

**MINUTES OF THE
BOARD OF ADJUSTMENT MEETING
EILEEN DONDERO FOLEY COUNCIL CHAMBERS
MUNICIPAL COMPLEX, 1 JUNKINS AVENUE
PORTSMOUTH, NEW HAMPSHIRE**

7:00 P.M.

NOVEMBER 21, 2017

MEMBERS PRESENT: Chairman David Rheume, Vice-Chairman Charles LeMay, Jeremiah Johnson, Patrick Moretti, Arthur Parrott, Jim Lee, Alternate Peter McDonell

MEMBERS EXCUSED: Christopher Mulligan, Alternate John Formella

ALSO PRESENT: Peter Stith, Planning Department

Chairman Rheume noted that it was Vice-Chair LeMay's last meeting. He thanked him for his service and wished him well.

I. APPROVAL OF MINUTES

- A) October 17, 2017
- B) October 24, 2017

DECISION OF THE BOARD

It was moved, seconded, and unanimously passed to approve both sets of minutes.

Chairman Rheume stated that the alternate Mr. McDonell would sit in on all petitions.

II. PUBLIC HEARINGS - NEW BUSINESS

Chairman Rheume recused himself from the petition and passed the gavel to Vice-Chair LeMay as Acting Chairman for this petition.

Case #11-1

Petitioners: Working Stiff Properties LLC, owner, Matthew Beebe & Barbara Jenny,
applicants

Property: 87 Lincoln Avenue

Assessor Plan: Map 113, Lot 34

Zoning District: General Residence A (GRA)

Minutes Approved 12-19-17.

Description: Appeal.
Requests: Appeal by the owners of the action taken by the City of Portsmouth issuing a cease and desist for a non-permitted use as a short term rental for the property referenced above.

SPEAKING IN FAVOR OF THE PETITION

Attorney Frank Quinn was present on behalf of the applicant to speak to the appeal. He introduced the owners Matthew Beebe and Barbara Jenny and stated that Ms. Jenny would present to the Board. He asked the Board for extra time.

*It was moved, seconded, and unanimously approved to **extend** the 15-minute presentation rule to 20 minutes.*

Ms. Jenny distributed a copy of the Meals and Rentals Procedure to the Board. She stated that the appeal was for the cease and desist only and to address whether the City could legally regulate short-term rentals (STRs). She reviewed her presentation in detail. Her main arguments were that NH was a Dillon’s Rule state and the Zoning Ordinance had to be consistent with State law. She explained why she felt that the City’s administrative policy on STRs wasn’t valid and why the memorandum from the former Planning Director Rick Taintor was in error. She summarized that the City had no power to regulate STRs and that an STR was a permitted use in the General Residence A (GRA). She said the City’s policy was illegal and used selective enforcement and that the cease and desist order could not legally be upheld.

SPEAKING IN OPPOSITION TO THE PETITION

Attorney Monica Keiser representing Peter Fernald of 77 Elwyn Avenue stated that RSA-541a was defined as applying to State agencies and was not applicable to local land use boards. She addressed use regulations for zoning ordinances and discussed the code official’s enforcement pertaining to STRs in the City. She noted that the Zoning Ordinance was more than five years old and that it defined a dwelling unit as a ‘building or portion providing completely independent living facilities for more than one person ... whose use shall not be deemed to include such transient occupancies as hotels, motels, rooming or boarding houses.’ She discussed the importance of statutory interpretation rules and said a definition couldn’t be superimposed elsewhere. Relating to the applicant’s discriminatory enforcement claim, she said the applicant had to provide to a court a conscious effort by the City to discriminate intentionally.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Peter Fernald of 77 Elwyn Avenue said he knew about the code against short-term rentals and Airbnb’s, where owners charged boarding fees to short-term guests to help pay the mortgage. He said that usually guests were closely monitored, but operating an owner-unoccupied short-term rental for up to 8-9 guests over a period of six months was another matter. He asked what would prevent a developer from purchasing a large home and operating it as an Airbnb from Boston or Singapore. He asked where the City drew the line as to how close the owner should be to the Airbnb. He said it was a slippery slope.

Attorney Quinn said the City stipulated that there be no noise, traffic, or violation of zoning issues, and that the only reason the City enforced it was due to a philosophical issue a neighbor had. He said the issue of the complaint vis-à-vis the applicant's property should be looked at; otherwise, all Airbnb's in the City should be shut down.

Mr. Parrott said his concern was the selective enforcement issue, and he likened it to a State trooper not catching every speeder. He asked Attorney Quinn if enforcement, whether it was land use or otherwise, had to be perfect or couldn't be anything at all. Attorney Quinn said his position was whether there was a qualitative violation in order for the City to enforce it, and it was stipulated that there was not. Mr. Parrott asked what he meant by qualitative. Attorney Quinn said it meant too many cars in front of the house, or complaints of noise, or criminal activity in the dwelling unit, none of which occurred. Mr. Parrott said the number of cars as a quantitative number was very different from qualitative and didn't address his concerns. He said Attorney Quinn's client seemed to be saying that just because there were other people apparently doing the same thing in the City and not being subject to proposed enforcement actions, there could be no action taken against her house, even though it was clear that she was running a commercial establishment. Attorney Quinn said the selective enforcement was that the City, when they heard a complaint about 87 Lincoln Avenue, made a conscious decision to issue a cease and desist order, which they could have done against any number of people running Airbnb's, but that hadn't happened. Mr. Parrott said 'so what' – a violation was a violation.

Ms. Jenny said the City stated that enforcement would be triggered if there was an ideological complaint on principle, and she felt that it should apply to all short-term renters. Mr. Parrott said he still didn't understand the applicant's argument that, lacking 100% enforcement from the City, there couldn't be any enforcement at all. Regardless of the reason the neighbor complained, he said he didn't see any relevance as to what prompted the complaint if the activity was against the rules and regulations of the Ordinance. Ms. Jenny said it was City policy that they would enforce only upon complaint, and in her case, it was selective and ideological. She said it wasn't a quantifiable or qualitative complaint because one couldn't count cars, and no specific complaint from the Ordinances had been lodged against her. She said there was only the City's administrative policy that was in conflict with State law. Mr. Parrott said that the claim in the written material stated that the rental wasn't a business. He asked how it wasn't a business if two unknown people exchanged money for goods and services. Ms. Jenny said she had other tenants in one-year leases who paid rent and that it was no different than accepting money month-to-month. She said it was a residential use, not a business use.

Tom Smart of 133-135 Lincoln Avenue said he had a few tenants living on the other side of his house and that someone else who wanted to make a lot of money could turn it into an Airbnb. He said if the appeal was approved, it would set a precedent in Portsmouth.

Attorney Keiser stated that selective enforcement assumed that everyone was situated the same. She said the issue was that not every resident was in the same zone and wasn't subject to the same rules as GRA or GRB. She said the State law on taxes and meals couldn't dictate what the Zoning Ordinance said, so if they made a change, it would have no bearing.

Ms. Jenny said the City collected its share of Rental and Meals taxes without sending back any taxes from short-term rentals.

Susan Fernald of 77 Elwyn Avenue said she was concerned about safety and issues, like who was watching the property, smoking, and whether renters were taking care of the property.

Ms. Jenny said that the Lilac House met all safety building codes and that she would reassert her private property rights. She said the official occupancy rate for Lilac House in 2017 was 17%, which was a lesser impact than someone living there full time.

No one else rose to speak, and Acting Chair LeMay closed the public hearing.

DECISION OF THE BOARD

Peter McDonell said there were two main questions, 1) whether the City had the authority to restrict short-term rental income, and 2) whether they had exercised it arbitrarily. He said it wasn't relevant whether it was a business or residential use, but whether it qualified as a dwelling unit. He said that, for it to be an allowed use, a dwelling unit of a definition was that one shall not include transient occupancies such as motels, rooming houses, and so on, and there was really nothing clear on whether a 15-day short-term rental would qualify as a transient occupancy, so an administrative policy was enacted. He said it didn't create a new law. He said he wasn't sure about the administrative clause idea and didn't think there was any change. He thought it was just trying to provide some helpful guidance and that it did in saying that a less than 30-day rental would qualify as a transient occupancy and would be something that would fall outside of the definition of a dwelling unit. He said he next thought was whether the NH State Meals and Rentals Tax Statute that defined a short-term rental would have any effect on the administrative policy but he didn't think it did. He thought the policy said that it would stand in as a definition for a short-term rental in the absence of an explicit other definition. The Statute said that it was either an allowed or disallowed use, and whether it was a use that would qualify it as a dwelling unit. He said he didn't think the Statute that defined it as a short term rental was relevant. He said the City did have the authority to say that it was a prohibited use and didn't think one could say that anything less than perfect enforcement was arbitrary enforcement. He said the applicant talked about whether it was a qualitative violation. He said he thought the qualitative violation was not whether there were noisy renters or too many people parking but was the existence of the thing that was the short-term rental, and that was what was prohibited. He said it wasn't a noisy short-term rental, it was a short-term rental per se. He said he wasn't convinced that anything he saw was arbitrary.

Acting-Chair LeMay said that most of the points raised had some legitimacy but that they all had some caveat, e.g. 'we're almost there on this point'. He said Mr. Taintor's memo was simply guidance from the rest of the Ordinance pulled into one place to explain how the department would approach those issues. He said the question was whether the code officer made his decision with faith and according to the rules, and not whether the underlying Ordinances might have been flawed. He said he was a bit unsympathetic with the casual enforcement that the City did on whether an Airbnb fit into a neighborhood, and he thought that the applicant's Airbnb might have fit into that particular neighborhood and could have been done by special exception.

Mr. Johnson agreed and said he felt that the way the Ordinance was enforced pitted people against each other. He said he also felt, however, that it wasn't the proper forum for the decision to be made and that people should write to the City Council. He agreed with the interpretation that was made but not the Ordinance itself. Mr. Lee said that, if a violation happened and was found to be true, it was irrelevant how the code official made the decision. Acting-Chair LeMay said he agreed, so far as an individual case, and thought the enforcement was lackadaisical. Mr. Moretti said he felt that those laws or Zoning Ordinance rules were forced on the City and that the City had to make quick changes. He agreed that the Board was there to see if the administrator made the right decision, not to judge the regulations. He recommended that the applicant return for a different purpose, perhaps to change the zoning. He said the Board was there to judge whether the City Administrator enforced what he felt was the proper rules, and he didn't feel that the Board could overturn the administrator's decision.

*Mr. Moretti moved to **deny** the appeal, and Mr. Parrott seconded.*

Mr. Moretti said he would reference his prior comments and believed that Airbnb's were important to the future of Portsmouth. He said he hoped that Portsmouth and the State researched it better and came up with something that worked for everyone. Mr. Parrott said he concurred with Mr. Moretti and would refer to his prior comments. He agreed with the concept that the nature of the Ordinance was not before the Board, but rather, it was the action of the official who was charged with interpreting and applying the Ordinance. He said the official did what he was supposed to do as part of his job and that he supported the official's actions.

*The motion **passed** by unanimous vote, 6-0.*

Chairman Rheume resumed his voting seat and as Chair of the meeting and Acting-Chair LeMay resumed his seat as Vice-Chairman.

Case #11-2

Petitioners: KL Boston Revocable Trust, Kelly L. Boston, trustee
 Property: 465 Cutts Avenue
 Assessor Plan: Map 210, Lot 27
 Zoning District: Single Residence B (SRB)
 Description: Extend existing garage and front porch.
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:

1. Variances from Section 10.521 to allow the following: a) a secondary front yard setback of 11' ± where 30' is required; and b) to allow a 20.13% ± building coverage where 20% is the maximum allowed.
2. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance.

SPEAKING IN FAVOR OF THE PETITION

Steven Brown on behalf of the applicant was present to speak to the petition. He reviewed the petition and the criteria, which he said were met.

Mr. Parrott asked what the sides of the foundation were. Mr. Brown said it was 26 feet from front to back. In response to Chairman Rheume's questions, Mr. Brown said the petition was based on a survey, that the current setback to the property line was 12 feet and that he wanted it one foot closer to Brigham Lane, and that there were more than 10 feet of pavement from the foundation to the pavement of Brigham Lane.

SPEAKING IN OPPOSITION TO THE PETITION AND/OR SPEAKING TO, FOR, OR AGAINST THE PETITION

No one rose to speak, and Chairman Rheume closed the public hearing.

DECISION OF THE BOARD

*Vice-Chair LeMay moved to **grant** the variances as presented and advertised, and Mr. Lee seconded.*

Vice-Chair LeMay stated that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance because the project would not change the nature of the neighborhood. He said a lot of the surrounding homes had a modulated front line, so the project would blend in better. He said that granting the variances would do substantial justice because it would allow improvement to the house and make it more functional in terms of the garage, depth, and interior work, and would also improve the value of surrounding properties. As for unnecessary hardship, he said there would be very little public interest in extending the house and noted that there were the corner lot's setbacks, so he believed it should be granted.

Mr. Lee said he concurred with Vice-Chair LeMay. He said the modest addition would be an asset to the neighborhood.

*The motion **passed** by unanimous vote, 7-0.*

Case #11-3

Petitioners: Ned and Bill Properties LLC
 Property: 621 Islington Street
 Assessor Plan: Map 164, Lot 6
 Zoning District: Character District 4-W (CD4-W)
 Description: Convert three retail/office units into three residential dwelling units (for a total of 7 units).
 Requests: Variances and/or Special Exceptions necessary to grant the required relief from the Zoning Ordinance including:
 1. A Variance from Section 10.5A41.10B to allow the following: (a) a lot area per dwelling unit of 2,074 s.f. where 2,500 s.f. is required; (b) 9.7% ± open

space where 15% is the minimum required; c) a ground story height of 7'7"± to 8'1"± where 12' is the minimum required; d) a façade modulation length in excess of 80' where 80' is the maximum allowed; e) façade glazing in excess of 50%; and f) a ground floor surface above sidewalk grade in excess of 36" where 36" is the maximum allowed.

2. A Variance from Section 10.5A44.35 to allow a 34'± wide driveway where 24' is the maximum allowed.

SPEAKING IN FAVOR OF THE PETITION

Attorney John Bosen was present on behalf of the applicant to speak to the petition. He introduced the applicant Ned Savoie and distributed copies of the plan to the Board. He reviewed the petition and explained why the applicant wanted to convert the three commercial units to residential. He reviewed the criteria and said they would be met.

In response to Mr. Johnson's questions, Attorney Bosen said the current commercial users were a software technology company, a barber, and a massage therapist, and that the building was sprinklered.

Mr. Parrott said the summary sheet indicated a maximum height above surface on the ground floor and asked how much greater it was than 36 inches. Mr. Savoie said Islington Street tapered down at that point, so it went from 18 inches to 4 feet. He said the renovation process would not change that 4-ft figure and the floor would remain the same.

Chairman Rheume noted that there were different diagrams, Attorney Bosen said the floor plan by CJ Architects for the residential use would be used. Mr. Savoie added that the Ambient Engineering plan was accurate for the other units.

In response to further questions from Chairman Rheume, the applicant said that Units A, B and C were currently business uses, that the residential units would remain the same, and that the dimensions for the driveway and parking areas were on the Existing Conditions plan. Mr. Savoie said the entrance off Islington Street was originally going to have greenspace and that they were willing to still do so, but at the time the City was paving the parking lot and he wasn't sure why the buffer wasn't put in. He said they would be fully compliant on that aspect if greenspace was added.

SPEAKING IN OPPOSITION TO THE PETITION AND/OR SPEAKING TO, FOR, OR AGAINST THE PETITION

No one rose to speak, and Chairman Rheume closed the public hearing.

DECISION OF THE BOARD

*Mr. Parrott moved to **grant** the variances in Item 1 with the stipulation that, in lieu of the 34' driveway, the plans should incorporate the 24' driveway with 5' of buffer on each side as shown*

on the submitted plan drawn by Ambit Engineering and dated January 2007. Mr. Parrott moved to deny the variance in Item 2.

Mr. Lee seconded the two motions.

Mr. Parrott stated that granting the variance would not be contrary to the public interest and would observe the spirit of the Ordinance. He said it was hard to see how the public would be adversely affected by it. He said it would pose no change to the character of the neighborhood and no threat to the public's health, safety, and welfare. He said that three commercial uses changed to residential ones may reduce what little traffic there was on that section of Islington Street. He said granting the variance would do substantial justice because the benefit to the applicant would not be outweighed by any detriment to the public. He said that granting the variance would not diminish the value of surrounding properties. He said he thought it would be a positive effect because it would narrow the entryway and provide greenspace. He said both adjacent properties were tight, so a bit of elbow room would be desirable as well as the decrease in traffic. Mr. Parrott said the property met the hardship test because it had existing special conditions and didn't meet the setbacks due to the passing of time and the change in Ordinances. He noted that it also backed up to the railroad tracks.

Mr. Lee concurred with Mr. Parrott. He said it was appropriate that the dwelling was returning to its original purpose as a residence. Chairman Rheame said he would support the petition and thought the nature of the variances was minor and the building would be in keeping with the neighborhood.

*The motion **passed** by unanimous vote, 7-0.*

Mr. Johnson recused himself from the petition.

Case #11-2

Petitioners: KC Realty Trust, Keith Malinowski, Trustee

Property: 84 Pleasant Street

Assessor Plan: Map 107, Lot 77

Zoning District: Character District 4 (CD4)

Description: Replace rear addition and permit residential uses on the second and third floors with no off-street parking provided.

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

1. Variances from Section 10.5A41.10C to allow the following: a) 0% open space where 10% is required; and b) 100% building coverage where 90% is the maximum allowed.
2. A Variance from Section 10.1111.10 to allow a change in the use or intensification of use in an existing building or structure without providing off-street parking.
3. A Variance from Section 10.1111.20 to allow a use that is nonconforming as to the requirements for off-street parking to be enlarged or altered without

providing off-street parking for the original building, structure or use and all expansions, intensifications or additions.

4. A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance.

SPEAKING IN FAVOR OF THE PETITION

Attorney Peter Loughlin was present on behalf of the applicant to speak to the petition. He reviewed the petition and gave a brief history of the building, noting that if a building was changed, parking had to be provided for the new uses as well as the grandfathered ones. He reviewed the criteria and said they would be met.

Chairman Rheume noted that the building was broken up into two properties and asked whether the client owned both sides of the building. Attorney Loughlin said he didn't. Chairman Rheume said the façade shown in the plans indicated that the next building had the same kind of new look, and he asked whether the other owner would do that. Attorney Loughlin said his client was just dealing with his part of it. Chairman Rheume said the applicant didn't state what he would put in place of the demolished building, and that the handout indicated proposed garage spaces, but another drawing showed that the floor plan wasn't changing. He asked whether it was an accurate depiction of the redevelopment. Attorney Loughlin said they were recessed areas for the garbage and utilities and that the redevelopment was currently being worked on by McHenry Architects and being reviewed by the Historic District Commission (HDC).

Mr. Parrott asked whether the shed roof addition was attached to the applicant's building and who owned it. The owner Keith Malinowski said he was planning to leave the wall up because there was an opening between the shed and the corner building. Attorney Loughlin noted that there were no utilities shared between buildings.

SPEAKING IN OPPOSITION TO THE PETITION

Ron Bougeault of 93 Pleasant Street said he was concerned about whether the building's façade would be changed, whether the roofline would be raised, and the lack of parking.

Paige Trace of 27 Hancock Street said there was no drawing of what was proposed. She asked if the building would be raised on the back side or if the roofline would change. She was concerned that the project could change the look of the neighborhood.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Mr. Johnson said he worked for McHenry Architects and asked for permission to speak.

It was moved, seconded, and unanimously approved to allow Mr. Johnson to speak.

Mr. Johnson said the shed roof single story on the back of the building didn't belong to the applicant and wouldn't be touched. He said that nothing would happen to the building's height or

appearance of anything above street level and that nothing would exceed the eave line of the Pleasant Street side of the building. He said that, because the current building had a flat roof, they would go up in height but wouldn't exceed the front ridgeline. He said the contemporary storefront would be replaced with a more traditional storefront and that no exterior changes would be made to the Pleasant Street side or potentially the State Street elevation of the building. He said there would be four additional parking spaces.

Chairman Rheume said the Board didn't like getting information at the last minute. He said that the project was proposing something new for the alley side, which was something the HDC would normally consider, but he said the Board was granting the relief on allowing a bigger structure than what was allowed, and that he received an answer to his question of what the project was exchanging for that extra 10% of space.

No one else rose to speak, and Chairman Rheume closed the public hearing.

DECISION OF THE BOARD

Chairman Rheume told the Board that they were considering the building coverage issue that was related to the addition on the back that would be demolished, and he said the parking was also an issue. He noted that a photograph showed a different paint job than the adjoining property, indicating that there was separate ownership at one time, and he felt that the applicant was trying to do the right thing for the Pleasant Street façade.

The parking issue was discussed. Mr. Moretti said he didn't see it as a problem because, even though it would be two more apartments, the building wouldn't change much. Mr. Parrott said that parking would be self-regulated because it would not be provided by the building or anything nearby. He agreed that there were already a few existing apartments and it wasn't like they were talking about a development that would create dozens of new apartments.

Chairman Rheume said he was always cautious about giving up parking, even downtown. He said he thought the applicant had to work with the restaurant that dominated the first-floor plan, so there was a hardship on him because there was no way to put underground parking there. He said the use wouldn't be that much more intensive and noted that there was some parking. He said a lot of people found ways to get around without a car or parking. He said he was good with the coverage and the fact that they were getting something a lot nicer, and thought it made sense to take up the extra volume.

*Mr. Moretti moved to **grant** the variances as presented and advertised, and Mr. Parrott seconded.*

Mr. Moretti stated that granting the variances would not be contrary to the public interest and would observe the spirit of the Ordinance because the existing building was on an existing footprint and the applicant was asking to rebuild a building that wasn't up to current standards and didn't fit the character of the neighborhood. Substantial justice would be done because the building wasn't made for housing and had no positive effect on the streetscape. He said the new design would add character and texture to the neighborhood. He said granting the variances

would not diminish the value of surrounding properties because the property would do substantial justice to the properties around it and the streetscape. He said the hardship was that it was a building on the footprint on the lot line and the only option was to bring it up to code.

Mr. Parrott said he concurred with Mr. Moretti. He said the impact on the City in terms of the people working and living in the structure would be practically unchanged. He said the lack of parking would have a minimal effect. He said the front of the building already had a restaurant, so the net change would be very small.

*The motion **passed** by unanimous vote, 6-0.*

Mr. Johnson resumed his voting seat.

Case #11-5

Petitioners: PNF Trust of 2013, Peter N. Floros, Trustee

Property: 278 State Street

Assessor Plan: Map 107, Lot 80

Zoning District: Character District 4

Description: Appeal decision of the Historic District Commission to deny the issuance of a demolition permit.

Requests: Issuance of a demolition permit.

The applicant's representative Attorney Bosen asked for extra time.

*It was moved, seconded, and unanimously approved to **grant** the applicant a 25-minute timeframe for his presentation.*

SPEAKING IN FAVOR OF THE PETITION

Attorney John Bosen was present on behalf of the applicant to speak to the appeal. He introduced the owner Peter Floros and the structural engineer Jeff Nouracki of JSM Associates. He said the term *de novo* meant that the Board got a fresh look at the evidence and was not bound by prior decisions made by the HDC. He reviewed the petition's background, including the fire that destroyed 266, 270, and 278 State Street. He said there were only so many funds to rebuild the property and that the 278 State Street building was deemed a total loss. He said the Ordinance was clear that a lawful non-conforming building destroyed by fire could be restored, reconstructed, or demolished. He said his client hired structural engineers, as did the insurance company and the HDC, and that five of the six engineers concluded that the building was a total loss and should be demolished. He said the HDC said it could be preserved. Attorney Bosen summarized what the engineers said and noted that three engineers said the building should be demolished. He said the most compelling report was from JSM Associates, which stated that the building was a hollow brick box with wood floors and that the first and second floors would have to be completely removed. Attorney Bosen said that was 40% of the building. He said the engineer also noted that construction costs and overall re-development must be explored, but there was no reasonable way to make it part of a redevelopment without those two floors.

Mr. Nouracki of JSM architects summarized his report. He noted that the building was originally four stories, with the main level a half-flight above the street, a basement level, and the second level up 16 feet. He said that someone tore out the original first-floor level at some point and crammed in a second level, which changed the look of the building. He said the building would need two stairways, an elevator, and other items. He said his analysis showed that it wouldn't be logical to do a project of that magnitude because if someone put in commercial space, the floors in the existing building would be in the middle of the windows. He said no one would build a new project and put a first floor a half-level above grade. He concluded that renovating the building was not logical or technically feasible.

Attorney Bosen said it would cost 50% more to renovate the building as opposed to rebuilding, and 40% of usable floor space would be lost. He emphasized that five out of six structural engineers said demolition made the most sense. He said it was the property of Mr. Floros and that his money was at stake, and that it wasn't like a big developer wanted to take down a historic structure. He said Mr. Floros wanted to re-invest by rebuilding the corner and would present a design for a new building after the demolition. He referred to the Martingale Building renovation and said there was no reason why 278 State Street couldn't do the same thing.

Vice-Chair LeMay asked Mr. Nouracki if he had found technical fault in the City engineer's structural report. Mr. Nouracki said the engineer just addressed the structure and made it sound like some of the floors could be saved. Mr. Nouracki said he felt that any renovator would replace all the floors. Vice-Chair LeMay asked Mr. Nouracki what he thought about the property's historic value and whether he had worked on similar buildings. Mr. Nouracki said he couldn't speak to the historic value, even though he had worked on similar buildings before.

Chairman Rheume said the main argument was that, if the structure had to be rebuilt and had to have a few new stairwells and an elevator, a lot of space would be taken up. He said the Martingale building was built as two separate levels and asked why that arrangement wouldn't work. Mr. Nouracki said there was a lot of grade change in the Martingale building, with several shallow headroom floors, but the applicant's building was a half-floor off with inadequate headroom. Chairman Rheume said he could envision a repurposing of the building, like putting a very high ceiling in the storefront space and letting the other floors be normal floors. He said the elevator and stairwell could be from an adjoining structure. Mr. Nouracki said that removing the low headroom floor would make the next floor at 16 feet, which wasn't a workable number, and that the stairs would be tremendous to get up to that height and the building much taller.

Mr. Parrott asked whether there were supports in the wall or anywhere in the building. Mr. Nouracki said there were not and that there weren't even solid brick walls. In response to further questions from Mr. Parrott, Mr. Nouracki said they could see girders supporting rafters and into the brick about eight inches and that he didn't know whether the overall thickness of the walls was uniform from bottom to top. He said that, relating to what percentage of the weight of the floors was carried on the outside walls, about 30% on the outside if the partition was in the center. He said there were interior load bearing walls on the whole height of the structure but that they weren't built very well, so that all the floors would have to be replaced. He said there was a structure from each floor to the basement, however.

Chairman Rheume asked whether the applicant could present the Board with a plan for a replacement structure within 30 days. Attorney Bosen said they had not designed a new building due to limited funds and because they didn't know whether they would have to design two buildings or three. He said there were discussions about building something that looked similar, was code compliant, and fit in with the Historic District.

SPEAKING IN OPPOSITION TO THE PETITION

Kerry Vautrot, Chair of Portsmouth Advocates, said the fire was a tragedy but 278 State Street was saved. She said it was a contributing resource to the Historic District and felt that the information in the applicant's packet was irrelevant. She said the Board had the right to see all the structural engineering reports, which she said made sweeping generalizations about historic buildings. She said the floor design challenge could be solved and that codes were not black and white and could be interpreted. She noted that the Board was asked to disregard the historic engineer who said the building could be repaired. She said if cost was a major concern, the applicant could use the Federal Historic Rehabilitation tax credit which would let him recoup up to 20% of the cost. She emphasized that the HDC wanted to preserve the integrity of the District and maintain its special character. She asked that the demolition be denied and that the applicant reach out to Portsmouth Advocates to investigate potential solutions to retain the property.

Vice-Chair LeMay asked Ms. Vautrot what was historic about what was left of the building. Ms. Vautrot said it was the scale, massing, rhythm of the windows, and the brick.

Chairman Rheume asked which of the building's historical characteristics of the building the Portsmouth Advocates knew of.

Richard Candee of the Portsmouth Historical Society referred to an article written by Dennis Robertson that described the historical importance of the building as being the center of publishing for over 75 years. He said the building had a previous fire and lasted another 110 years. He said there was good historical evidence, including the publishing history and the fact that it was the Times Building at one time, that the building had changes and was rebuilt safely.

Chairman Rheume asked what contributing factor was associated with the window fenestration. Ms. Vautrot said she thought that many of the windows had been replaced, but the window openings alone were significant.

Mr. Johnson referred to Ms. Vautrot's comment about codes not being black and white and said there were many building codes that were very black and white. He asked Ms. Vautrot what she thought about the code issue in terms of relocating windows and so on. Ms. Vautrot said a building could be constructed within a building and have the windows be in the same location. Mr. Johnson said that would create a financial hardship on the owner and asked how it would last for the next 100 years if it wasn't a usable space. Ms. Vautrot said she believed that it could be usable space.

Rick Becksted of 1395 Islington Street said the building had many contributing factors. He said the old brick could not be reconstructed and that no builder would be able to say that the building couldn't be restored. He noted that it was easier to build new, but not cheaper. He said the HDC did not consider financial concerns because their job was to preserve the heritage and history of a building. He said the City would work with the owner to comply with the safety regulations and bring to the building to current code.

Paige Trace of 27 Hancock Street said the building wasn't glamorous but represented a building that was built by the working class of Portsmouth. She said she was at a meeting where the applicant suggested an underground parking lot. She emphasized that the HDC had listened over and over to the applicant and paid attention. She asked the Board to respect the HDC members and how seriously they took the charge when they voted. She said she felt badly for Mr. Floros and the economic issue, but the building was invaluable, and once it was taken down, it would be a large bit of Portsmouth's history that would be gone.

Barbara Jenny of 92-94 Pleasant Street said the building was a mixed residential use one and that the 20% tax credit forms were not daunting. She said the Frank Jones Warehouse buildings were considered not able to be renovated for years.

SPEAKING TO, FOR, OR AGAINST THE PETITION

Attorney Bosen said there were several subjective comments but what mattered was the objectivity. He noted that the building had been changed over the years, with windows bricked over and the arching windows long gone, and the original openings removed and replaced with storefront windows. He said what was left was a building with basically four brick walls that had been significantly compromised over the years, especially by the fire. He said he understood that the brick was old, but said it was nothing compared to what could be built. He said the goal was to build something code compliant that would look exactly like what was there now.

Rick Becksted said a lot of downtown buildings weren't code compliant and pointed out that several windows and doorways were modified in buildings on Market and Ceres Streets. He said the HDC and City did their jobs by hiring one of the best historic engineers who said that the building could be saved.

Attorney Bosen said the first engineer that the City hired was Mr. Nouracki. He said the building was very narrow and that 40% of usable space would be taken up by life safety codes and stairways. He said it was not practical to save the building, based on the circumstance.

Mr. Becksted said the safety code could be accomplished and that there was no justification to tear the building down.

No one else rose to speak, and Chairman Rheume closed the public hearing.

DECISION OF THE BOARD

Chairman Rheume advised the Board to keep the HDC's review criteria in mind.

The Board discussed it. Vice-Chair LeMay said he understood the way the building was decades ago, with lovely windows and so on. He said there was some brick and some granite left, and not much else, and if it was preserved, it would be a functioning building instead of a disfunctional one that was antique. He said it would be Disneyland, only the outside would actually be real. Mr. Johnson said he was concerned about the compromises that needed to be made to make the building a viable structure, even though there were ways to work through code. Mr. Moretti said he was involved in the Martingale building project and the original concept was to keep the original building in the middle, but they couldn't because it was structurally flawed. He said it cost the builder millions of dollars. He said he felt that a compromise could be made. He referred to some historic buildings in Savannah where the front façade only was kept, thereby modernizing the building but keeping the integrity. He said it would alleviate some of the cost but give historic accuracy to the streetscape.

Chairman Rheume noted that the Historic District presented a conundrum because it imposed more pressure on the property owners, including the cost of renovating. He said the argument for demolishing the building was a structural one, including that the building was odd, had odd floors, life safety issues, needed stairwells and elevators. He said he thought there were other ways to get around that, like an adjacent structure, but there was also the economic argument as to what the value of the building historically was versus the cost to preserve the outer shell. He said it would take a lot more than patching fire-damaged areas to make the building workable. He said the Board recognized that preservation had a limit, as far as economics, but asked what that limit was. He said if the Board said the building had to be preserved, perhaps it would be demolition by neglect or would force the owner to sell the parcel to someone who had the means to renovate it. He said the Board were at a disadvantage because they didn't know what would replace the building. He said they also had no idea of what the rest of the parcel would look like. He said he favored a way to keep the building.

Mr. Parrott said it would help him make up his mind if he saw the complete reports from all the engineers. Chairman Rheume said he was convinced that the building could be rebuilt, but wondered if it would be worth it or if they would end up with something that would lose the overall context of that area of downtown. Mr. Johnson said that if the reports supported the applicant's case, the excerpts were commentary advocating for the building to remain standing. He said the Board had that report and that they put forward their big case through their expert witness. Chairman Rheume said he could request additional information if the Board felt that more information would help, but said he had seen enough information other than what the applicant proposed as a replacement. Mr. Johnson said the project would have months of work sessions with the HDC and could guarantee that the replacement drawing, if they had one, would not look the same when the work sessions were finished. He said he was trying to think of a way to recommend demolition with HDC's input, and how some significant aspects of the building could be retained. He said the scale, mass, and openings could be replicated.

Chairman Rheume said the Board lacked some of the HDC's architectural expertise but were doing the best they could. He noted that there was some discussion about some of the errors the HDC made but he thought it wasn't really relevant to what the Board was doing. He asked the

Board if they felt that the building should be preserved, like the HDC recommended, or that something different could be done.

The Board continued their discussion.

Mr. McDonnell asked whether the applicant could work with the HDC or others to do a partial demolition. Chairman Rheume said it would be back in the HDC's hands. Mr. Lee noted that demolition by neglect could happen and that the Board could send it back to the HDC to do something else and deny the appeal. Chairman Rheume said the denial would reinforce the HDC's ruling. Mr. Johnson said the BOA thought a lot about hardship, and it was a hardship to tell the owner to build another building next to it to fix the existing problems. Mr. Lee said that if the demolition was granted, the building would be gone, no matter what. Mr. Parrott said there could be a compromise with respect to a partial demolition and retaining some of the historic aspects, like the street front. Vice-Chair LeMay agreed and thought the HDC would perhaps see a new side to the project after hearing the Board's discussion. The Board agreed that they wanted to keep a portion of the building so that the street façade would be preserved. They said it would require the HDC to work with the applicant to work out how the two sides that didn't face a street would be reworked.

With no motion made, Chairman Rheume passed the gavel to Vice Chairman LeMay and was recognized by the Acting Chair.

Chairman Rheume then moved to deny the appeal with the stipulation that the applicant work with the Historic District Commission to arrive at an agreeable plan which, if it involved any reconstruction of the existing building, must fully preserve the State Street and the Church Street facades of the existing building.

Mr. Parrott seconded the motion and referred to all the previous discussion.

Chairman Rheume noted that the Board had a lot of discussion and considered such factors as the historical time period, the context, and the immediate setting. He addressed the following Review Factors: 1) *The historical time period, context or immediate setting.* Chairman Rheume stated the Board had some good discussion about that in terms of the age of this building. The property had some unique aspects to it but while it was not an overwhelmingly unique structure or incredibly historic, they believed that it did have some value. 2) *The structure's architecture, including stylistic features, design elements and mass.* Chairman Rheume stated that the massing was unique for that space and could be partially duplicated but not necessarily in its entirety. It had some unique stylistic features that, while compromised over the years, could be the basis for restoration. There were certainly some images out there that could be a guiding principle for restoring the facades that people would notice. 3) *Construction Materials.* Chairman Rheume stated that there were some existing construction materials that were worthy of preservation from a sight and even feel perspective for passersby. There was potentially some technology out there that could allow for this building to be successfully re-used as part of a bigger renovation of the entire site. 4) *Its importance relative to a historically recognized individual or event.* Chairman Rheume stated that there was sufficient history, not saying it

couldn't be partially demolished, but enough that it does give it some little extra value that makes it at least preserving in part.

Chairman Rheume then addressed the following Review Criteria: 1) *The special and defining character of surrounding properties, including architectural details, design, height, scale, mass, width of surrounding structures, street frontages, types of roofs, facades and openings.* Chairman Rheume noted the discussion of the Board about the structure's sort of unique characteristics in terms of its half floor height and how it was built. He stated that some of this has been compromised over the years but with the right effort some of that could be restored in a pleasant manner that kept in mind some of the historic characteristics that it originally had. The street frontages were kind of unique in that they sat right up on an alleyway and provided an anchor for that corner. 2) *The significant historical or architectural value of an existing structure for which a Certificate is sought, including its setting, scale and mass; and the general size of new construction with consideration of such factors as height, width, materials and architectural details.* Chairman Rheume stated they didn't have anything on the new construction side but they believed there was some ability to make a complimentary new construction adjacent to this structure that could still preserve some of it while at the same point in time resolving some of the technical difficulties. The setting, scale and mass were unique for that corner. They could potentially be partially duplicated but they felt there were enough unique aspects to it that it needed to be preserved. 3) *The extent to which a proposed project's exterior design, scale, arrangement, texture, detailing and materials complement or enhance the existing structure and are compatible with surrounding properties and the Commission's (Historic District Commission) adopted Design Guidelines.* Chairman Rheume stated that, again the Board was probably not the best to speak to that but they did see that there was enough there and how it was arranged in its texture and detailing. They had talked about the unique semicircular windows, again partly compromised by changes over the years but still pointing to something that was kind of neat and kind of different which he stated was worthy of at least preservation along those two facades. 4) *Encouraging the innovative use of technologies, materials and practices provided these are compatible with the character of surrounding properties.* Chairman Rheume stated that they were again opening up the door to use some of the innovative ideas to go and redevelop the rest of the site and possibly a portion of this building that could be done in a more cost effective manner and in a way that would allow full compliance with the Americans With Disabilities Act as well as compliance with life safety issues. He stated they could make something that had modern appeal and was saleable. While they didn't have all the details, there was enough there that could still be preserved what would be the touch and feel of it but at the same point in time allow that more modern development to take place.

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

Mr. Johnson said he supported the demolition concept but would support the vote to deny because once the building was gone, it was gone. He said he knew that cost wasn't supposed to be a significant factor, but it cost the applicant money to come back. He encouraged all parties to figure it out and move forward.

The motion passed by unanimous vote, 7-0.

III. ADJOURNMENT

*It was moved, seconded, and **passed** by unanimous vote to adjourn the meeting at 11:45 p.m.*

Respectfully submitted,

Joann Breault
BOA Recording Secretary