

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

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**

**7:00 p.m.**

**January 21, 2015 To Be  
Reconvened January 27, 2015**

**MEMBERS PRESENT:** Chairman David Witham; Vice-Chairman Arthur Parrott; Charles LeMay; Christopher Mulligan; Jeremiah Johnson; David Rheame, Patrick Moretti

**MEMBERS EXCUSED:** Derek Durbin

**ALSO PRESENT:** Juliet Walker, Planning Department

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**I. ELECTION OF OFFICERS**

*Mr. LeMay made a motion to **retain** David Witham as Chairman and Arthur Parrott as Vice-Chairman. Mr. Moretti seconded the motion. The motion **passed** by unanimous voice vote.*

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**II. OLD BUSINESS**

A) Request for Rehearing for property located at 56 Dennett Street

Mr. Mulligan opened the discussion, stating that he was in favor of the rehearing. The applicant had noted a few points that he felt should be taken into consideration, such as the New Hampshire Rooms and Meals tax and issues regarding selected enforcement, and he also had an explanation for why the Ordinance's definition of an inn did not apply to his property, so Mr. Mulligan said he wanted to hear more.

Chairman Witham concurred with Mr. Mulligan, stating that new information had been received and may have played a role in determinations and decisions. The applicant had felt that the Board almost forced it into a category, but he thought the Board had been clear that there was some struggle in how to define it, and they had made their best judgment. The applicant had insisted that it was more of a landlord/tenant situation, but Chairman Witham disagreed and felt that it was a transient accommodation, whereas a tenant/landlord situation was more permanent. He felt that it might be closer to a boarding house, but that wasn't allowed either. He was open to rehearing the case because of the new information.

Mr. Rheume said he was torn about the application because the information about the New Hampshire Rooms and Meals tax was significant but not the determinant for the Board in making its decision. It was more like an inn rather than an apartment, and he didn't see evidence pointing otherwise. He said that part of him thought the application should be reheard, yet another part felt that the Board did not make an error in judgment. The applicant had the opportunity to provide additional information during his presentation but hadn't, so he wasn't sure that the Board made a gross error that warranted a rehearing. He believed it did not deserve a rehearing based on the totality of the Board had done.

Mr. LeMay stated that he didn't think the property fit the definition and said he had made it clear at the meeting. In that sort of situation, he felt that the tie should go to the applicant, who should make another pitch. The Board had a split vote and it was evident that they were not absolutely clear about their convictions. Chairman Witham said he did not feel that the Board made an error. All the information he had was enough to make his decision, and he didn't feel that the new information would sway his vote. He concurred with Mr. Rheume.

Vice-Chair Parrott stated that the Board had conducted a thorough rehearing and everyone had ample opportunity to express their views. He didn't see any evidence that the Board had erred or misunderstood the issue. No new significant issues had been raised that would make him change his view. He did not see any error of procedure or law. He thought the allegations were reaching for something to justify a rehearing, and he didn't think it was appropriate. It had not been a crystal-clear issue regarding the sense of a variance, but the Board had to vote on the totality of the information presented to them and he was satisfied that the Board acted properly, appropriately, and with fairness to everyone, including the neighbors. Owners had the rights to use their property in that fashion, but neighbors had rights as well. He was satisfied that the Board was proper in its deliberations and decisions.

Chairman Witham agreed that the Board made the best decision they could, based on the Ordinance, and even if they reheard the case, the Ordinance had not changed and they wouldn't find a 'magic page'. The City Council was working to find something better, but the Ordinance was written the way it was, and the Board did the best they could.

Ms. Walker was asked about the City Council timeline and process, and she said there was no guarantee on the City Council process. She thought there were minor revisions that could happen, but she didn't know if the City Council would want to address the issue in its entirety. A work session would take place, and there potentially could be new zoning regulations soon, but it was a process and the Planning Board would have to weigh in.

Mr. LeMay thought that if the rules were clarified and changed and they wanted to resubmit the application, there would be a definition to work with. Chairman Witham said that he would be open to it once the City Council took some action. Mr. Mulligan felt that, if the rules were in flux, the Board should give the applicant another shot. There had been pointed opposition from one particular neighbor who clearly had an ax to grind. The applicant had retained counsel that had a more cogent argument in favor of the proposed use, which wasn't made the first time. He believed that it was a good opportunity for the Board to get it right. Mr. Rheume agreed there had been some passionate discussion from the neighbor, but he had provided one piece of relevant information from the earlier documentation the applicant had used in leasing their home, and it sounded more like an inn rather than an

apartment-type rental. The applicant admitted that they changed the nature of agreement they had with their tenants. Mr. Rheaume said he empathized with Mr. Mulligan's position but believed that the Board gave it their best shot. It had not been an easy case, but they had a good understanding of what they were getting into. He felt that rehearing it would imply that the Board somehow didn't do something right, and he didn't think they had gone to that level.

*Mr. Mulligan made a motion to **grant** the Rehearing. Mr. LeMay seconded the motion.*

Mr. LeMay thought Mr. Mulligan's comments were on point. Mr. Johnson said that he had not participated the first time but was open to rehearing the application.

*The motion **passed** by a vote of 4-3 with Messrs. Parrott, Rheaume and Witham voting against the motion.*

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### III. PUBLIC HEARINGS – OLD BUSINESS

#### A) Case # 12-10

Petitioner: State Street Discount House

Property: 3613 Lafayette Road

Assessor Plan 298, Lot 6

Zoning District: Gateway

Description: Modify existing free-standing sign.

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

1. A Variance from Section 10.1223.10 to allow an animated sign (changeable sign) where such signs are not allowed.
2. A Variance from Section 10.1251.20 to allow a 152± s.f. free-standing sign where 100 s.f. is the maximum allowed
3. A Variance from Section 1253.10 to allow a sign height of 30'± where 20' is the maximum allowed.

*Amendments have been made to this petition which was postponed at the December 16, 2014 meeting.*

### SPEAKING IN FAVOR OF THE PETITION

Attorney Bernie Pelech presented on behalf of the applicant. He stated that the establishment was on a 5-1/2 acre parcel of land, half of which was wetlands, and was located on the Rye/Portsmouth line, which made it a unique property. The existing sign was 30' high, and they would not change it but would simply remove the reader board below it and put up a double-sided sign. Attorney Pelech felt that the definition in the Ordinance was somewhat confusing because the proposed sign was categorized as an animated sign, which was prohibited. The sign did not have movement on it and would simply show a picture of something like a stove and a price. The price would be changed electronically from within the building, similar to what gas stations did. It would reduce the amount of square footage on the site because it would be only 20' high. Time and temperature signs were allowed by the Ordinance and not considered distracting, but a picture of a stove with a price was.

Attorney Pelech stated that the application met all the criteria. Granting the variance would not alter the essential character of the neighborhood, given the neighborhood context and what was proposed. It would result in substantial justice being done because the only difference between a reader board sign and an animated sign was that the sign could be changed electronically. Mechanically-changeable signs were allowed, but electronic signs were prohibited unless they displayed only time and temperature. That distinction, he felt, boarded on attempting to restrict the content of the signage or treating different people differently. The sign would not be any more intrusive than a manually-changed sign, and it would not result in distracting motorists because it would change every four hours, not every minute. There were special conditions regarding the property which rendered it unique, such as the wetlands and the property's location on the town line, and there was a hardship which merited considering that type of sign in that location.

Mr. Rheume requested clarification that the manually-changed reader board would come down if the variance was approved. One of his concerns was that the sign looked and felt more like a billboard than a basic sign providing a simple message. Attorney Pelech said it was not a billboard. The intent was that the display would be a product with a price. Mr. Rheume asked whether it would be changed less than every two hours and also how often the current reader board sign was changed. Attorney Pelech said it could be changed every three or four hours and he didn't know if the current reader board was daily or weekly. Mr. Rheume stated that if the Board approved the application, he wanted to ensure that other aspects of the sign would meet the daytime and evening illumination requirement, as well as the business hour requirement of between 11 a.m. and 6 p.m., and Attorney Pelech agreed.

Mr. Moretti asked Attorney Pelech if he had done a survey to see if there were similar signs in Portsmouth. Attorney Pelech said he had not, but he had looked at gas stations and found that most of them had electronic signs. Mr. Mulligan asked if the graphic representations would be static. Attorney Pelech agreed that nothing would move.

Chairman Witham noted that the Ordinance had changed since the electronic signs were put up, and one was a court case in direct response to those signs. Ms. Walker said she didn't know the history of it but she did know that exceptions were made for specific uses.

### **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 with the following two stipulations:*

- 1) that the existing reader board sign to the north of the sign to be changed be removed; and*
- 2) that the sign only be changed once per day (the product for that day's special would be chosen and would remain fixed for the day).*

Mr. Moretti opened it up for discussion, saying that he didn't mind limiting the changing of the sign but was concerned that the store may advertise that they were open at a certain hour but then be closed. He felt that limiting it to once a day might be tight, and that three times a day might be more realistic. Mr. LeMay said that the purpose of limiting the sign changes was to not distract drivers, which was the big issue, and he didn't think changing it every two hours would do that. Chairman Witham noted that an animated sign moved, and if the sign fell into the animated category, it was not allowed and there was no hardship to grant it. However, he asked if it was truly animated because it could change but wasn't like a television that was on, and that was why he was struggling with the term 'animated'. Mr. Mulligan said the Ordinance also defined a changeable sign as one with characters, letters or illustrations that could be changed, which he thought was more like what the applicant proposed.

Mr. LeMay said the definition of an animated sign was a sign that depicted action or created a special effect or scene, which the proposed sign was not. Ms. Walker read the Ordinance's definition of an animated sign, saying that a changeable sign was further defined as being restricted to a sign on which the message did not change more than once a day, and if it did, it regulated as an animated sign. Chairman Witham thought that if the sign was changed once a day, the applicant might not need a variance, and he did not want to grant a variance for something that was allowed.

Mr. Rheume asked the Board if they were comfortable with a sign that changed every two hours, and if they were, he would amend his motion. Chairman Witham said that if the motion were to grant the change every two hours, he would not support it because the Ordinance was clear. He felt the Board was willing to say that it was not an animated sign but was a changeable sign and was clearly defined as being changed once per day. He did not see the hardship to give them more than what the Zoning set out to do. Ms. Walker checked the definition for a changeable sign again and noted that it didn't say the sign could not be illuminated. Mr. Mulligan concluded that it was really a variance to allow the applicant to change the sign more than once a day. Given that the applicant offered to remove existing nonconforming signage, he said he could go for it. Mr. LeMay asked Ms. Walker if the sign could be put up if it only changed once a day. Ms. Walker said the issue was whether or not they were in conformance. The request was what the applicant would have to come into conformance with, and the Board had to decide. Mr. Rheume asked if the Board needed to vote on the 30' sign as well, and Ms. Walker said they would because there were other variances required if the applicant wanted to change out the sign. Mr. Rheume concluded that the applicant could remove the reader board sign and would be granted the ability to make a larger sign. His concern was that the Board was heading down a path with signs that were constantly animated, due to new technology.

*Mr. Rheume withdrew his first motion and made a motion to **grant Variances #2 and #3** as presented and advertised, with the stipulation that the reader board sign would be removed, and acknowledged that Variance #1 was not needed as a changeable sign, which would be changed no more than once a day was allowed.*

*Vice-Chair Parrott seconded the motion.*

Mr. Rheume stated that, for the two variances they were granting, granting the variance would not be contrary to the public interest because there was nothing the public would do that would outweigh the interest of the applicant to get the sign. Granting the variance would observe the spirit of the Ordinance because the existing sign had been there for many years and was not right on the road, and there were other large signs around. The 150 s.f. where 1,000 s.f. was allowed was a reduction in the total square footage, so that would be acceptable. Granting the variance would do substantial justice because it would allow the property owner to make full use of his sign and provide the opportunity to modernize and attract customers. The public interest would not outweigh the benefit to the property owner. Granting the variance would not diminish surrounding property values because the community businesses all had signs, some of which were fairly large. As for the hardship test, there were special conditions because the existing sign had been there for many years and the owner would make a modification to it, so owing to those conditions, there was no substantial relationship between the general public that would outweigh the applicant's benefit, and the use was a reasonable one.

In denying the first variance, Mr. Rheume stated that the hardship was whether there was something unique about the business that would require them to change the sign more than once a day. They probably changed the current reader board once daily, and they would still be allowed to change the new sign once a day, which would be adequate.

Vice-Chair Parrott concurred with Mr. Rheume and said he had nothing to add.

Chairman Witham said he supported the motion and felt that characterizing the sign as a changeable sign instead of an animated sign was the correct path. The Ordinance was clear that a changeable sign was allowed and could change once a day.

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

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

- 1) Case # 1-15 (173-175 Market Street)
  - Petitioners: Betty Morton Belcher, Jane Morton Man, Matthew Morton, Seth Morton, Ann Morton, Jennifer Hanson, Martha Fuller Clark, Clare Kittredge, Nancy Elwell, Larry Cataldo, Keith Eveland, George Dodge, Erica Dodge, Philippe Favet, Belcher Market Realty, LLC, Betty Morton Belcher Revocable Trust, Jane Man Associates, LLC, and Seth Morton Associates, LLC
  - Property: 173 – 175 Market Street
  - Assessor Plan 118, Lots 3 & 4
  - Zoning Districts: CD4, Historic and Downtown Overlay
  - Description: Appeal Decisions of the Historic District Commission.
  - Requests: Appeal the decision of the Historic District Commission to grant a Certificate of Approval.

Chairman Witham read the petition into the record.

#### **SPEAKING TO THE PETITION**

Minutes Approved 2-17-15

The applicant Mr. Chris Erikson, Attorney Kevin Baum, Ms. Carla Goodknight of CJ Architects, and Messrs. Corey and Ken Erikson were present to speak to the petition.

Attorney Baum addressed the Fisher vs. Dover analysis and said he believed that the Fisher vs. Dover case did not apply to his petition's circumstances because it had not been applied to any non-quasi judicial review but only applied to cases of a variance or special exception. He felt that it was also not applicable to HDC review. The applicant was encouraged to work with the HDC to modify the proposal, and even if it were applicable to the HDC Process, the New Hampshire Supreme Court in other cases had clarified that Fisher vs. Dover did not preclude consideration of a subsequent application where the new submission was invited by the Board and the application was modified to meet the Board's concerns.

Mr. Erikson stated that he had been encouraged to work with the HDC to modify the proposal, which he had done. The HDC went through its criteria in making their determination and changes were made to address all their concerns. Based on all the material changes that had been made, Eport had met the requirements set by Fisher vs. Dover. The HDC had spent lots of time going through detailed reviews and had determined that there had been many significant material changes to the project. The Portsmouth Advocates had given their support after the major changes were done. Mr. Erikson gave the Board a petition signed by Portsmouth residents, business owners and property owners consisting of 55 signatures that supported the HDC's decision to grant the Certificate of Approval. He discussed how his team had taken their time to ensure that their changes addressed the concerns of the BOA and the HDC.

Mr. Erikson gave a brief history of the existing building, saying that it was in overall decay and would need an extensive restoration effort. He stated that buildings and lots on their site had always changed and had never been a real part of Merchants Row. He showed various footprints of Ceres Street that indicated that there had always been historical precedence for buildings extending out even further than what he intended to do. He felt it was important to note the different kinds of structures on the site that came out closer to the road and water than what he was proposing. Mr. Erikson said they didn't require a single variance for their proposal except for the CUP that they got because the existing building had more stories than what the new Ordinance was changed to. He discussed how the Merchants Row buildings took up 100% of their footprint and said the length of his project was 90' in total for two separate buildings, while nearby buildings were more. The depth of their structure was 85.4', while the Deer Street building next to it was 88.6' and the Attrezzi Building was 82.7' long. He showed a rendering of how their building fit in perfectly with its surroundings from the perspective of Memorial Bridge.

Mr. Erikson said his team had worked hard to address the BOA's concerns and cited several design changes that were made, including removing the front dormers, changing the shutters to metal clad, leaving the original wall exposed and repairing it to keep as much brick as possible, and eliminating the contemporary round and reducing the amount of windows and glazing on the rear façade. The massing was brought back 5' on both buildings and the parking spots were pushed in. The penthouse was lower in height. More of the rear façade was revealed by using a recessed connector. The windows were simplified and the projecting balconies were pushed in. The two buildings were brought together by extending the

detailing over to the cornice of the existing building. The City wanted more commercial activity along Ceres Street, so they moved and minimized the residential entrance and maximized the amount of commercial space. They also raised the curb sidewalk to make it more pedestrian-friendly. Mr. Erikson said that Ms. Goodknight did an extensive study of Ceres Street to focus on the architectural elements common to that area to bring them over to the project building, and he went through the details of the materials. They had offered to do site improvements for the Colonial Dames in the coming months, like a dump enclosure and making their sidewalks meet. The views up and down Market Street would have minimal impact and the project would activate the corridor that used to terminate in the garden area. It would be a bridge to the Northern Tier and Deer Street and would offer more commercial uses and also help activate pedestrian traffic. He noted that their new design was almost an exact restoration of the original Frank Jones warehouse.

### **QUESTIONS FROM THE BOARD**

Mr. Rheume asked how many residential units the previous application had compared to the new one. Mr. Erikson said there were six residential units and that the number had not changed, but that there could be possibly five units. Mr. Rheume asked how many parking spaces there were and if they were adequate to meet all the housing requirements for the new and existing buildings. Mr. Erikson replied that there were six spaces and that they were adequate. Mr. Rheume asked Mr. Erikson to describe depth and width of the recessed portions and how much volume would be lost. Mr. Erikson said Ms. Goodknight would address it. Mr. Rheume asked for more detail about the parking volume. Mr. Erikson replied that the City wanted to make sure the project provided an adequate commercial space, so the team tried to maximize the parking and made sure there was proper space in the back of the building for turnarounds.

Mr. Rheume asked about the commercial space and what drove Mr. Erikson to continue the wall and make it one single façade rather than setting it back more for the upper floors. Mr. Erikson said that Ceres Street was a flat façade of buildings. Originally, the project's storefronts projected out with more glass and awnings, and they made them more like the buildings on Ceres Street, with a flat plane and a walk-out basement feel. Mr. Rheume asked about the front of the side view, questioning if the skylights would blend in more than what was presently shown on the diagram. Ms. Goodknight stated that the skylights would have a low profile and would not project off the roof more than necessary. They would be a dark anodized color and blend in with the roofing.

### **SPEAKING TO THE APPEAL**

Attorney Duncan MacCallum representing the 539 State Street appellants insisted that the *Fisher vs. Dover* case did apply to the appeal. He gave a history of how the BOA reversed a decision by the HDC because six Board members had thought that the bump out was too big, and they issued a Certificate of Disapproval to the applicant. The developer then went back to the HDC with a new plan that showed a 5' difference between the new and the old bump out. He stated that he filed a Motion for Summary Disapproval before the HDC, citing the *Fisher vs. Dover* case on the basis that there was no substantial difference in the bump out. The HDC still approved it, so the applicant was back before the Board with another appeal. He was asking that the HDC's decision be reversed again because, even if *Fisher vs. Dover* did



not apply and the project was considered based on its merits, there was no substantial difference between the bump out of the current year and the previous year. He emphasized that if one went before a land use board for a project and was denied a variance, one could not simply go back again with the same project or one with minor changes. He believed that the Board's review was *de novo* and that they did not have to pay attention to what the HDC did. The BOA's decision had been final, and there was no reason why the Fisher vs. Dover case should not apply. Attorney MacCallum reiterated that the Fisher vs. Dover case left no doubt that it applied to HDC and land use boards, and if it went back before the New Hampshire Supreme Court, the Court would say that the Fisher vs. Dover case did apply to HDC proceedings and appeals. He cited other cases and read the comments from the BOA members who originally rejected the proposal. He stated that there was no substantial difference between the changed plan and the previous year's plan, so the Board should deny or disapprove the applicant's project and the HDC's decision should be reserved and a Certificate of Disapproval issued.

### **QUESTIONS FROM THE BOARD**

Mr. Mulligan stated that Attorney MacCallum had gone on in length to demonstrate a marginal change in the building's depth, but he asked whether it was true that depth was not the only way to judge the mass and scale of a project. Attorney MacCallum replied that the mass was so big that simply taking off 5' made no difference. Mr. Mulligan noted that the roofline had come down and the dormers were removed, and Attorney MacCallum replied that they were cosmetic changes in design elements. He felt that the dormers were a positive construction change but had nothing to do with the mass of the rear addition.

Mr. Rheume noted that 13 appellants were listed in the first appeal, and of those only eight were listed along with 10 news ones. He asked what had changed. Attorney MacCallum replied that there were political reasons and several did not want to be named again. Mr. Rheume noted that items discussed in the previous appeal, including the restoration work on the wall, the loss of views with the new addition, and concerns about architectural and historic preservation, did not appear in the most recent appeal, and he asked whether they were things that Attorney MacCallum felt the developer had adequately addressed. Attorney MacCallum replied that the developer had made a number of improvements, but he was there because of the rear bump out that did not belong the previous year and still did not belong. Mr. Rheume noted that Attorney MacCallum had said that if the bump out was reduced by 50%, he would feel better about it and it may not have led to an appeal. Mr. Rheume said he was trying to balance the developer's rights vs. the public's rights and asked what the positive things would be if the Board reduced the bump out further. Attorney MacCallum stated that the Board would preserve the historic character on Ceres Street and would not allow the developer to make some money and sacrifice the historic nature. He felt that 50% was not enough and said he would like it cut down to zero percent.

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

Ms. Kathryn Soave-Bailey of 135 Market Street said that she lived near the project and was excited about its potential, but felt it would block out a lot of her views, so she was opposed.

Mr. Matthew Morton of Newington stated that his father had bought several buildings on Ceres Street in the 70s and redesigned them all. He felt that if the project was approved, tourists would notice that it looked different. He was against the bump out.

Ms. Donna Ryan of 233 Vaughan Street asked the Board to support the HDC's decision. She said she understood the importance of the HDC when she worked with them on her petition and felt that the applicant made recommended changes after working with the HDC and also the Portsmouth Advocates. She said she applauded the applicant because they represented collaboration and were an example of how developers in a community can work together.

Mr. David White of 27 New Castle Avenue said he supported the project. He said he cared about the historic character of his Colonial home and Portsmouth. He felt that the design was extremely well done and fit with the surrounding buildings, unlike other big-box structures that had been approved.

Mr. Darrin Kenney of Portsmouth said that he supported the project because the building was beautiful and smaller than a lot of surrounding buildings. The applicant had done everything they were asked except for the bump out, which he thought looked and fit great.

Chris (last name and address inaudible) said he supported the project and thought it would be an attractive addition. He thought it was important to note the extent to which the developer had gone to respond to the BOA, the appellants, and others previously opposed.

Ms. Susan Whitaker of Portsmouth was opposed to the project because she felt that places like the North Church and Ceres Street were quintessential to Portsmouth, and things should not be done that did not represent the Portsmouth's historical aspect.

Ms. Carolyn McGee said that she owned two commercial units on Deer Street and was thrilled that the building would be developed. She thought the developer did a beautiful job and was not offended by the addition at all. She supported the project.

Jeff (last name inaudible) of York, Maine, said he was the owner of 110 State Street and fully supported the developer. The building was an eyesore and clearly in need of repair, and he felt the developer did an amazing job and was impressed with the details.

Mr. John Stevenson of 197 Miller Avenue said that he couldn't believe the project was still being debated because the building was out of character with the rest of the 1800s buildings on Ceres Street. He strongly opposed the project, saying that the value of the building in its current condition was more important than allowing the developer to make a quick buck on it.

Mr. Greg Whalen of 118 Maplewood Avenue said that downtown Portsmouth was barely alive in the early 1970s. The renaissance that followed had a role in the economic aspect of Portsmouth. Portsmouth's neighborhoods had been evolving for 382 years, and future generations would approve the project. He urged the Board to uphold the HDC's decision.

Ms. Mary McDermott of 40 Rockingham Street said she was impressed with Mr. Erikson's presentation and the great changes that were made but felt that the addition on the back was

still too massive and obtrusive. She also noted that the Board and the public were not shown a clear view of the addition from the water, due to the dark lighting and shadows.

Ms. Jane Mann of Portsmouth agreed that the developers did some nice things but that the bump out did not belong on the street because it was massive, blocked views, and cut down the right-of-way. She also agreed that the developer had not shown a clear picture of the building from the back and that the building would change the character of Ceres Street.

Mr. Marty MacCallum of 536 State Street said that when the new rendering was shown, the building could not be seen clearly and it looked like a postcard picture. People needed to see it in bright, true light. He also thought the water views were blocked and should be treated sacredly. As for the bump out, he felt that once it was done, it was done forever.

Ms. Barbara DeStefano of 99 Hanover Street said she had followed the project through all the committee meetings and thought the applicant had done a great job in reducing the size of the bump out and pulling it back from the historic building. She didn't think the bump out was an issue because that end of the street was dead anyway. She thought the project would be great for the neighborhood and hoped it would be approved.

Ms. Clare Kittredge of 27 Franklin Street said she felt the design was much improved and that most people liked the Market Street side, but the scale of the Ceres Street side was still too big. She had not seen a good view of the proposed building because the rendering obscured it, and comparing it to nearby buildings was inappropriate because it was the waterfront.

Mr. Jeff Kissel of Portsmouth said that he hadn't agreed with the HDC's decision at first but now felt that the HDC made the right decision. The developer cut down the size of the building, and he felt it was enough. He said he looked forward to the project moving forward and that it represented the direction Portsmouth was moving in.

Ms. Patricia Bagley of 213 Pleasant Street said she commended the developer on making the changes and thought that the front of the building was beautiful, but the fact that people kept referring to the addition as an addition and bump out spoke volumes. She thought the bump out was huge and didn't fit with its surroundings. If approved, it would impact Portsmouth, just like Portwalk. She urged the Board to stick to what they had decided the previous year.

Mr. Joe Caldarola of 170 Dennett Street said Portsmouth had a Historic District Committee to preserve the historic character of the City's important buildings. Concern had been expressed about the size of the bump out. He pointed out that the new rendition of the building looked like the old rendition, in that it completely hid the building's historic part. The essence of not losing the historic building had not changed at all, and that was the crux of it.

Ms. Martha Fuller Clark of 152 Middle Street said she was an architectural historian and preservation consultant and that she grew up in Portsmouth over 60 years. She said that the BOA was asked once again to rule on a decision that the HDC made on one of the last industrial warehouse buildings from the 19<sup>th</sup> century, and their role was to make sure that their decisions preserved the historic nature of Portsmouth. People were seeing a number of new, massive buildings that would destroy the scenic character of the City, and she thought the bump out would impact the true nature of the original building.

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

Attorney Duncan MacCallum stated that the applicant had made much of the fact that the Portsmouth Advocates supported the changes, but the truth was that they did not support the overall plan, especially the bump out. The new project still had to be materially different, and shaving off 5' from the bump out did not address the changes. He reiterated that Fisher vs. Dover required the Board to reverse the HDC's decision and issue a Certificate of Disapproval. Even if the Fisher vs. Dover case did not apply, the Board could not grant the approval that year if they denied it the previous year. There was not enough difference on the rear bump out because it still blocked water views and dominated the building.

Mr. Erikson stated that the building was on the verge of failing, and their treatment and restoration effort to save it was the opposite of losing it. Throughout his presentation, he had cited numerous other material changes. As for the bump out only being moved 5' from the back of the building, they changed the roofline of the penthouse and pushed it in 11' introduced the recessed connector, and eliminated the rounded contemporary portion and made it a chamfered edge, amounting to a 20% reduction at that end. The HDC voted 6 to 1 that there had been multiple material changes to the building, both in massing and style. The approved project was a wonderful addition to Portsmouth that met all the criteria and objectives. They met with many advocacy groups and opponents to get as much feedback as possible, making a collaborative effort with the City and public. He felt that the project was a tribute to the former owner and a much-needed bridge to the Northern Tier. The surrounding community had spoken loudly in support, and he hoped that the Board recognized the professional opinions and judgments from the HDC experts. In summary, he believed that they abided with the City's approval process every step of the way.

With no one rising, the public hearing was closed.

**DECISION OF THE BOARD**

Chairman Witham asked the Board members if they felt that the Fisher vs. Dover case should be applied, saying that he believed it did not because there were significant changes and he felt the developer had done due diligence. Mr. Rheame said that he agreed that the appellants had focused on one aspect, but there were several criteria, and size, scale and mass were one small component of all that criteria. It struck him as a new application at that point, and the Board hadn't yet determined if it truly met all the criteria, but there were enough changes that warranted that it at least deserved a look.

Chairman Witham said the project was developing two sites at the same time, which worked against them. He felt that the term 'bump out' was the wrong term because it was an addition off the rear of the property. He didn't have much heartburn with the addition of the left, but he was concerned about the mass and scale of the addition on the back. Even though the addition was scaled back 5', it still obliterated two sides of the building, and its mass and scale were issues as to whether or not the addition was out of character with Merchants Row. The building was not as tall and didn't go to the property line, like the other buildings did. The building was twice as deep and the applicant wanted to use half of the open area. The view corridor would be partially blocked. The other buildings were all 5-6 stories high and

went to the property line, and the project's building was set back and was only four stories. A common theme of the public was the loss of the view. Chairman Witham said it would not mean a 'quick buck' for the applicant because the restoration would be expensive. The applicant had done many details to make the building historic. He felt that a lot of the concerns raised the previous year had been addressed and that the Board did not need to factor in what the HDC said, although he respected their opinion. The application had passed 6-1, so it was obvious that the HDC members were swayed and happy with its direction. He thought the project was worthy of a Certificate of Approval.

Mr. Rheume thanked the developers for making a good faith effort to go back and do something different. The Board had a developer who spent over two years to restore one of Portsmouth's old buildings and bring it back even more historically accurate, which was a vital thing for a developer to do in Portsmouth. He felt that good things were the removal of the dormers as well as the coating and recreating of the brick appearance, which preserved the original sense of the old building and was a tremendous effort. There were a lot of changes on the building's back side appearance, like the added commercial space, which he thought was a plus to draw people to the area. Another big plus was the reduction of the overall height of the back addition. He felt that the overall appearance of the building was a powerful presence, and the addition off the old building looked a lot better with the flat façade and recessed portion. The question was whether the back addition was the appropriate scale and mass. The far end of Ceres Street was a private way, not a public way. He had not heard opposition about the building being too deep. He would have liked the addition to be a bit shorter so that it would still provide views of the original building, but the recess helped. He felt that the Board was looking at the need to provide a compromise. Commercial space and parking equaled the need for the depth and length, and the tipping scale was a win-win. It was a potential win for the City, and by giving up some of the size, it was a win to the developer. He didn't think it was right to make the developer go back and make more changes. He said he was leaning toward upholding what the HDC did and granting a Certificate of Approval.

Mr. LeMay said a lot had been made of the Fisher vs. Dover case, but it was settled. The 5' change in depth would have meant the world to him if it had been a property line setback and the applicant had gone from 32' to 27', but the case was more complicated because it had to interact with Ceres Street, which had always been the Board's biggest objection in terms of massing and appearance, and he felt the applicant had addressed it well. He thought the Board had been right in its previous decision, and looking at the Planning Department's work on the application, which was substantial, he thought the appropriate action was to deny the appeal and let it stand.

Vice Chair Parrott said he agreed with previous comments and felt there had been substantial change. Deleting the front dormers and projecting balconies, deleting the veneer wall, and shrinking the size of the rear wall were all positive changes. Reducing the glazed windows and changing the rounded corner to a chamfered one were huge changes. To say that the applicant hadn't made significant changes was to underplay what the real design elements were. All change was for the better. Adding commercial space was very appropriate. The iron shutters were a good change because they went back to the 1900s. As far as the bump out, there was nothing in the HDC guidelines in terms of numbers, so it was left to the Board to decide. He thought the bump out was big, but it was offset by some of the other good

things, including the sidewalk. As to the question of whether the 15% in the bump out was a significant change or not, he felt that looking at the confined spaces and small dimensions, the 15% reduction in that addition was not trivial. No matter how deep it was from the street, it would still obliterate the back wall because it would cover it up, so whether it was 4' or 12', the back wall would not be seen. The addition wasn't as small as he would have liked it to be, but the other changes balanced it off. He believed that all the architectural changes were appropriate and brought back some of the overreach. The rear bump out was a little bigger than what he would have liked, but it was a lot better.

*Mr. Rheume made a motion to **deny** the appeal and uphold the Certificate of Agreement granted by the HDC. Mr. LeMay seconded the motion.*

Mr. Rheume stated that the Board's basis for doing it had to do with lengthy criteria, and he felt that it was noteworthy that the project not only preserved the existing building but recognized that new buildings and additions would take place. The HDC's goal was to integrate those additions into the overall character and sense of place of the area. One criteria was to foster Portsmouth's heritage and economic well being to the conservation and enhancement of property values. He believed that all the improvements made to the front and the existing buildings, the addition to the new building, and the addition of a shop on the first floor added to the vitality and enhancement of the overall area and also added value to the surrounding properties. Assessing the historical and architectural value of the buildings as well as their setting and local and national significance, a lot had been made about the Frank Jones Building. He believed that the Frank Jones Building was an important character piece, but the defining character of the area were the buildings on Merchants Row that had been well preserved over the years and had modified aspects, and they were really what tied the area. He respected the Frank Jones building for its importance but felt there were lots of Frank Jones buildings in Portsmouth. What was being done to bring the building back to life was in keeping with what the Historic District was all about. With the changes to the back side of the building, he felt that it continued the context of the panorama on Ceres Street. The structure's architecture, design elements and mass as well as the added elements showed an appreciation of the neighboring buildings by bringing in some of the features that were previously discussed. Removal of the dormers in the front was a positive contribution to keeping the original sense of the existing building. The new building stylistically echoed enough of the buildings around it that it continued the trend of the overall pattern in the neighborhood. Construction materials including technological systems and features were first rate. The added effort that the developer went through to preserve the look and feel of the buildings with the coating as opposed to creating a new brick exterior was a very big positive.

Relating to the criteria of a historically-recognized individual or event, the Frank Jones Building tied in, but he didn't see it as that significant compared to other buildings. It was important to preserve the building to a certain level, and what was done met the criteria. Mr. Rheume said all his previous comments applied to the special and defining characteristics of surrounding properties, including architectural details. A lot of those elements were brought into the building to pay homage to the buildings around it. As to the significant historic and architectural value of an existing structure, including setting, scale, mass, and new construction with height, width, materials, and architectural details, he felt that this was where the bump out portion factored in the most. He believed that the bump out had been changed enough and met the criteria. As to the balance test of the public interest vs. the

developer's interest, he believed that the Board had found a suitable balance that met the overall goals of the Historic District.

As to the extent to which a project's exterior design and texture enhanced the existing structure and were compatible with surrounding properties, Mr. Rheume felt that the brick facades, the nature of the windows, and keeping the historic nature but giving it a separate feel preserved the old structure but added complementary pieces around it that fit in with the overall area. The application met the criteria of encouraging the innovative use of technology, materials and practices being compatible with the character of surrounding properties by the use of the coating on the building to preserve it and keep a sense of it being separate. In conclusion, Mr. Rheume believed that all the criteria were met.

Mr. LeMay found that, looking over the Certificate of Approval that the HDC did, there were ten findings of fact that he thought were accurate and relevant, as well as stipulations that he thought the Board should incorporate into their approval. Mr. Rheume said he would concur with making those stipulations carry over. Chairman Witham agreed.

*The motion to deny the appeal **passed** with all in favor, 7-0, with the following stipulations:*

- 1) Spacer bar shall be used in all windows;*
- 2) Proposed fencing on Market Street shall be mahogany with a fence cap molding;*
- 3) The color of the skylight shall match the roofing material; and*
- 4) The grout on the brick shall be tinted to match the grout of the existing Frank Jones warehouse building.*

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## V. ADJOURNMENT

*It was moved, seconded and **passed** by unanimous voice vote to adjourn the meeting at 11:00 p.m.*

Respectfully submitted,

Joann Breault  
Recording Secretary