley, Building Inspector; William Gladhill; Colby Gamester; Elizabeth Moreau, Michael Barker, Jay Leduc, Alternate and Justin Finn, Alternate

**MEMBERS EXCUSED:** n/a

**ALSO PRESENT:** Rick Taintor, Planning Director

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Chairman Ricci welcomed Justin Finn to the Planning Board as the newest alternate member.

**I. APPROVAL OF MINUTES**

- A. Approval of Minutes from the July 18, 2013 Planning Board Meeting – Unanimously approved.
- B. Approval of Minutes from the August 15, 2013 Planning Board Meeting – Unanimously approved.
- C. Approval of Minutes from the September 12, 2013 Planning Board Work Session – Unanimously approved.
- D. Approval of Minutes from the September 19, 2013 Planning Board Meeting – Unanimously approved.
- E. Approval of Minutes from the October 10, 2013 Planning Board Work Session – Unanimously approved.

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**II. PUBLIC HEARINGS – OLD BUSINESS**

*The Board’s action in these matters has been deemed to be quasi-judicial in nature. If any person believes any member of the Board has a conflict of interest, that issue should be raised at this point or it will be deemed waived.*

- A. The application of **Ertugrul Yurtseven, Owner**, for property located at **292 Lang Road**, requesting Conditional Use Permit approval under Section 10.1017 of the Zoning Ordinance for work within a wetland buffer, to construct a 15’ wide paved driveway, with 4,885 s.f. of impact to the wetland buffer. Said lot is shown on Assessor Plan 287 as Lot 4 and lies within the Single Residence B (SRB) District.

The Chair read the notice into the record.

Ms. Moreau made a motion to postpone this matter. Mr. Gladhill seconded the motion.

The motion to postpone Conditional Use Permit approval to the next regular Planning Board meeting passed unanimously.

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B. The application of **Strawbery Banke, Inc., Owner**, for property located off **Washington Street**, requesting Site Plan Approval to construct a 12,500 s.f. seasonal ice skating rink with an 8' x 10' transformer, a 25' x 10' rink chiller and a 25' x 60' concession pavilion, with related paving, lighting, utilities, landscaping, drainage and associated site improvements. Said property is shown on Assessor Map 104 as Lot 7 and lies within the Mixed Residential Office (MRO) District and the Historic District.

The Chair read the notice into the record.

Mr. Rice made a motion to postpone to this matter. Ms. Moreau seconded the motion. The motion to postpone Site Plan approval to the next regular Planning Board meeting passed unanimously.

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C. The application of **Borthwick Forest, LLC, Owner**, for property located **between Islington Street and Borthwick Avenue**, requesting Conditional Use Permit approval under the Zoning Ordinance for work within an inland wetland buffer to construct a road from Borthwick Avenue to Islington Street in connection with a proposed subdivision, with 10,700 s.f. of impact to the wetland buffer and 5,800 s.f. of wetland buffer restoration. Said properties are shown on Assessor Plan 233, as Lots 112 & 113 and Assessor Plan 241 as Lot 25 and lie within the Single Residence B (SRB) District and the Office Research (OR) District. (This application was postponed at the December 19, 2013 Planning Board meeting)

The Chair read the notice into the record.

Ms. Moreau made a motion to postpone this matter. Mr. Gamester seconded the motion. The motion to postpone Conditional Use Permit approval to the next regular Planning Board meeting passed unanimously.

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### III. PUBLIC HEARINGS – NEW BUSINESS

*The Board's action in these matters has been deemed to be quasi-judicial in nature.  
If any person believes any member of the Board has a conflict of interest,  
that issue should be raised at this point or it will be deemed waived.*

A. Proposed amendments to the Zoning Ordinance to implement Character-Based Zoning (also referred to as “form-based zoning”) in the downtown area. The proposed amendments include inserting a new Article 5A – Character Districts, consisting of proposed ordinance text, illustrations, maps and tables; and making conforming amendments to other sections of the Zoning Ordinance, including Sections 10.410, 10.420, 10.640, 10.1230 and 10.1520. (The City Council has voted to schedule first reading on these amendments at its meeting on March 3, 2014.)

Chairman Ricci read the notice into the record.

Mr. Taintor referred the Board members to the exhibits that were provided which included the Proposed Character Based Zoning Ordinance dated February 20, 2013, the Interim Architectural Design Guidelines, the conforming amendments to other sections of the Zoning Ordinance to make the CBZ fit in with the rest of the ZO, and finally the four 11” x 17” maps. Additionally he handed out a Character Base Zoning Timeline which shows that they started in June of 2012 when they applied for and received a grant for consultants and they signed a contract in February of 2013. From February to May the Planning Department staff did a survey of all of the buildings in the study area, leading up to the Design Charrette in June for 5 days. Many people provided information to the consultants and a draft was submitted to staff in early July. In September a second draft was submitted and was sent out for public review. In September and October the Planning Board had work sessions on the proposal and at the end of October the City Council scheduled a first reading for November 18th, the Planning Board held two public hearings in October and voted unanimously to recommend adoption of the ordinance. The Council voted to postpone consideration to January for the new Council. In January the new Council postponed to March 3<sup>rd</sup>. The Planning Department held an informal work session for the public and then made revisions to the draft document. In addition to the Memorandum, he also provided the Board with excerpts from previous Staff Memos on this subject.

It was felt that another public hearing was necessary as there has been a lot of input and they felt the public should be able to speak. Tonight they will review the revisions which were made as a result of public input.

Nick Cracknell, Principal Planner, indicated that the purpose for bringing this forward was to address some of the short comings of the current ZO in respect to building height, scale, massing, bulk and volume, the style, parking on the ground floor and access, and dealing with the fact that the ZO has not required any significant open space in the downtown area as sites get redeveloped. The target area is the inner sanctum of the City's historic district. They wanted to focus on the central core which consists of 80 acres, 32 streets, 38 blocks, 75% of the buildings are either focal or contributing, 25% of the buildings are not yet rated because they were too young or as obtrusive or non contributing. There are about 15-20 acres of the 80 acres that will likely be redeveloped in the upcoming years and the zoning that they have in place today is guiding the private sector and the business community to what they would like to see happen. The matrix compares the existing zoning with the proposed CBZ with respect to the four issues: scaling, style, parking and open space.

They focused in on the amendments from October 31<sup>st</sup> when they were last here and put together what would be the third draft. In moving forward towards the fourth draft, based on a lot of public input received at Planning Board meeting, at the City Council and the informational public workshop at the end of January, they made some administrative changes, in particular, clarifying the relationship between the CBZ and the existing ZO. They wanted to clarify when a zoning amendment is required. A zoning amendment is only required before the City Council when one wants to change one property designation from one character district to another, which is how it would work today. If you want to change the uses allowed in your Character District you would need to change the map and go to the City Council. All other inconsistencies with the zoning that is being proposed and before you tonight would go its typical route to the BOA if you could not meet one of the performance standards in the zoning. Except for building height as that is the only provision they have inserted in the amendment that one would have to go to City Council. The third item is to clarify when variances or special exceptions are reviewed as there was some confusion about whether conditional approvals from the Planning Board or HDC would be allowed prior to the Board of Appeals taking action and that is not what they are proposing and the language has been clarified to keep the status quo. They relocated and refined the maximum building footprints as there was discussion in October of having some limit on the volume of the buildings in terms of the footprints and what was inserted in the 3<sup>rd</sup> draft was a 10,000 s.f. maximum. They went back and looked at the data they collected on all of the properties, including the buildings, and came up with more refined numbers for the CD-4 and CD-5 districts. Lastly, on the clerical side they added definitions for the attic space, penthouse levels, floor height, mansard roofs, short-story and story.

They made eight material changes:

Regulating Plan shows the Character Districts. We currently have five districts and we have five districts afterwards. He recapped the different districts on the regulation plan. All of the changes they are looking at from October to the present are all on Court Street in CD4-L.

They made five revisions to building height. There are two properties on Congress Street that were inadvertently in the highest district. Also, the end of Rudy's on High Street was never intended to go that far down High Street. There is a stretch along Congress and because people were having heartburn at recommending a 3-4 story minimum it was going to target these buildings as being really inappropriate. Their recommendation was to drop the minimum down to 2 stories, like it has been since 1956 through 2010. They are recommending that they stay with that minimum and they are also recommending that they lower the minimum floor height to 2 stories across all three character districts. On Ceres Street they have wood clad buildings next to the tugboats and they are recommending that change to a blue line rather than a green line. If they allow 2 ½ story buildings down there it is inevitable that if someone rebuilds or alters those buildings it is highly likely they are going to want to put dormers in the roof, making an "almost 3<sup>rd</sup> floor" so it makes sense to just allow property owners to build a short 3<sup>rd</sup> story. The fourth change is on Bow Street where they have gone with a continuous height along the street which is representative of what currently exists. The last change is not visual. In order to accommodate someone who wants to do a pitched roof and wants a recessed penthouse level, in order to support that you have to have a little more height than the 40' so they are recommending, consistent with the Conditional Use Permit, and the fact that you can have slops issues on Ceres Street, Market Street and Bow Street.

Special requirements for shopfront, office front, step fronts and special uses: CBA and CBB – only difference is one allows harborside uses. They have included that none of the uses change along Daniel, Penhallow and Ceres.

On the Special Requirements Map 10.5A21B, Mr. Cracknell noted that the only discernable difference between CBA and CBB from a use standpoint is there are three water dependent uses for the CBA that are appropriate because it is on the waterfront. This is a clerical change, which was never intended to go away, but they caught it, they have included that the uses do not change for any of the properties along Bow Street between Daniel and Penhallow or Ceres.

The last set of amendments relate to the district standards of the dimensional controls that are in the two tables that go with all three character districts. The changes are consistent with all three districts – CD4-L, CD4 and CD5. They have three main changes. In the October 31<sup>st</sup> version they were trying to regulate the façade modulation by using lot width however they decided that didn't make sense. They came up with a term called Maximum Façade Modulation which essentially requires the façade beyond a certain dimension to be broken with vertical or horizontal breaks. The idea is to break up the plane after a certain distance. Importantly, because they do have some fantastic buildings like the Franklin Block building which is long and continuous, they have the ability for the HDC to allow buildings to exceed this, like buildings that are articulated like the Franklin Block. In relation to CD4-L they have also included a minimum lot area and a minimum density. The minimum lot area in MRO is 7,500 s.f. and the density is also 7,500 s.f. Less than 15% of the properties in this area are conforming to both density and lot area and less than 20% are conforming just to lot area. Therefore, the 7,500 s.f. is not effective for the MRO properties inside this study area and they are recommending 3,000 s.f. for both the minimum lot area and the density. Only other change on the map is the concept of a maximum footprint and they are recommending 10,000 s.f. in CD4 and 15,000 s.f. for CD5.

Mr. Hopley asked if the intent of the Penthouse definition is to be above the cornice of the building. Mr. Cracknell confirmed it was. Mr. Hopley suggested they check their definition as he thought it should say "above" the cornice rather than "below".

Mr. Gamester asked where the language was regarding the City Council addressing going over height in certain districts. (Page 5, highlighted) He asked if this would be a quasi type judicial variance. Mr. Cracknell confirmed it would be a zoning amendment. Mr. Taintor added that the reason for that is because building height is an issue that people feel very strongly about. It could go to the BOA but it would have to go to the City Council to modify the map. Mr. Gamester asked if it would be held to any quasi judicial standards now. Mr. Taintor stated it would be a legislative action.

Ms. Moreau assumed that change would be on that property for the rest of time, unlike a variance that goes with the building. Mr. Taintor stated that, technically, it would go away if the building went away but the idea would be if they are investing in building a building that is higher than is allowed that is not going to go away for quite a while.

Chairman Ricci pointed out that staff did a good job calling out all changes in yellow so they are easy to find.

Deputy City Manager Allen noted that on Page 5A-16, the lot width needs to be changed.

Chairman Ricci opened the public hearing and called for public speakers. He reminded the public that first time speakers are allowed 3 minutes, second time speakers 10 minutes and third and final time speakers have unlimited time to speak.

Paul Mannel, of 1490 Islington Street, had two comments. He referred to the building across from 18 Congress Street, which is abutted by two tall buildings, with the 2 story minimum in between, but there is a 60' limit in that zone. His feeling would be, just like the Portwalk building, it is limited to 3 ½ stories in CBZ, because nothing is going to go there for many years.

Mr. Cracknell pointed out that Portwalk is in a 60' district with 2-4 story. That was wrapping around existing conditions with the assumption the buildings are new and will be there for a very long time. Mr. Cracknell confirmed Portwalk is 5-story buildings and they are allowed here, even though it is a short 5<sup>th</sup>. They didn't put a lot of attention on Portwalk given it is new.

Mr. Mannel had concerns for that particular building and instead of making the whole block 60', which makes the three buildings in between, if a developer comes in regarding the building in the center and says he wants to put a 60' building there, FBZ is going to allow it and they would then have an odd looking high-low-high-low. His second concern is on the waterfront where one building is a residence and it will now be zoned for 2 ½ with a short 3<sup>rd</sup> where he can now go 45'. Mr. Cracknell confirmed that 40' is the maximum today and it is proposed to be 40' in the future and a short 3<sup>rd</sup> floor. Mr. Mannel didn't want the only residence on Ceres Street to be lost in the shuffle. He would rather have the Congress Street area a uniform 35' in case someone takes down 55 Congress Street.

Dick Bagley, 213 Pleasant Street first stated that Mr. Cracknell has done a fabulous job. No system is going to be perfect but his appears to go a long way to move us forward. Mr. Taintor's point about letting exceptions go to the Council for legislation is a good idea as it makes citizens feel like they have a say in the process. He spoke in favor of adoption of CBZ. If at the end of January they have this discussion about the end of Congress Street and the idea was that a developer could come in and knock down all of the 2 story buildings and build 60' buildings. Mr. Cracknell had comments about why that would never happen and why that was a good thing so that was his first questions. The changes on Court Street make a lot of sense. His last question was that he was not quite clear on the curve on Bow Street going from 40' to 45'.

Mr. Cracknell addressed his question concerning Congress Street. He believes it is extremely unlikely that those buildings would be removed in the short term and, barring some sort of structural disaster, it is highly unlikely that the HDC is going to do a dramatic U-turn on how they view demolition to suddenly support the demo to facilitate a 5 story 60' building. They have had zoning in this City since WW II that is 60' – 100' in this district and those buildings are still here. Their focus has not been on removal or redevelopment of focal or contributing buildings but rather the HDC will continue to protect those buildings. That was the spirit of the answer to the first question. Also those buildings are on the north side and not blocking the sunlight and are on the widest portion of Congress Street. Regarding the second question regarding Bow Street, there are some 40'+ buildings on Bow Street and that area is seen as a focal point. The idea was to look at what's there and fill in the spaces with consistent buildings. There are 5 story buildings on the waterside but only 2-stories on Bow Street. Rather than have it be a checkerboard of heights, they kept it consistent.

Jerry Zelin, of 70 Kensington Road, stated that he has a memo that addresses the three issues that are before them tonight – FBZ, Design Review, and the Conditional Use Permit. He distributed the Memorandum to the Board and indicated he will be back to speak in his second time speaker and 10 minute slot.

Joe Caldarola, of 170 Dennett Street, felt that a lot of work has gone into this. He was really worried about the uses and he doesn't think the uses have been part of the dialogue. Mr. Taintor stated they

have been referring back to the uses in the CBA, CBB and MRO districts. Mr. Calderola felt the language was confusing and should simply say that it leaves the former uses section in tact. Mr. Taintor explained that this is not an overlay district so if they don't say something about uses, then they would have no uses at all. It is no longer in the CBB District so the CBB district uses do not apply unless they refer to them. Mr. Cracknell stated that the CD4 and CD5 Character Districts displace the CBA and CBB Districts. They refer to the CBB uses for CD4 and CD5. Maybe, the first clause to 57.11, except as noted on the map, is actually repeated in the last clause so they probably could strike and start the sentence with "All buildings, other structures and land, within the CD-4 and CD-5 shall comply with the use regulations for the CBB set forth in 10.440 and the special requirements for the uses set forth on the map. The only thing new is the wood siding requirement and they have added tonight the three water dependent uses that were in the CBA. Mr. Calderola felt it was very complicated and confusing. Mr. Cracknell felt it was pretty clear.

David Adams, of 210 Gate Street was very excited by this microscopic review of the community and the opportunity to make zoning and design review less of a blood sport and something that residents can depend upon. He supports this and looks forward to seeing this brought through the City Council. He had one question about the ground level parking and he would like that illustrated.

Mr. Cracknell stated that the existing zoning today allows ground floor parking, which is unfortunate. Underground parking is great but first floor parking is not great because it displaces the store front or restaurant which would normally be on that first floor. Ground floor parking will not be allowed in the character districts. They will have to have active uses on the ground floor.

Esther Kennedy, of 41 Pickering Avenue, spoke as a citizen. She had some questions and decided to come now rather than wait for the City Council hearing. She is in favor of the concept of FBZ but was concerned that they have not received where this is successful in other communities. She is also concerned about the Bow Street height as there are historic houses there. She understands there are bigger buildings on the waterfront side but she doesn't want to overshadow the Warner House and older buildings in the area. She also wanted them to look at Market Street. There are great buildings but one side is bigger than the other side and, again, she doesn't want to over shadow some of the historic buildings. She is concerned about some recent buildings which have been built extremely tall and she encouraged them to look at what height is right for the area. She thanked the Board for all of their work.

Claire Kittridge, of 27 Franklin Street, questioned how this has worked in other historic cities. She agrees about the concerns expressed regarding Bow and Market Street. She is also concerned about the uses.

Mr. Cracknell addressed the question about other communities. Their consultants are looking into that but are trying to focus in on communities that are similar to Portsmouth. Regarding uses, most of this study area is currently zoned CBA and CBB. They are not changing any of the uses in the character districts. This was not a use based study. The use table in Portsmouth is very flexible and supportive of form based or urbanism and part of why downtown Portsmouth has been so successful. The only one adjustment they made to the use table was to have the wood siding requirement on the buildings in the waterfront industrial on Bow Street.

Mr. Taintor added that some areas switched from CBB to MRO so those uses would switch as well. Those uses are less intense in the areas that switch to MRO.

The Chair called for second time speakers.

Jerry Zelin was not speaking for or against. His Memorandum listed both pros and cons to help them with their review. He praised the Planning Board for working so hard on this and believes this would relieve a lot of pressure on the HDC. At the bottom of Page 10 of his memo he meant to say that the draft that he looked at was not the most current version. It turns out what was on the web was the previous version and the revised version that the Board has tonight was not on the web until today. They have an evolving document which many people have not had the opportunity to study and he hopes that is remedied before the City Council hearing. In terms of other pros, he likes the idea of the maximum building footprint where there is currently none. He has heard rumors that the FBZ won't regulate uses but that is clearly incorrect. The entire FBZ area, other than the southern-most portion, will have the permitted uses in CBB. But, currently, the area along the river is in CBA and there are some uses permitted in CBA that area not permitted in CBB and vice versa. He felt they are now forcing CBB uses on them will create consequences and he asked them to look closer at that. For cons on his list, he stated this remains an experiment and they don't have any evidence that this has ever been implemented in a historic downtown. He would like to see the details of those ordinances. He lamented that the ordinance was still too vague on what FBZ supplants and what it supplements. Tonight seems to have remedied that and it is much clearer. That brings him to the issue of zoning variances where he echoes Mr. Gamesters' concerns. They have a state statute that says the BOA can grant a variance when there is a hardship and he is dubious that they can prohibit that. He also has concerns about the oddness of the City Council being asked to grant a variance on height because the City Council is a legislative body and the BOA is quasi judicial body. He asked if that maybe considered spot zoning. Lastly, he urged them not to just throw up their hands and say that Portwalk is already tall so let's zone it for tall. He would like to keep Portwalk a prior non-conforming use and would like to see something less than 60'.

Dick Bagley referred to Bow Street. He recognized there isn't a lot of open space in town but the church parking lot creates an ambiance on that street and the height limit could change that. He would think retaining it at 40' would be a good idea. They have a 72' building in Portwalk and those structures are not very far away from the whole discussion on C3. He doesn't see a strong argument to lower it from 60' down as it is done. On the other hand, at the State level, there are other issues that will weigh in and the C3 issue is a big concern. Also, the Governor of NH is adamant that she needs money to support social services which will affect the Casinos in downtown Portsmouth. They need to be careful about letting someone come in and knock down buildings in Portsmouth and putting in a casino. He still speaks in favor and he wants to see it move forward.

Joe Calderola stated he is neutral and supports the ordinance. He felt the street width should affect the maximum building height, which is more or less what has been followed. He also felt the width of the sidewalk should be a consideration as that can affect the feel of a building. He was still confused about the uses. He felt it was vague and lawyers would have different interpretations on it. He understands that 30 Maplewood Avenue could have a maximum height of 40' under FBZ and Portwalk is already there. He felt the ZO should be done correctly so that another building could not be built like Portwalk was. On Bow Street, the 45' height limit could mean a more imposing building could be built and he thought they should seriously think about that.

Esther Kennedy wanted to wrap up from her first time speaking. The existing building coverage is 40% in MRO, 90% in CBA and 95% in CBB. The new FBZ will be 60%, 90% and 95% so the coverage goes up. She wants them to look into that. She also wanted them to look at the projection



feet on the bottom. In the MRO it is 5' and the increase should be 10'. She downloaded the compare/contrast chart and asked them to review it.

Mr. Cracknell responded by saying that he believes Ms. Kennedy is referring to a panel he had written on the wall at the work session and there was a typo that he had pointed out. It is currently 40%, 95% and 95% and most of the study area is in the CBA and CBB. Most critical to the building coverage is that in the CBA and CBB today there is no open space requirement so it is 95% building coverage but the 5% could be parking, dumpster, etc. This is a modest but very significant change. Instead of it being 95% along Bow Street it becomes 90% and 10% has to be open space. Hopefully access to the water will be easier than in the past. In the CBB, which is the majority of the study area, it is currently 95% with no open space, and it stays at 95% but has a 5% open space requirement with the thought to create some interesting alleys and wider sidewalks to create areas for outdoor cafes and semi public and public use along the edge of the building. The big change was from 40% – 60%. But, remember what he said about the existing 45 properties in the MRO where 85% are non-conforming to one or more of the dimensional controls and almost none of them meet the minimum lot area. Very few meet the 60% requirement of today. The 60% they are recommending is a good number of what is out there. It is not an attempt to intensify the building and construction within the CD4-L but rather it is basically what is out there and is the existing character. These numbers reflect what we have and what people like.

Barbara Destefano of 99 Hanover Street, agrees with Mr. Zelin that any potential height request should not go to the City Council. She felt it should go to the BOA. She supports Portwalk. She does not ever see them filling in the open parking section in the middle. People need to wait until the building is done before criticizing it. A lot of people in the City are in favor of tall buildings. People want to live here and they need places to live.

The Chair called for third time speakers.

Jerry Zelin, felt that changing the riverfront from CBA to CBB will make a significant difference in terms of the permitted uses. He reviewed 10 uses that are allowed in CBB but not allowed in CBA and he felt they would change the FBZ districts.

Mr. Cracknell responded and felt those were all good points, specifically to the water dependent uses. The three waterfront uses (marina, marina with repair, and the vessel like the Wannamaker) continue to be allowed by Special Exception or permitted as expressed in the ZO. That was an oversight by him and he will correct that. Other than the tradecraft use and possibly the self service Laundromat, only a couple of uses mentioned by Mr. Zelin would be allowed the way this is proposed. Those waterfront uses have been accounted for in the amended version of the map.

Joe Calderola had a complexity concern. Mr. Cracknell had the table of design standards on the screen but after looking in the Table of Contents for quite some time, he could not find it in the ordinance. He suggested they expand the table of contents and organized so that people other than Planners could find things.

Dick Bagley was speaking in favor. Regarding the recommendation for Bow Street that Mr. Zelin made, last night at the BOA meeting he was astounded when it was pointed out that there was a State law that indicated the appeal they were hearing actually should have gone to the Planning Board. They had a discussion about whether they would be breaking the law by proceeding forward and they took a vote and ended up breaking the law. His thought is that they need to have variances go to the BOA

and not the City Council. Regarding the height issue, he felt if you deal with the density, then you can deal with the height. In conclusion, he felt that nothing is perfect. All in all they should move forward as it will help the City understand how the Planning Board and BOA really work.

Seeing no further speakers, the chair closed the public hearing.

### **DISCUSSION & DECISION OF THE BOARD**

Mr. Taintor stated that he had recorded a number of specific recommendations that were made and one way to proceed would be to have a motion to recommend the amended version of the ordinance as presented tonight and then to through and consider individual amendments to that.

Ms. Moreau made a motion to vote to recommend to City Council amend the Zoning Ordinance by inserting a new Article 5A – Character Districts, as set forth in the document dated February 20, 2014. Deputy City Manager Allen seconded the motion.

Chairman Ricci asked for discussion on the motion. Ms. Moreau suggested amendments to the motion.

Mr. Taintor stated the first amendment had to do with the building height map for Ceres Street. That was supposed to be blue, which is the two short 3<sup>rd</sup> 40' maximum instead of the green that is shown. This will change the east side of Ceres Street, the Waterfront Industrial only. Deputy City Manager Allen made the motion to amend the height designation for the east side of Ceres Street from 2-3 stories with 45' to 2 stories with a short 3<sup>rd</sup> at 40'. Ms. Moreau seconded the motion. The motion passed unanimously.

The next item was a typo correction on Page 48, under the definition of Penthouse Level, 2<sup>nd</sup> line, change the word “below” the cornice to “above” the cornice. Mr. Hopley made the motion. Mr. Rice seconded the motion. The motion passed unanimously.

A minor correction on Page 16 on the table where it says lot width 35 – 80 s.f. should be 35 – 80 feet. Deputy City Manager Allen made the motion. Mr. Hopley seconded the motion. The motion passed unanimously.

On Page 41 under Building and Lot Uses, Section 10.5-A.57.11, to delete the first phase “except as noted on Map 10.5A.21C as that is redundant with the last phrase. Ms. Moreau made the motion. Mr. Barker seconded the motion. The motion passed unanimously.

Getting into some areas that were raised by members of the public, on the southwest side of Bow Street, dealing with 40' versus 45'. Mr. Cracknell recommended that they revert to the October 31<sup>st</sup> version of the map that has 35' on the parking lots at St. John's and 45' across the road. This would be instead of 50' across the road. Mr. Taintor suggested the proposed amendment would be to revert on Bow Street to the map they presented in November. Mr. Barker asked if the lot to the right of the Warner House would remain orange. Mr. Cracknell confirmed it would default to the orange. Ms. Moreau made the motion. Mr. Leduc seconded the motion. The motion passed with Chairman Ricci voting against them motion.

The next amendment was a major one regarding when a Regulating Plan amendment was necessary, on Page 5A-5. This has been brought up by several people regarding whether a Regulating Plan

amendment should be required to go to the City Council when the uses or building height do not confirm with the Zoning Maps. If they deleted Section 10.5A.22.20 on Page 5, When Regulating Plan Amendment is Necessary. Everything else under the Regulating Plan just tells you have to do a Regulating Plan and this is the only section that says a Regulating Plan is necessary. Mr. Hopley made the motion. Ms. Moreau seconded the motion. City Councilor Thorsen stated that, whether he agreed with having this provision in or not, he thought it was a legal issue and is therefore problematic. He believed the State Statute clearly gives the BOA the power to make these type of adjustments so he thought it would almost be inviting a law suit to force it to the Council. He understands the sentiment behind wanting to do it because building height has been such an issue but he doesn't believe it is a valid provision and it is wrong. Ms. Moreau stated she had a problem with the provision also and would like to see it go away. She felt it looked like spot zoning to have people changing the Regulating Plan for a specific building when the whole point of FBZ is to have everything alike. The motion passed unanimously.

Mr. Taintor indicated there were a number of other issues that were raised but he did not have specific recommendations. There was concern by Councilor Kennedy about whether they should increase the coverage in MRO from 40% to 60% and whether they should increase the rooftop appurtenance from 5' to 10'. There were some issues raised by Mr. Zelin about the uses going from CBA to CBB. They did not talk about the heights on the north side of Congress Street and whether that was a proposed amendment. Councilor Thorsen wasn't sure if a motion was necessary but because there were so many table inconsistencies with respect to the uses issue he asked if they could simply request that the Planning Department look at the tables, come up with recommended amendments that might be forwarded to the City Council for consideration. Chairman Ricci did not believe they will be able to get to every item that was brought up tonight due to the late hour.

Mr. Cracknell felt there was a very easy solution to the use issues that were raised. When he went through the draft, he picked up the water dependent uses and they talked about the Laundromat and the restaurant with so many people in, but this was not a use based project or exercise and the solution is to amend the footnote that he put on for tonight's meeting which basically encompasses the CBA properties with the intention of addressing what he thought was all of the problem and replacing that footnote with a note that says "All buildings, other structures and land shall comply with the use regulations for the CBA District set forth in Section 10.440.

Mr. Hopley felt that in the FBZ sub-district they have a mixture of CBA and CBB. The intent of this added layer is not to mess with the uses so they just stay the same. Mr. Taintor explained that they are getting rid of A & B and replacing them with CD4 so they have to refer to something. Mr. Cracknell added they are not in the same place. Mr. Hopley noted that they are covering what currently is in the CBB district in Section 11 under uses.

Mr. Taintor felt the motion would be to amend the note on Regulating Map C and the appropriate text in the ZO to indicate that uses that are currently in the CBA would be subject to the CBA use regulations rather than CBB and they can deal with it in the Planning Department. Ms. Moreau made the motion. Mr. Hopley seconded. The motion passed unanimously.

Ms. Moreau noted that since they have made some minor changes to the building height map, they now have two different colors with the exact same requirements. Dark blue and purple are the same. Mr. Cracknell confirmed that and will make it all the same color.

Mr. Cracknell commented on the concern about the intensification in the CD4-L and stated that the purpose of going from 40% to 60% lot coverage is to make less non-conforming that are out there. People are reasonably concerned and fearful that it is going to create some unintended consequence of people being able to put more on the lots. He didn't have any aversions to reverting to the 40% because the CD4-L is essentially built. Chairman Ricci was comfortable with that.

Mr. Gladhill asked if a property listed as civic uses is sold to a private buyer, what would they be allowed to do with that property. Mr. Cracknell responded that they would have to go to the City Council and have it amended to a character district beyond the civic district.

The motion to recommend that the City Council amend the Zoning Ordinance by inserting a new Article 5A – Character Districts, as set forth in the document dated February 20, 2014, along with the amendments as voted on tonight, passed unanimously.

Ms. Moreau made a motion to recommend that the City Council amend the Zoning Ordinance as set forth in the document entitled “Conforming Amendments”, dated February 20, 2014. Mr. Hopley seconded the motion.

Councilor Thorsen asked if these were just the amendments that they were just talking about so they made amendments to the entire document and he asked if there are more amendments. Mr. Taintor indicated there is a four page document that show conforming amendments to the existing Zoning Ordinance to make things match up. The changes have to do with parking in the DOD, the sign regulations in character district 4-L and with definitions.

The motion passed unanimously.

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B. Proposed amendment to the Zoning Ordinance deleting Section 10.535.13 – Increased Building Height by Conditional Use Permit (Central Business A and B districts). (The City Council has voted to establish a public hearing and second reading on this amendment at its meeting on March 17, 2014.)

Mr. Taintor summarized what has happened in the past regarding this item. Last year the City Council amended the zoning with respect to building heights in the downtown and the second amendment was to require a Conditional Use Permit to go about 45' or 3 ½ stories. The caps are still the same in CBA and CBB but there is a requirement for a Conditional Use Permit to go above 45' or 3 ½ stories. What is interesting about this is that there are currently only about 10-12 properties that this would apply to, including Gary's Beverage, the plumbing supply company next to it, a few houses on the left of Maplewood along the North Mill Pond, and the health club near Green Street. The issue before the Board is whether the Conditional Use Permit is something that should be continued. If they want to recommend that it be kept, they revised the criteria for the HDC to grant a permit. They strengthened the criteria. He recommended to keep the Conditional Use Permit as is or to recommend that the criteria for granting it be strengthened.

Mr. Gladhill feels like they have two competing zoning amendments going on. They are moving forward with the CBZ which would supplant the Conditional Use Permit in that area, leaving less properties under the jurisdiction of this. He would like to know what the Council decides about moving forward with CBZ. If they are, then maybe they should look at the remainder of the properties

that are left and see what type of Conditional Use Permit is or is not necessary. If they don't move forward with CBZ, then he felt they should go back to the Conditional Use Permit.

Ms. Moreau agreed with Mr. Gladhill. Also, there are some buildings that would be subject to this if CBZ went forward. She was pleased with the recommend changes and it would allow them to get better buildings. They would be more pedestrian friendly, they would have more green space and use better building materials. Knowing that the Northern Tier and Deer Street could get developed with CBZ, then this measure would be valuable.

Mr. Thorsen has been very vocal about supporting this amendment and would vote no on the proposed motion. He doesn't agree it is a structural issue vs. a timing issue. If this amendment passed after FBZ is would mess things up. But, to make a change now, it covers a broader area than FBZ would cover. This is only the first attempt at these zoning changes and it is likely that in 6-9 months they will be going through the same exercise with other areas. There is an interest in making an overall change and then there is an interest in going to the FBZ code. He felt they need to cover the broader area quickly in the view of several other councilors which is why they have brought it forward. He wanted to explain his position on this issue and explain it as much as possible. He doesn't see the structural issue unless they delay the FBZ.

Mr. Taintor mentioned that when he talked about the properties that would not be included in the FBZ he did not mention the properties which are now in CBA and have a 50' height limit. It would have a minimal effect on those as it reduces the maximum height from 50' to 45' in that district. Also a building cannot be any higher than 40' at the street edge. In effect, it would not make any difference in the perceived height in that area. If FBZ is adopted, then this would only affect 2-3 properties.

The Chair opened the public hearing and called for public speakers.

Jerry Zelin, of 70 Kensington Road, indicated he would like to see the proposed amendments to the Conditional Use Permit ordinance that the Planning Department is making. It is true that the number of lots in CBA and CBB that would not be encompassed by FBZ and therefore the Conditional Use Permit would remain relevant, may not be a large number of lots but they are huge lots. They are talking about the undeveloped area of the Northern Tier. Some people think FBZ would continue to leave the Northern Tier unregulated. If the elimination of the option for a Conditional Use Permit for this area then those buildings will be confined to 3.5 stories or 45' and the stories limitation is an important element that has not been discussed this evening.

Barabara Destefano, of 99 Hanover Street, thought that the City Council vote seems to be a thinly veiled attempt at halting Harborcorp in the Sheraton parking lot. No one thinks the original plan is a good idea and it will change as it goes through the HDC and Planning Board process. This should not be withdrawn for that development.

Sherry Donnermeyer, of 193 Gosport Road, has a lot of friends who don't want the Conditional Use Permit to be withdrawn and there is a misunderstanding among City Councilors that there is a huge residential fraction in the City that is anti-development, no matter what that development is. She does not feel this is the case. Many people are too busy to attend the meetings and speak. She asked them not to withdraw it.

Dick Bagley, of 213 Pleasant Street, did not believe that was about being anti-development. They are looking to have the City approach development in a way that is conducive to conducting business and

honorable to the long term integrity of the City. The idea of modifying this Conditional Use Permit is better than eliminating it. People will go the BOA for density and developers will try to maximize value. He spoke to retaining and refining.

Peter Weeks, lives in Newcastle but is a prior 50 year resident of Portsmouth. He has done development in the City and some people liked his projects and some people didn't like them. He was in favor of retaining the Conditional Use Permit. This gives the HDC the right to improve a project if certain criteria has been met. It has not been in effect long enough to give it a fair shot and truly test it.

Jeff Kisell, 21 Wallis Road, agreed with Peter Weeks. He would like to see a strong recommendation to the City Councilors who voted to get rid of the Conditional Use Permit. A 45' or 55' height limit doesn't help the roof scape or what it looks like. Developers will build right up to the 45' height limit to maximize their property and we will end up with straight flat roofs and it will look bad coming into the City. The Conditional Use Permit has only been in effect for 3-4 months and it hasn't been given a fair shot. With certain regulations and requirements, such as underground parking or restoration of a building, certain materials, developers will be allowed to build up the character of the city. He wants Portsmouth to grow.

Kerry Vaultrot, of 96 Highland Street, spoke against eliminating the Conditional Use Permit. As an architectural historian, she feels that there are locations within the CBA and CBB, and specifically under the HDC overlay district, where structures taller than 45' or 3 ½ stories could be appropriate. Height is not the only factor for new development. Massing and setback are equally important. Her chief concern is that this is overly restrictive and has the ability to stifle innovative and compatible design. She thinks the process for issuing a Conditional Use Permit needs to be re-defined and should not rest solely on the shoulders of the HDC, although they play a vital role in the process. If the criteria for a Conditional Use Permit is significant benefit to the City, that determination should be made by the Planning Board or the City Council. She would recommend that a Conditional Use Permit be issued contingent upon the applicant successfully obtaining a Certificate of Appropriateness from the HDC. If the extra height is not compatible with the HDC, in that specific site, specific area and specific design, the Conditional Use Permit is null and void. To eliminate the opportunity for a Conditional Use Permit not only limits height but also hinders compatible and successful architecture.

Joe Calderola, of 170 Dennett Street, felt this was a very difficult issue. Personally, he agrees with Ms. Vaultrot, but the public has lost faith in the boards. People do not want these humungous buildings. He speaks in favor of the residents and they say to get rid of it. He thinks there is a very big difference between 3 ½ stories and 4 stories.

Susan Duprey, Attorney for Harborcorp, stated that they feel the elimination of the Conditional Use Permit is directed at their project. They cannot build their project without a Conditional Use Permit and although they feel they are vested, that is already being attacked by opponents of the project. They believe there would be a lot more flexibility if the Conditional Use Permit is preserved.

Paul Mannel, of 1490 Islington Street, believes they should eliminate the Conditional Use Permit. His concern is Islington Street and he wants it to remain 3 stories. A smart developer can always get a variance if they have a good argument.

Rick Beckstead, 1395 Islington Street, felt they should do away from the Conditional Use Permit. He stated that their concerns are what are outside the FBZ. This would close that loop hole and protect

them. If they continue to have the Conditional Use Permit, they will continue to have 60' buildings. This will affect the Northern Tier and the out skirts of Islington Street and outside of FBZ.

Doug Bates, President of the Chamber of Commerce, felt that FBZ was a great innovative way for Portsmouth to proceed. This City cannot have any one regulation for everything. They need extra tools for the developer who may need a few extra feet. It hasn't been on the table long enough to see if it is effective. Not every developer is evil and they are just trying to create a project that works. He felt this is the test area for FBZ and if it works, they will expand it throughout the City. To take tools off the table now that will help the process is a mistake. He speaks on behalf of the Chamber of Commerce and also as a resident.

Claire Kittridge, of 27 Franklin Street, agrees with all speakers who said they want to eliminate the Conditional Use Permit because they want to keep Portsmouth at a human scale. We are unique, eclectic and they want to keep it human scale.

The Chair called for second time speakers.

Jerry Zelin was not against development and was not wedded to the repeal of the Conditional Use Permit but he felt there are factors that need to be considered. He applauds the revisions to the criteria to encourage a building to have varying height. His fear was that the difference between 45' and 60' would mean they would have a flat building either way. Harborcorp's application was an example of that. The most important issue is not repealing the Conditional Use Permit because buildings are 3-dimensional. If a building has a huge footprint, it may not make all of the difference what height it is. The most important amendments proposed by the City Council are restricting footprints. Kicking the issue of what to do with the Northern Tier down the road opens them up to the hazard that if they keep Design Review, they are inviting to have developers come in and propose projects that we may not want in the Northern Tier. He reviewed technical issues in his Memorandum that he provided to the Board. He thinks the current Conditional Use Permit ordinance is illegal and some of the members of the BOA expressed the same sentiment last night at their meeting. He asked the City Attorney what was in the statutes that allows the HDC to grant a Conditional Use Permit for anything. When he looks at the statutes, he sees that the BOA can grant a Special Exception and the statutes allow the Planning Board to issue a Conditional Use Permit. He does not see anything that allows the HDC to grant a Conditional Use Permit. At the BOA hearing last night, it was pointed out that the Conditional Use Permit appeal should be referred to the Planning Board and not the BOA. The language of the Conditional Use Permit should be revised to meet that requirement.

Dick Bagley felt that Mr. Zelin strikes to the heart of what they discussed earlier. It is just height. At the City Council meeting this was a controversial issue and it was a 5-4 vote. One of the new Councilors said that we don't really need this because FBZ will take care of this. They are so focused on height that they have lost sight of the goal. He feels the middle that makes sense is whether they want to apply this if FBZ is going to go forward as some properties will apply for density variances. He was concerned about the ethics of the land use boards. The criteria of the CUP are vague and should be further defined.

Jeff Kisell stated that he trusts the Planning Board, who are volunteers donating their time to serve. He was concerned about the Harborcorp Attorney saying this puts their project in jeopardy. He felt different neighborhoods have different requirements. If the elimination of the Conditional Use Permit puts Harborcorp in jeopardy then the City should be concerned as well.

Rick Beckstead first complained that Mr. Kisell didn't give his address. He then stated that he doesn't understand why Harborcorp can't break their project into three separate buildings. He also talked to a lot of people who want this withdrawn. This would give confidence back to the people.

Joe Calderola had a number of items. He would be interested in seeing the improved criteria as he could not find it on line. Many old timers don't like how the HDC operates by holding so many work sessions. He addressed Harborcorp directly. Harborcorp had a great meeting and everyone in attendance was heard. He can't imagine that anyone that opposed the initial project would oppose the vesting. The way to get the best building built would be to remove the Conditional Use Permit. Their project was originally submitted as maxing everything out so any changes would not affect their vesting.

The Chair called for third time speakers.

Paul Mannel asked the Board to consider eliminating the Conditional Use Permit as it was never needed in the first place. A developer can always go to the BOA. It is not about Harborcorp. It is about Islington Street for him and Councilor Kennedy's proposal would take care of that.

Seeing no further speakers, the Chair closed the public hearing.

**DISCUSSION AND DECISION OF THE BOARD:**

Mr. Taintor clarified various comments regarding Islington Street. The current height limit on Islington Street is 40' (CBB). If people are concerned about Islington Street, unless the City were to zone the Central Business back into the neighborhood away from the street which would separate those existing lots from the residential zoning district, the elimination or preservation of the CUP would have no effect on Islington Street as it is currently subject to a height limit that is lower than 45'.

Ms. Moreau heard a lot about the need to refer a CUP to the Planning Board and she asked Mr. Taintor to go into a little more detail on that. Mr. Taintor stated that the State statute regarding innovative zoning controls says it can be given to the Planning Board or any other board or official, but if it is given to anybody other than the Planning Board then the Planning Board has to give a recommendation to that board or official before the final action is given. That is what they missed in their first attempt. The first CUP that was granted was done so over a month before the City Council adopted the ordinance because it was in that advertising period. At the time it was given, it was unclear who was going to ultimately get the authority. It finally settled down on the HDC when the City Council finally voted on it. Everyone was working with their best understanding of what might ultimately happen. It was a technical error and they did not snub their nose at the State Statute intentionally. That was not an issue that was raised in the appeal from the HDC to the BOA and it was discovered later on after the appeal period had ended.

Councilor Thorsen stated if they didn't follow process and it was an illegal procedure, could they have the Planning Board ratify the decision after the fact. Mr. Taintor stated it was too late because the decision was made by the HDC and appealed to the BOA and the BOA has acted. They would have to make a recommendation to the BOA.

Mr. Rice made a motion, for the purposes of discussion, that they amend the Zoning Ordinance and recommend that the criteria for granting a Conditional Use Permit be strengthened as suggested in the Planning Department Memorandum. Deputy City Manager Allen seconded the motion.



Mr. Rice clarified he would like to see the Conditional Use Permit continue but with the criteria suggested in the Planning Department memo.

Mr. Rice indicated that as someone who has “had his boots on the ground” with the historic district, he found it was very frustrating to approve a building and then seeing all of the quality of that building being taken out after meeting after meeting. The proposed amendment encourages some architecture for the ages using good building materials, not phony architecture. Another portion that they haven’t discussed frequently is the view corridors and that is one of the two areas that they could select. There is enough flexibility with the CUP where if they allow a building to be higher than 45’ then they will get a building that the City could be proud of, if the HDC is doing their job, and they need to have faith in their boards. Washington D.C. was brought up and the height restrictions there. There is one big building, or two, that exceed the height limit and Portsmouth has lost that and it would be nice to get back to that. Charleston is the same but has a custom building that rises above all of the others and can be seen. A view corridor gives a sense of well being. If they are going to allow a building to be taller, it would be pretty cool to have an amendment to allow a better quality building.

Mr. Gladhill stated he can’t support amendment because with the current CUP the HDC would have the ability to have high quality building materials used but the way it is written now the applicant has the ability to choose only 2 out of 3. He doesn’t want to see building materials optional and feels they should be mandatory.

Deputy City Manager Allen stated that he supports the motion and, with respect to Mr. Gladhill’s comments, this amended ordinance does allow them to select 2 items and the HDC would be able to work with the developer. He felt an incentive based program that is intended to deliver both quality as well as public benefit are extremely important and this is a method of delivering that.

Ms. Moreau was in favor of the amendment. She loves the idea of braking it up and requiring a certain set of criteria. She believes that everyone wants better quality materials and the other items. In the end, she doesn’t want to see an entire block of 45’ high boxes. This will encourage buildings be more pedestrian friendly and appealing with green space.

Councilor Thorsen felt that the comments made by Mr. Rice have a lot of merit and they should be looking at this amendment. He looks forward to discussing it more on the City Council but will be voting against it. He understands the position and that they want to make it better. He felt it was an excellent point to recognize the problems with the original version and that is a great step. He wanted to thank Mr. Taintor for putting together the amendments, felt they were an excellent idea and will certainly bring a lot of that discussion to the City Council when the time comes.

Mr. Gladhill wanted to talk about the original version which was used once. There was a second version on the books that has never been used. He would like to take another crack at the second version. Secondly, he asked Mr. Taintor about one of the items, “a significant contribution to the restoration of an existing public historic resource located on a surrounding property”. He asked that be defined more and, as he sits on the HDC, he felt that surrounding property was vague and they would need more direction on that. Mr. Taintor felt the intent is to use a project to strengthen a nearby historic resource and they didn’t want to nail down exactly how close it had to be. It could be a park, a monument, or something else.

Mr. Taintor noted there had been a lot of discussion about how big a park has to be to qualify and they could change the introductory language to add something about proportionality, for HDC guidance.

Mr. Barker had an issue with the whole height discussion in general. 45' seems to be very important to a lot of people and City Council members. The Rockingham is a beautiful building and is one of the tallest buildings in town. Height is a small part of the issue and they have to allow variability. But, that said, there clearly is a big concern but he likes the concept of having to give something back to get additional height. He doesn't think enough is being asked for, it should be stricter and more items should be mandatory. It is hard for him to say yes to this as it is written.

Mr. Gladhill indicated that the Rockingham Hotel was built during an era where they built a building as best they could and they don't build buildings like that anymore. This is an era of simplification so we look at the height more.

The motion to amend the Zoning Ordinance and recommend that the criteria for granting a Conditional Use Permit be strengthened as suggested in the Planning Department Memorandum passed with Mr. Gladhill and Councilor Thorsen voting in opposition.

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C. Request by the City Council that the Planning Board evaluate the design review provisions established in Section 2.4 of the Site Plan Review Regulations.

Mr. Taintor indicated that when the City Council was voting on the first amendment in 2003 related to building height regarding maximum height at the street level as opposed to average height, concerns were raised about things that had been in the pipe line for 8+ months and would be affected. Developments often go to the HDC and TAC before getting to the Planning Board so they don't get the option, as they do in many communities, to go straight to the Planning Board and get a public hearing. That issue was raised at the City Council meeting and the Planning Board was asked look into it. The Board made the recommendation to institute the Design Review process which would allow the applicant to bring a fairly well developed application forward. They would still have to provide almost all of the information in their plans that they would need for a full site plan review application but they would not have to get to the final engineering stage. They have had four applications come before them for Design Review. The Market Street project came too late to use this process. The three that came before the Board and were reviewed were 111 Maplewood Avenue, the Harborcorp project and 30 Maplewood Avenue. Harborcorp was the only one of those four that was a real design review project. The other projects were fully developed by the time they filed for Design Review and received little or no comment. Mr. Taintor really believes the Design Review process works and it does what it was designed to do. They received a lot of public comment at the December 19<sup>th</sup> hearing, a lot of comment at the joint HDC/Planning Board work session and a lot of public hearing at the January hearing. Mr. Taintor doesn't see a strong reason to change this. They could change the zoning to allow the applicant to come to the Planning Board first but that would put people to the expense of doing a lot of engineering that may not be useful as they may want to change the project.

Councilor Thorsen stated that he has received some feed back from the City Councilors. He asked several Councilors for more specifics about what the review should entail. He stated that the general question is whether the Planning Board should continue or discontinue the Design Review process. He indicated that questions came up regarding the process itself, what constitutes a complete application and who makes a determination of completeness, an area of concern was addressing more specific design and engineering details, how does the Planning Board reject an incomplete application as he felt

that there didn't seem to be any review where the Planning Board could reject an incomplete application, how does the Planning Board dismiss an application, whether or not any such dismissal or application rejection would change the vesting or not, what specific action is required during the design review, other than applicant presentation and public speakers, to close the process at the end. Those were general overall questions and he asked if they could form their response back to the City Council to address some of these issues.

Ms. Moreau stated that after having experienced the Harborcorp Design Review process, she finally understood what they approved the year before. The feedback they received was invaluable to both the public, the Board and the developer. That helps the entire process become more complete and create a better end result. There were a lot of comments about whether an application was complete however the regulations are very subjective and say it must have sufficient detail for the Board to understand enough of the project to identify the potential issues. She felt that what they had in front of them had more than enough information to identify potential issues down the road where it may cause problems. They may not have all of the fine details but that is what Site Review is all about. She felt the process absolutely works, especially for larger projects. It is an invaluable tool that does work. She started to look at all of the details in the Site Review Regulations and it comes back to what do they, as a Board, feel is enough to allow them to have a subjective view of the project. It is their expertise of being a member of this Board.

Mr. Gladhill felt that a lot of questions regarding Design Review are about vesting and how long it is valid for. Mr. Taintor stated that vesting is good for one year.

Mr. Barker noted that, according to the City Attorney, vesting happens on the date of publication. He asked if that would normally be after a review by TAC. Mr. Taintor responded that if they did not have Design Review, publication would happen after TAC had completed its purpose. By having Design Review, it gets it before TAC. Also, there is no application for Design Review as it is a pre-application phrase and it is a request which is also why the Board does not make a decision. Mr. Barker was uneasy that if the applicant wants to have a Design Review process and it is noticed in the paper, then that is the date when it vests. What if an incomplete application is filed and noticed. Mr. Taintor indicated they have to meet the requirements of the submission regulations and the Planning Department will make the determination that a request is complete enough to send it to the Planning Board. If they wanted to, and it is in his memo, it would be possible to amend the requirements to require a review for completeness and then have the applicant come back for the public hearing.

Councilor Thorsen indicated that part of the concern was, with the Planning Department making the decision on vesting, what public body would have the ability to overturn that decision. Mr. Taintor stated there was no mechanism for that. However, if they are concerned about that, they should be much more concerned about another item. As they will recall, last year they added the provision to the Site Plan Regulations to have a separate vote on whether an application is complete. If they are concerned about the Planning Department accepting Design Review plans then the Planning Board should not even be accepting any Site Plan applications until they have had a separate meeting where they have determined that the Site Plan application is complete. If there is a concern for Design Review, there should be much more of a concern for Site Plan Review and they should think about extending the whole process, and adding more meetings for developers, as that is a much more serious item.

Councilor Thorsen noted that and stated that his concern is just simply that a public body should have the power to overturn a City determination and that is what he thinks is lacking. Mr. Taintor stated

that was what he was saying also because the Site Plan Review application comes to the Planning Board with a public hearing before the Board has made a determination as to whether the application is complete because they have delegated that determination to the Planning Director, which is how it has been done for decades in Portsmouth. Mr. Taintor felt they are a complicated community, and many towns don't have a TAC and many don't have a professional planning staff so everything happens at the Planning Board meeting. However, he was serious that if someone is concerned about him making the right decision about accepting a request for design review publication, they should be much more concerned about him doing the same thing for Site Plan Review. Councilor Thorsen understood what Mr. Taintor was saying but he was looking at the exception as opposed to creating another piece of the process. Perhaps the Planning Board needs the power to overturn a decision made by the City but doesn't necessarily have to. Mr. Taintor felt that the problem was State law which stated that design review becomes vested when it is advertised. Therefore, in order to accomplish what they are asking, they would have to add an extra meeting for Design Review and an extra meeting for Site Plan and Subdivision review, all prior to publication.

Chairman Ricci asked what was broken in the process that would require them to reinvent the wheel. Chairman Ricci felt they have to have faith in staff. He would not want design plans to be any more complete because the purpose of the review is to make suggestions for change. He agreed with Ms. Moreau and felt that the Harborcorp Design Review was excellent. A change as a result of the completeness concern would be a huge disservice to this Board and the Department. Councilor Thorsen asked if it was his opinion that this Board does not make any completeness or validity of the submission at all. Mr. Taintor indicated that they don't actually do that because it doesn't really matter as it's not an application. Chairman Ricci didn't understand people being concerned that they didn't see catch basins on the plan because he doesn't want to see that type of detail. He wants to see a general discussion. There have been other projects that have been so far down the road that they couldn't change course.

Mr. Leduc believed that Chairman Ricci was talking about the Design Review process and Councilor Thorsen was talking about the vesting issue. Chairman Ricci felt it all comes down to completeness. Mr. Leduc felt the issue was that it was getting vested before the Board even reviews it. .

Ms. Moreau felt that when they initially implemented this, the whole point was fairness on both sides. The Board was able to have an initial review of a project and was able to get feed back so that it was going in a direction they wanted while, at the same time, the developer didn't have to worry about changes in the ordinance once they vest. There are still property rights out there so they still have to be fair to the people that actually own the property. They are spending a lot of money and they shouldn't have to worry about zoning changes two to three months down the road. That is unfair to the property owners. She can see that the developer puts a lot of work into plans to get to the point of Design Review and they deserve the ability to not have to worry about the zoning changing during their process.

Mr. Hopley absolutely agreed with Ms. Moreau and felt it was so unfair to pull the rug out from underneath somebody after they have spent huge amounts of money on design. Some people seem to feel it is acceptable to do that but he feels it is just wrong. Just because somebody doesn't like the project, they shouldn't be able to change the rules.

The Chairman opened the public hearing and called for public speakers.

Esther Kennedy, 41 Pickering Avenue, spoke as a resident. She mentioned that at the HDC meetings, they have a view book for people to look at that includes the applications and exhibits and she felt it would be helpful to have one for the Planning Board. Regarding tonight's public hearing, she supported what Councilor Thorsen was trying to say. These are questions that have been brought up in the community. She also wanted to clarify Mr. Taintor's statement that this came from the City Council. According to the Planning Board minutes, it came from this Board. The City Council never asked them to look at it. It came down tonight from the City Council but not when it was originally brought up. The public has a real concern with what is a plan that has been finalized or accepted. She suggested they look at the criteria and make it really strong criteria for the Planning Department on what constitutes an acceptable document. When people were present discussing other buildings potentially going up, questions were brought up that weren't correct on the plans. The citizens as well as the developers need to know what they are accepting as completed applications. She felt that was part of the component that was lacking. The other item is what happens if they don't feel it is a complete application. That is leaving the developer in the dark just as much as if they accept the application and just throw it out there. She encouraged the Board to look at the criteria. They are the only Board that can do that and make these decisions. They really need to look at it and define it for the public. The Board might understand it but it needs to be in black and white so that the public can understand why they have accepted an application, why they have accepted a completed application, what the journey of that application is once it comes to this Board. That needs to be defined better.

Joe Calderola, of 170 Dennett Street. Mr. Calderola agreed with Design Review and felt it was unfair to pull the rug out from a developer and you see that happen in small town. He supports the concept. However, he felt it was equally unfair where an applicant can see a zoning change coming and they can throw together what looks like a coherent design that nobody has the time to evaluate to see if it was actually based on reality. He felt there should be a requirement that the natural course of events be followed. When they designed the building for the Sheraton site, the first thing they would do is the fundamental engineering and if they weren't under the pressure of filing an application under a deadline to vest the project, they wouldn't have made so many mistakes. He asked that the Planning Board evaluate all of the aspects of building design and they should require that preliminary engineering be submitted as a requirement for Design Review. That way they would make sure they weren't tricked. They would also make sure they weren't wasting the public's time. The design of a building that is not based on preliminary engineering would be foolish. He supports some sort of process, but they have to make sure the project is ready for review.

Jerry Zelin, of 70 Kensington Road. He wanted to start out by answering a few questions that arose during various discussions. The first question is when a project vests. The statute says vesting occurs when the request for design review is "submitted" and it does not define submitted. He believes a reasonable interpretation means when it is actually handed to the Planning Department. The statute goes on to say that the request for design review must also comply with local rules. Therefore, if what was submitted doesn't comply with local rules, there is no vesting. Our local rules state very clearly in 2.4.3 what an application for design review must include. Third, there undoubtedly will be situations where members of the public disagree with the Planning Department's conclusion as to whether the application has all of the information required by the local rules. The public should have a chance to weigh in on that during the public hearing phase. Lastly, a question arose about when the design review process ends. The statute says "At a public meeting, the Board may determine that the design review process of an application has ended and shall inform the applicant in writing within 10 days of such determination".

Dick Bagley, of 213 Pleasant Street. In response to Mr. Hopley's comment, making an investment as a developer just goes with the territory. He built a new home in the historic district and invested \$50,000 in plans. He agrees they shouldn't change the rules but it shouldn't be about the money. You can't have a good system if you have to go through 15 HDC meetings and 13 Planning Board meetings and he understood from the City Attorney that was why this came about. He felt the process needs tweaking. He agreed it was new and it was tested and it worked. The joint meeting with the HDC and the Planning Board produced a lot of good dialogue. It seems to him that it would be good to do as Mr. Taintor suggested which is to tweak the process. It may not need to be as elaborate but there should be an opportunity for public input so that the Planning Board can say that it is complete. The adjudication would be saying to Mr. Taintor that he did it right by publishing the notice. In conclusion, when Harborcorp came in and the design review process ended and it became vested, it would have been better if Harborcorp didn't come in with a uniform 60' height so that what was vested was the 60' height assuming they would get the conditional use permit. He said the public was very appreciative of what the Planning Board does but it is very confusing and they don't end up seeing the documentation and reports until the last minute.

Chris Thompson, of Harborcorp, stated that the Harborcorp development team would not have wanted to do any project without going through the design review process as it was incredibly valuable. The joint work session they had gave them excellent feedback and with the final discussion with the Planning Board they were able to bring that all together and see the plan improve over the course of those few weeks. He felt there are things that can be tweaked with any process but he felt it was a good process and he was glad for the opportunity to go through it.

Seeing no further first time speakers, the Chair called for second time speakers.

Jerry Zelin agreed that the Harborcorp process worked out very well and most of the comments from the land use boards came from the joint Work Session. On the other hand, he was present for the 111 Maplewood Avenue Design Review and no one on the Planning Board said a single thing and he felt it was a charade and the sole purpose was vesting. He wanted to explain why the current form of Design Review was not the best variant and vesting should not occur prematurely. Mr. Zelin had filed a Legal Memorandum with the Board, on his interpretation of State Statute on Design Review and he reviewed it with the Board. (See copy in Planning Department.) There are two steps to design review: the preliminary conceptual consultation phase and the design review phase. In Portsmouth, the local rules allow a developer to opt for Step 1 or Step 2, or both. They see developers skipping Step 1 and going directly to Step 2 and, in the case of 111 Maplewood Avenue, that was done for the sole purpose of achieving vesting because they saw proposed zoning amendments on the horizon. He felt the developer created engineering plans to beat the City Council to the punch. Portsmouth could have insisted that a developer must go through Step 1 as well as Step 2, before the developer has invested money and plans and the City Council would get an early warning signal and amend the ordinance before the developer has invested money in the plans. He reviewed three ways to begin the design review process. He felt it was debatable whether the statute allows a municipality like Portsmouth to have a process that enables a developer to skip Step 1. Therefore, he suggested some reforms. The City would gain the most protection if it kept the design review process but required both steps of design review before applying for site review. That would give the City an early warning signal and a chance to amend its zoning ordinance before the developer had invested money. A second option would be to completely repeal design review, as the City Council suggested, or to amend the regulations to require a developer who chooses to go through design review to go through Step 1 to get to Step 3. Lastly, if the Planning Board does not repeal the design review process, he suggested that

the regulations establish a procedure to determine whether an application is complete and therefore vested.

Joe Calderola, of 170 Dennett Street. Mr. Calderola felt the right balance was within reach. He reviewed a list of criteria that Harborcorp did not provide, or was incorrect, for their Design Review request. He contends they did not provide every single item that was required.

Esther Kennedy, speaking as a City Councilor, thanked the Board for the way they handled the meeting and the fact that they have allowed everyone to have full public input.

Chairman Ricci called for first, second or third time speakers. Seeing no one rise, he closed the public hearing.

### **DISCUSSION AND DECISION OF THE BOARD**

Mr. Taintor felt there was a lot to think about and the hour was late. The City Council requested a report back for the March 3<sup>rd</sup> City Council meeting but no City Council action can be taken on this so he felt they could simply report back that the Board was still working on it.

Councilor Thorsen agreed. He felt that a lot of good points were brought up and it may take a little time to think them through. He felt it was an ongoing job of this Board to be dealing with this process as they learn new things. He would be satisfied with a report back saying they have received public input and are considering changes that may or may not be ruled out over time. He felt there was a misconception that the City Council said they had to eliminate the process. The intent was to look into the process, let the public speak, and now they should take some time and see what works and what doesn't. He felt that response to the City Council would be acceptable knowing that this board would be looking at the process to make improvements.

Deputy City Manager Allen agreed with Councilor Thorsen. He felt they have heard some good comments. He was not ready to put together a list tonight and he certainly felt that taking some time to think about it would help them come up with some improvements.

Deputy City Manager Allen made a motion to report back to the City Council that they are considering the input from the public hearing and will provide a more detailed report in the future. He would recommend postponing this to next month.

Ms. Moreau agreed with Deputy City Manager Allen and seconded the motion. By postponing they would have time to look at it and possibly make some change. She asked if they made changes, would they have a new public hearing. Mr. Taintor indicated that they would have to have a public hearing if they made changes.

Mr. Barker asked if they could bring back some recommended changes but not make it a public hearing next month, which would give the board a chance to discuss them. They could then schedule the public hearing the following month.

The motion to report back to the City Council that they are considering the input from the public hearing and will provide a more detailed report in the future, and postponed this matter for non-public hearing at the March Planning Board meeting and a public hearing at the April Planning Board meeting, passed unanimously.

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D. Proposed amendments to the Subdivision Rules and Regulations to clarify when an approval becomes final, to establish time limits for satisfying conditions of approval and for recording approved plans, and to provide for notification to the Assessor of final approvals.

Mr. Taintor stated that this was just to deal with an issue that has come up regarding when parcels that have received subdivision approval get taxed as separate parcels. The issue is that parcels can be taxed as separate parcels when an owner has the right to sell them without any further approvals by the municipality. They usually have stipulations, which are usually administrative, and the subdivision is not approved until those stipulations are satisfied. Sometimes there are more complex issues, such as easements. The Assessor is confused about whether the plan is ready to be taxed as separate parcels or not. Therefore, they are proposing to put time limits on satisfying the stipulations. He is recommending a new section to clarify these items.

Mr. Taintor is therefore recommending that the Subdivision Rules and Regulations be amended by inserting the following new Section III.E.:

E. Certification of Final Approval

1. Where the Planning Board has granted subdivision approval subject to conditions, such approval shall become final upon certification by the Planning Director that the applicant has satisfactorily complied with the conditions imposed.
2. Within 14 days of a final subdivision approval, the Planning Director shall forward to the Assessor a digital copy of the approved plan and a copy of the certification of final approval.

The Chair opened the public hearing and called for speakers. Seeing no one rise, the public hearing was closed.

Ms. Moreau made a motion to amend the Subdivision Rules and Regulations as recommended. Mr. Hopley seconded the motion. The motion passed unanimously.

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**IV. OTHER BUSINESS**

A. Nominations of representatives to the Rockingham Planning Commission.

Mr. Taintor advised the Board that the Rockingham Planning Commission holds a monthly meeting on the third Wednesday of the month. There is a requirement that members must be a resident of the City.

There were no volunteers from the Board.

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**V. PLANNING DIRECTOR'S REPORT**

None.



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**VI. ADJOURNMENT**

A motion to adjourn at 11:30 pm was made and seconded and passed unanimously.

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Respectfully submitted,

Jane M. Shouse  
Acting Secretary for the Planning Board

These minutes were approved by the Planning Board on June 19, 2014.