

**6:30 P.M. City Council Chambers, Work Session on proposed Impact Fees Ordinance**

**REGULAR MEETING  
PLANNING BOARD  
PORTSMOUTH, NEW HAMPSHIRE**

**7:00 P.M. CITY COUNCIL CHAMBERS AUGUST 16, 2001  
CITY HALL, MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

**MEMBERS PRESENT:** Arthur Parott, Chairperson; Kenneth Smith, Vice Chairperson; Richard A. Hopley, Building Inspector; Thaddeus J. "Ted" Jankowski, Deputy City Manager; Noele Clews, City Council Representative; John Sullivan; Ray Will; Ernie Carrier; and, Don Coker, alternate

**MEMBERS ABSENT:** Faye Goldberg; and, Paige Roberts, alternate

**ALSO PRESENT:** David M. Holden, Planning Director; and, Lucy E. Tillman, Planner 1

.....  
Prior to proceeding with the meeting, the Planning Director announced that he would ask the Board to table Public Hearing (F) to its September meeting due to the fact that City staff is attending meetings at the Seacoast MPO as there are a number of projects pending on the State's Ten Year Plan.  
.....

**I. OLD BUSINESS**

A. The application of **Anthony Giovannettone** for property located off **Lang Road** wherein a Conditional Use Permit is requested as allowed in Article VI, Section 10-608(B) of the *Zoning Ordinance* to allow the construction of a two-story 28' x 65' building upon a paved accessway within an Inland Wetlands Protection District Buffer Zone. Said property is shown on Assessor Plan 286 as Lot 22A and lies within a General Business district. **(This application was tabled to this meeting from the Board's July 19, 2001, meeting. The Public Hearing remains closed.)**

Let the record show that Messrs. Hopley and Coker stepped down from sitting on this application.

Mr. Holden explained that this application arises out of a conditional use requirement. He suggested that the Board could take the application off the table and either re-table to the end of the meeting or to next month's meeting to allow for the issue of the subdivision to be further addressed. He further suggested that the Board may wish to afford Attorney Pelech an opportunity to speak.

Mr. Smith moved to take the application off the table. Mr. Sullivan seconded the motion which passed on a 7-0 vote.

Attorney Pelech stated that he concurred with the Planning Director in that this application cannot be disposed of until Item B under Public Hearings is resolved.

Mr. Holden informed the Board that he had received a call from Attorney Peter Loughlin at 4:30 p.m. stating that he had a conflict and would try to be at the meeting by 8:00 p.m. (Attorney Loughlin represents the applicant in Item B under Public Hearings).

Mr. Sullivan recommend tabling the application to the next meeting of the Board and further commented that if Attorney Loughlin was not present by 8:00 p.m., that Item B under Public Hearings be tabled also. Mr. Will seconded the motion for discussion purposes. There was no further discussion on the motion. The motion passed on a 7-0 vote.

.....

B. The application of **Michael Iafolla** for property located off **Regina Road** wherein a Conditional Use Permit is requested as allowed in Article VI, Section 10-608(B) of the *Zoning Ordinance* to allow the construction of a single-family home within an Inland Wetlands Protection District. Said property is shown on Assessor Plan 225 as Lot 28 and lies within a Single Residence A district. **(This application was tabled to this meeting from the Board's July 19, 2001, meeting.)**

Chairperson Parrott stepped down from sitting on this application and handed the gavel to Vice-Chairperson Smith.

**SPEAKING TO THE APPLICATION:**

The application was taken off the table. Attorney Mike Donahue of Donahue, Tucker & Ciandella of Exeter addressed the Board stating that he had the pleasure of appearing before the Board on behalf of Mr. Iafolla. Attorney Donahue stated that John Chagnon was seated in the audience and would be presenting the site plan.

Attorney Donahue went on to state that they were last before the Board in December of 1999 when a motion to approve a Conditional Use Permit failed on a tie vote. He based that tie vote on the uncertainty within the Conservation Commission on whether to recommend approval of the request.

Subsequently a conclusion was reached that it would make more sense to work with the recommendation of the wetlands consultant engaged by the City, Jim Gove of Gove Environmental Services. They worked to come up with an alternative proposal. That proposal received a favorable recommendation from the Conservation Commission.

John Chagnon of Ambit Engineering addressed the Board and stated that the plan before the Board had taken into consideration the suggestions made during the recent site walk. He went on to state that they have taken the house location and moved it to the westerly corner and considerably shortened the driveway. The septic system is still in the same location as was shown on the prior plan. He reminded the Board that the property was purchased in 1967 as part of an approved subdivision.

Curves have been included in the design of the driveway in order to preserve as many trees as possible in the project vicinity 14" in diameter or larger (20 trees). It is anticipated that eight of those trees will be removed. Additional tree plantings will be provided along the VanBilliard property line; some arborvitae, some hemlock. A conservation easement will protect 3.5 acres of the 4 acre parcel.

Mr. Coker inquired as to the date of the latest plan with the response being June 12<sup>th</sup>. Mr. Holden stated that it was his understanding that even though the driveway has been shortened, the siting of the house does not require approval by the Board of Adjustment. Mr. Chagnon concurred adding that the house is at the 20' setback from the property line.

As a result of the meeting with the Conservation Commission, monitoring wells will be installed to assure that there is no impact to water quality. There are four locations for the monitoring wells: adjacent to the driveway, adjacent to the septic tank and two locations adjacent to the leaching field.

Paula Womby of 25 Oakwood Drive asked if the driveway could be shortened by 20' and asked that additional vegetation be provided between their boundary line and the back of the proposed house.

In response, Attorney Donahue stated that with regard to screening, they have reviewed the letter submitted by the Wombys which he characterized as an appropriate letter for the Board. He stated that the Board might remember from the site walk, that the Wombys' residence is located quite some distance from the location of the proposed house. He pointed out that the site in question (the Iafolla property) would have a very limited area for a back yard due to the siting of the septic system and the placement of the conservation easement.

The plan before the Board is a balance of environmental concerns with the property rights associated with a lot of record for some years. Attorney Donahue stated that the applicant would provide at his own expense mutually acceptable screening similar to what will be provided for the VanBilliards, if the Wombys would be comfortable with that.

Mr. Chagnon pointed out that the wetlands line is not parallel to the boundary line; that a turning area has been provided in the driveway for the safety of the residents. By changing the location of the house, they would lose the ability to have a safe driveway. Mr. Chagnon pointed out that the Wombys' house is at least 150' away.

Mr. Jankowski expressed his concern with the 20' setback and thought it would be reasonable to require a certified plot plan to ensure that the foundation is appropriately sited.

Mr. Coker stated that it was his understanding that Attorney Donahue was offering to provide mutually acceptable screening for the Wombys. Attorney Donahue concurred stating that they are offering to plant six hemlock trees as they are doing for the VanBilliards with the understanding that the trees would be located on the Wombys' property.

Mr. Sullivan wondered how close one could plant trees to a septic system. He wanted to make sure that the trees would not disrupt the septic system once they take root. Mr. Chagnon stated that the septic system is far enough from the property line to be in compliance with the necessary rules adding that there is room between the toe of the side slope for the leaching field and the boundary line to plant trees. Mr. Sullivan inquired as to how close the septic system would be to the neighbor's line with the response being 10'.

The Chair made three calls for speakers. There being none, the Public Hearing was closed.

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

Mr. Smith noted for the record that there is a letter from David Womby on file.

Mr. Coker stated that he would like to ask the wetlands consultant some questions. Jim Gove of Gove Environmental Services addressed the Board. He stated that one of the issues that may still be outstanding is the issue of water quality testing. He went on to state that the monitoring well adjacent to the driveway is likely to receive oil drippings and/or any salting of the driveway. He suggested that the monitoring wells be installed prior to the actual occupancy of the structure in order to have a base line. The monitoring should be done once a year typically in the springtime (spring runoff). It was represented before the Conservation Commission that the monitoring would be done over a three year period which Mr. Gove felt would be adequate. He referred to and submitted for the record water quality testing package information from Beland testing laboratory. The other three wells would deal with the basic concern of what might be the impact of a leaching field not functioning properly.

Ms. Clews questioned the three year monitoring period and whether that would be sufficient time; say, if a different person was living in the house. Attorney Donahue stated that if there were any test results that were out of line, the testing period would be extended. Furthermore, the wells will be left in place as part of the conservation easement which would allow the municipality to continue monitoring the wells if they so desire.

Attorney Donahue spoke to the clause in the conservation easement regarding enforcement authority at the expense of the violator which he felt would be an ideal model down the road for enforcement issues.

Mr. Smith also inquired if a three year monitoring period would be enough. Mr. Gove responded by stating that he thought so." He went on to state that his recommendation would be to have a base line placed on record and then it would be easy enough to compare the yearly reports to see if any significant changes have occurred.

Mr. Coker inquired of Mr. Gove in terms of protecting the wetlands, how would he rate the four monitoring wells in a scale of one to ten. Mr. Gove stated that he would give them a rating of seven or eight on this particular proposal adding that this is a pretty good plan from the standpoint of where the monitoring wells are located.

Mr. Coker stated that it was his understanding that when wetlands mitigation is done, the normal and customary monitoring period is five years. He wondered how the three year term was arrived at. Mr. Gove responded by stating that it is based on a sliding scale; that smaller mitigation sites have three year monitoring periods adding that the Army Corps of Engineers had instituted a five year monitoring program for major projects.

Mr. Coker inquired of Mr. Gove if, in his professional opinion, the three year monitoring period is sufficient. Mr. Gove responded by saying, "I believe so" adding that a trend would occur within one to two years should there be significant degradation. Mr. Coker then inquired what would happen if one were to see a trend. Mr. Gove stated that depending on what might have occurred, then remedial action would have to take place.

Mr. Holden interjected that it might be helpful to the Board in looking for an action on this application to recall the recent site walk and the history of this property as a pre-existing lot of longstanding. He felt that the issues of the wetlands ordinance had been addressed by the applicant and that a balance of competing interests had been achieved. He pointed out that the house has been relocated to a site where it conforms with the *Zoning Ordinance* adding that the leaching field should have a minimal impact on the environment. He went on to state that the City's own consultant had gone on record to state that the application before the Board meets the requirements for the granting of a Conditional Use Permit.

Mr. Holden went on to state that the application is before the Board as a result of a Court action adding that if the Board chose to grant a Conditional Use Permit, it would effectively complete a partnership which has taken a long time to be formed.

Mr. Holden continued on to state that the Board needs to be aware that the Conservation Commission has labored extensively and has recommended approval with stipulations. He concluded his statements by stating that from the department's perspective a solution has been achieved which at one time was thought to be impossible.

The Chair commented that if a motion were made to grant that it would be subject to the four monitoring wells for a three year period together with the planting of six hemlocks along the Wombys' property line and the submission of a certified foundation plan.

Mr. Coker stated that he has been outspoken on this application; however, he agrees with the Planning Director that competing interests have balanced out. Mr. Coker moved to accept with stipulations. Mr. Will seconded the motion. Mr. Sullivan asked that the Board be provided with copies of the monitoring reports. Mention was made that the stipulations from the Conservation Commission be included. Attorney Donahue interjected that the stipulations were acceptable to them (the applicant). Ms. Clews asked that a recommendation be included that the owner minimize the amount of salt used on the driveway. The motion passed on an 8-0 vote.

Stipulations:

1. That the stipulations from the Conservation Commission be complied with regarding the Conservation Easement and the monitoring wells;
2. That the Conservation Easement be reviewed by the City Attorney as to content and form;
3. That four monitoring wells shall be installed prior to occupancy and remain in place for a period of a minimum of three years;
4. That the results from the yearly report from the monitoring wells shall be submitted to the Planning Department with copies to be distributed to the Planning Board;
5. That six Hemlock trees shall be planted as a vegetative buffer on the Wombys property (25 Oakwood Drive); if such is agreeable to the Wombys; and,
6. That a certified plot plan be submitted to the Inspection Department after the foundation is in place to ensure that the foundation is properly sited.

At this point in the proceedings, Vice Chairperson Smith returned the gavel to Chairperson Parrott.

.....

C. Amended Site Plan review – 127 Parrott Avenue (**This Agenda item was tabled at the Board's July 19, 2001, meeting to this meeting.**)

Mr. Smith moved to take the application off the table. Ms. Clews seconded the motion. The motion passed on a 9-0 vote.

Mr. Holden advised the Board that the department had invited Ted Connors, Executive Director of the Portsmouth Housing Authority to be present. He continued on to state that the department has worked closely with other City departments and Mr. Connors in reviewing the issue. The

Board has the various department reports which conclude that the emergency access is mostly to the public benefit. He invited the Board to ask questions of Mr. Connors.

The Chair inquired as to the main issue. Mr. Holden stated that the Housing Authority is looking for approval of an amended site plan showing a driveway connection between two parking lots owned by the Housing Authority. Due to a series of miscommunications, the driveway connection was not included in the original approval. The City has attempted to work cooperatively with Mr. Connors.

Timothy J. "Ted" Connors addressed the Board apologizing for installing an emergency gate while they (the Housing Authority) were in the process of hardtopping without coming back to the Board. He thought that the emergency access would be useful during such events as the Fourth of July fireworks, First Night, etc. The Fire Department would have egress to the gate. The two parking spaces on the other side of the gate have been relocated.

The Chair commented that the gate was put in the fence right up against two existing parking spaces blocking the emergency gate.

Mr. Coker inquired as to how the installation of the gate happened.

Mr. Connors stated that during the repaving of the Parrott Avenue lot, it was realized that it would be a good time to install the gate; that Housing Authority staff met on site but did not come back before the Board. He apologized once again for not keeping the Board "in the loop" as they (the Housing Authority) try to do.

Mr. Holden interjected that the Housing Authority has worked well with the Fire and Police Departments with regard to lighting; that the emergency access would be helpful during Citywide events. He noted that Mr. Connors (the Housing Authority) controls parking and felt that the area behind the gate would be kept open.

Mr. Hopley inquired as to who stripes the lot with Mr. Connors informing him that the Housing Authority does the striping. Mr. Hopley suggested that the area behind the gate be striped as a "no parking zone".

Mr. Jankowski moved acceptance with the stipulations contained in the department's memo. Mr. Will seconded the motion. The motion passed on a 9-0 vote.

Stipulations:

1. That parking be eliminated on the Court Street lot at the entrance to the 127 Parrott Avenue connection and the area be signed for emergency access/egress only and designated as a "no parking zone";
2. That the gate padlock be a knox padlock for Fire Department access;
3. That the access be plowed and maintained by the Portsmouth Housing Authority during the winter months; and,
4. That site lighting be addressed.

.....

## II. PUBLIC HEARINGS

A. The application of **Susan B. Parnham** for property located at **1220 Islington Street** wherein Preliminary Approval is requested to re-create two lots from an existing lot. One lot would have a lot area of 5,163 s.f. ± with the other lot having a lot area of 5,000 s.f. ± in a district where 15,000 s.f. of lot area is the minimum required. Furthermore, one lot would contain the existing dwelling unit and garage and would have a non-conforming rear setback where 30' is the minimum required. Said property is shown on Assessor Plan 233 as Lot 6 and lies within a Single Residence B district.

### **SPEAKING TO THE APPLICATION:**

Attorney Bernard W. Pelech addressed the Board stating that 1220 Islington Street is a portion of one of the oldest subdivisions in the City of Portsmouth. He stated that a copy of the tax map was included in the Board's packet. The small lots in the Islington/Melbourne/Essex Streets area were created in the late 1800s.

Attorney Pelech informed the Board that Ms. Parnham has owned the property for a number of years. She acquired what she thought was two lots. The lot in question is a long, narrow lot which runs from Islington Street to Melbourne Street. Originally the site was two lots on the subdivision plan. Unbeknownst to her the two lots were merged into one lot.

Attorney Pelech went on to state that when Ms. Parnham approached the City about building on the second lot, she was told that she would need to appear before the Planning Board and the Board of Adjustment. The matter is scheduled for the Board of Adjustment meeting on the 21<sup>st</sup>. Attorney Pelech suggested that the application before the Board be tabled pending action by the Board of Adjustment or that Preliminary Approval be granted subject to Board of Adjustment approval. He stated that if the garage within the 30 yard setback becomes a big issue, that they would offer to remove the garage.

Attorney Pelech went on to comment that the original subdivision plan created over a hundred of these 50' x 100' lots. He reiterated that due to statutory language, the two lots were merged unbeknownst to Ms. Parnham. He referred to the housing shortage in the City and informed the Board that Ms. Parnham wanted to construct a very small dwelling which would meet all the zoning requirements for her own purposes adding that the house on Islington Street is too large for her current needs.

Mr. Coker inquired as to how the lots became merged unbeknownst to Ms. Parnham. Attorney Pelech responded by stating that the *Zoning Ordinance* and State statutes in the late 70s, early 80s provided that two adjacent lots which do not meet the requirements of the *Zoning Ordinance* are merged into one lot for purposes of zoning. The deed specifically references Lots 12 and 15 on the subdivision plan. No formal notice is given of the merger.

Mr. Holden asked Attorney Pelech to explain to the Board the purposes of the numbers in the circles on the tax map. Attorney Pelech stated that they are the actual numbers that correspond with the original subdivision plan.

Mr. Joseph Louther of 64 Melbourne Street addressed the Board and stated that historically Attorney Pelech was correct in that the houses in the area are 1900s vintage. However, many people bought adjacent lots. It was his contention that there was no room for a building on Ms. Parnham's lot; that the City had shortened the street up by six or seven feet; that traffic has become a problem. He felt that the new house would be jammed in between two existing houses which are situated on double lots. In concluding his statements, Mr. Louther stated that his

neighbor at 65 Melbourne Street (George Pendleton) was out of town on business but that the neighbor had said, "no, no" to the request

Kent LePage of 45 Melbourne Street addressed the Board stating that he respects property rights and he respects what Ms. Parnham is trying to do. However, he disagreed with the creation of two non-conforming lots. He also referred to the shrinking of the street and spoke to parking and fire hazards. He recommended a site walk for the Board to see the closeness of the houses.

Sue Parnham addressed the Board and emphasized the fact that she had bought the lots as two lots. In 1996 she was divorced and received a Quitclaim Deed which referenced the two lots. She stated that she was looking to put a 28' x 46' house on the back lot just for herself; otherwise, she couldn't afford to stay in Portsmouth.

Attorney Pelech reiterated that the house Ms. Parnham wants to build would meet all zoning requirements and would meet all setbacks unlike the houses depicted on the tax map. He contended that there is room for parking.

Mr. Smith moved to table the application to hear back from the zoning board. Mr. Carrier seconded the motion.

Ms. Clews inquired what would happen if the Board of Adjustment approves the request. Mr. Smith replied that the application would be back before the Board with more information.

The Planning Department disagreed. Mr. Holden interjected that the reason the request comes to the Planning Board first is so that the Board can put the line back in. Should the Board of Adjustment grant approval, arguably there is a hardship.

The Chair tried to explain that the actions of the Planning Board and the Board of Adjustment are independent of each other. In no way does Board of Adjustment action change the Planning Board's rights or responsibilities.

Mr. Holden interjected that the Planning Board cannot grant relief from the *Zoning Ordinance*. Mr. Will commented that the Board of Adjustment has nothing to do with subdivisions.

Mr. Coker stated that the purpose of the tabling motion is to get input from the Board of Adjustment. Mr. Smith stated that he was interested in what the outcome would be at the Board of Adjustment level. Mr. Coker inquired if procedurally they (the Board of Adjustment) would be looking at putting a house on a small lot. Mr. Holden explained that the Board of Adjustment would not be looking at the structure; that they would be looking at insufficient frontage and lot area.

Mr. Smith argued that if the Planning Board doesn't approve the subdivision, it doesn't matter what the Board of Adjustment says. Mr. Coker stated that if we (the Planning Board) table, it goes to the Board of Adjustment. Mr. Holden interjected stating that with all due respect that one of the obvious impulses is to let somebody else go first; however, in reality, it takes both Boards to accomplish what Ms. Parnham wants to do.

The Chair stated that it is logical to come to the Planning Board first; that if the Planning Board doesn't create a lot, then what is the reason for going to the Board of Adjustment.

A roll call vote was taken on the motion to table. The motion lost on a 4-5 vote with Messrs. Coker, Clews, Will, Jankowski and Parrott voting in the negative.



Mr. Coker commented that from a technical standpoint, the application should probably be turned down; that the lot is clearly non-conforming. However, he pointed out that by looking at the tax map, the lot is not an unreasonable size. It was his contention that there are many, many substandard lots this size. He did not feel that the request was an unreasonable one and stated that he supported subdividing the lot as proposed.

Mr. Will stated that he would have to agree with Attorney Pelech and Mr. Coker. He thought the City needed to get back to small lots with small houses similar to such areas as Maple Haven and Atlantic Heights. He felt that the City was becoming a place of things adding that Portsmouth is a City of living people; that unless we keep a balance that we are going to be in big trouble.

However, Mr. Will went on to state that he had to go by the law and couldn't support subdividing an existing non-conforming lot into another non-conforming lot. He felt that the request was an example of why the standards should be changed.

Ms. Clews inquired as to the handling of mergers. Mr. Holden stated that she was looking at the reason. He stated that at the turn of the century before zoning and land use sensitivity to issues, people would go out and subdivide land without Planning Board approval. Since then we have learned a lot. The reason for a merger is to create a lot as conforming as it can be. He commented that Mr. Will had hit it right on the button; that approving this application would not change the ordinance. He realized that this is a difficult situation adding that the Board has acted on similar requests in the past and has denied them in the past.

Mr. Louther re-addressed the Board stated that he is retired and can't afford the taxes; that he has nothing against Ms. Parnham pointing out that she could sell her property on Islington Street. He referred to Mr. Will's statement that the law is the law.

Attorney Pelech stated that the request does have to go to the Board of Adjustment. He stated that they are not asking for Final Subdivision Approval; that they are asking the Board to grant Preliminary Approval subject to Board of Adjustment adding that somebody has to go first. It was his opinion that they should go to the Board of Adjustment first adding that numerous times the Planning Board has tabled applications for Board of Adjustment action.

Kent LePage re-addressed the Board and asked if the Board had received the department's recommendation. The Chair replied in the affirmative and stated that the recommendation was in the negative.

There being no further speakers, the Chair declared the Public Hearing closed.

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

The Chair noted that Attorney Pelech had mentioned that there were a lot of small lots in the area in question. However, the Chair stated that he noted that 12 lots in the block ranged in size from 5,300 s.f. to 22,680 s.f.

Mr. Sullivan commented that some people in the area were fortunate enough to purchase two lots side by side. He stated that the Board had granted relief over on Essex Avenue a couple of years ago adding that most of these lots were 50' x 100' around the 1920s adding that Portsmouth historically is built on small lots.

Mr. Coker stated that it looked like there were many 5,000 s.f. lots in the Essex, Islington, Vine and Melbourne area. He reiterated that he felt the request was not out of character for the neighborhood.

Mr. Jankowski stated that he was very sympathetic with the plight of the applicant; however, more and more he is seeing shoe horn development adding that the lot is already non-conforming. He felt that to grant the request would be a very serious step in the wrong direction.

Mr. Will stated that he felt the City needed to start to consider shoehorn development; however, he had to go by the regulations as they stand. He commented that Portsmouth was becoming a place to work and not a place to live.

Ms. Clews stated that she agreed with Mr. Will. She felt that if the Board approved this request, that a standard would be set for other people in this area who would feel they have a right to create 5,000 s.f. lots which would go against the *Zoning Ordinance*. She concluded her statements by stating that it is not the Board's job to change the *Zoning Ordinance*.

Mr. Smith stated that he was actually going to make a motion to approve Preliminary Subdivision Approval. Mr. Sullivan seconded the motion for discussion purposes. In speaking to his motion, Mr. Smith noted that looking at the area in question, some people had purchased adjacent lots and put them together but there were many 5,000 s.f. lots within the neighborhood. He pointed out that if the lots were owned by two separate owners, the Board would not be looking at this issue.

Mr. Coker stated that he would support the motion. He thought that the Board should look at the larger picture adding that frankly he didn't see a problem.

Mr. Will felt that there were other ways to accomplish what Ms. Parnham wanted to accomplish; such as, placing another building on the lot with Board of Adjustment approval. He concluded his statements by stating that the Board does not create non-conforming lots.

The motion lost on a 3-6 vote with Mrs. Clews, Messrs. Carrier, Will, Hopley, Jankowski and Parrott voting in the negative.

.....

At this point in the proceedings, the Board took a recess and stated that when they returned, they would decide whether to abide by their 10:30 p.m. rule. Upon returning from their recess, the Chair announced that the Board would make an assessment of where they stand at 10:00 p.m.

.....

B. The application of **R & L Enterprises** for property located off **Lang Road** wherein Preliminary and Final Approval is requested for a lot line verification of a 1.37 acre lot with some 290' of continuous street frontage. The 50' wide right-of way as shown on plan entitled, "Lot Line Revision for Erminio A. Ricci" dated October 19, 1981, recorded in the Rockingham County Registry of Deeds as D-10485 and as shown on plan entitled, "Subdivision of Land for R and L Enterprises" dated February 4, 1982, and recorded in the Rockingham County Registry of Deeds as C-10638 is not shown on the proposed lot line verification plan. Said property is shown on Assessor Plan 286 as Lot 22-A and lies within a General Business district.

Attorney Peter J. Loughlin addressed the Board and stated that he was representing Jim Labrie and R & L Enterprises. In 1981 Jim Labrie and Bud Ricci purchased a 4.27 acre lot near the corner of Lang Road from the Ricci family. In late 1981, approval was received to subdivide the land into two lots with frontage off Lang and Lafayette Roads. When the Subaru garage came before the Planning Board with a site plan, a right-of-way was shown on the site plan. The right-of-way was neither requested or required by the Planning Board and was not made a condition of

approval. The lot was eventually sold to the owners of the Subaru garage. However, the right-of-way was never conveyed to these individuals.

Attorney Loughlin submitted photographs which showed that the right-of-way was blocked off. He offered that the right-of-way had been blocked off for the past 15 years. Some time in the late '80s the property was mortgaged to Fleet Bank. No reference was made to a right-of-way. Fleet Bank foreclosed and sold the property to Mr. LaBonte. No reference was made to a right-of-way.

Attorney Loughlin went on to state that the right-of-way is nonetheless shown on a plan. They are asking for approval of another plan removing that right-of-way. Attorney Loughlin informed the Board that Mr. LaBonte's attorney was present as they want the right-of-way to be kept in existence. Attorney Loughlin stated that they (R & L Enterprises) would indemnify the City and defend the City in any legal action arising from this issue with the right-of-way.

Mr. Coker stated that he was confused and asked why the Board was being asked to approve a plan without the right-of-way in question. Attorney Loughlin stated that they want to record the plan without the right-of-way; that such an action would not take away the legal issue between the parties. Attorney Loughlin went on to state that the City has never taken the position that the right-of-way was necessary.

Mr. Will interjected that he remembered a few years back a dispute between two property owners in the center of town; that at that time a note was added to the plat that a dispute was ongoing.

Attorney Stephen Hermanns addressed the Board explaining that he was representing Lionel LaBonte, owner of Stratham Tire. He felt that the issue was a private property issue. He stated that Lot 1 (on the subdivision plan) would not exist unless the subdivision plan was approved by the Planning Board. That plan shows the right-of-way. Ordinarily, for the conveyance to be done properly, a deed would be prepared referring to the plan. However, he commented that not all conveyances are properly done.

Attorney Hermanns stated that he had read eight or ten New Hampshire Supreme Court decisions. This precise question was not decided one way or another by the New Hampshire Supreme Court. He went on to state that he agreed with Attorney Loughlin that the issue to be decided is the validity of what was presented on an approved plan. A landowner asked permission to subdivide a lot into two lots. One of those lots had a right-of-way running out to Lang Road. The right-of-way was not a condition of approval. It is Attorney Hermanns' contention that the right-of-way exists; that the Board approved the plan and had it recorded in the Registry of Deeds. Attorney Hermanns stated that the plan was recorded so that subsequent buyers would know what the lot is.

Attorney Hermanns reiterated that the right-of-way is there; it is paved and it runs out to Lang Road. Mr. LaBonte bought the property from Fleet at foreclosure. The notice of foreclosure referenced access from two roads. Another component of the foreclosure package was the very subdivision plan with the right-of-way shown on it. It was Attorney Hermanns' opinion that Mr. LaBonte was not at fault and the applicant was not at fault.

Jim Labrie addressed the Board stating that he is one of the partners of R & L Enterprises. He stated that the right-of-way was never shown on any deed. When he saw the foreclosure notice, he immediately called Joe Shanley (real estate agent) and told him that the right-of-way was not included and was not to be transferred. An announcement to that effect was made at the auction. Subsequently, Mr. Labrie's attorney, Jim Ritzo, contacted Mr. LaBonte regarding the right-of-

way. Mr. LaBonte indicated at that time that he had no interest in it and turned it down. The right-of-way has been permanently blocked since 1987.

Attorney Louglin referred to Mr. Will's statement about placing a note on the plat that the City recognizes a dispute and will not become involved in that dispute. He reiterated that by not conveying the right-of-way and by blocking it off, they (the applicant) tried to avoid putting the City in the middle of a dispute. Attorney Loughlin went on to explain that if the right-of-way can be removed, a small portion of a two acre lot could be developed. He did not feel that any particular point was being served by having a right-of-way left in there.

Mr. Coker commented that an alternative would be to have the parties settle the dispute and then come to the City. Attorney Loughlin responded by stating that he did not know whether they would be able to settle it. However, he added that if that is the only way it is going to get resolved, then that is what will happen although they would prefer that the City approve the plan without the right-of-way on it.

There being no further speakers, the Chair declared the Public Hearing closed.

**DISCUSSION AND DECISION OF THE BOARD**

Mr. Holden interjected that both attorneys are correct; that there are two issues here. One is a dispute of a private property right that legally exists. The party of interest has to carry the burden. R & L Enterprises is defending the question, not the City. The issue before the Board is the determination of what is the public interest in the right-of-way. He went on to state that if the Board is uncomfortable in this role, that the request could be tabled until such time as the City's counsel could be present.

Mr. Will so moved to table the application to the Board's September meeting to allow for the City Attorney to be present. Ms. Clews seconded the motion. The motion passed on a 9-0 vote.

.....

C. The application of **Richard P. Fusegni, DSP Shopping Center, LLC and Endicott Hotels** for property located at **1574 and 1600 Woodbury Avenue** wherein Preliminary and Final Approval is requested for a lot line relocation which would result in the following: 1574 Woodbury Avenue would have a lot area of one acre  $\pm$  and 1600 Woodbury Avenue would have a lot area of 15.94 acres  $\pm$ . Said property is shown on Assessor Plan 238 as Lots 16 and 17 and lies within a General Business district. Planning Board approval for this request was granted on September 2, 1999; however, the mylar was not recorded within a year of that approval.

**SPEAKING TO THE APPLICATION**

Attorney Bernard W. Pelech addressed the Board and stated that he was representing Mr. Fusegni and the Shopping Center. He stated that the lot line relocation was before the Board in 1999; however, the site review process for having a restaurant on this lot was never completed and the lot line adjustment was never filed. The same lot line relocation is before the Board and will enable the owner and applicant to go forward with the site plan.

Attorney Pelech went on to explain that in the early '90s when the shopping center was built, Mr. Fusegni's property was to be included. For one reason or another Mr. Fusegni's property was

never conveyed to the shopping center; and, in fact, the shopping center had to provide a 75’ buffer all the way around the residential parcel. With its present configuration, the parcel could have no structures on it other than, say, a photo mart or communications antenna (laughter ensued). The proposal before the Board is to allow the shopping center to convey basically the buffer zone to Mr. Fusegni – enough for a one acre lot. The site plan places a building on the one acre lot. In other words, the request before the Board involves adding land to a non-conforming lot to make it a conforming lot.

There being no further speakers, the Chair declared the Public Hearing closed.

**DISCUSSION AND DECISION OF THE BOARD**

Mr. Smith moved to approve the request as presented. Mr. Sullivan seconded the motion. The motion passed on an 8-1 vote with Mr. Will voting in the negative.

.....

D. The application of **Richard P. Fusegni** for property located at **1574 Woodbury Avenue** wherein site plan approval is requested for the construction of a 5,250 s.f. building for restaurant use with related paving, utilities, landscaping, drainage and associated site improvements. Said property is shown on Assessor Plan 238 as Lot 17 and lies within a General Business district.

**SPEAKING TO THE APPLICATION**

Attorney Bernard W. Pelech addressed the Board and informed them that they (the applicant) got three-fourths through the site review process about a year and a half ago. At that point in time, they realized that the site plan was not going to work due to traffic problems within and without the access road.

Subsequently, a Variance was granted to have a 20’ buffer in the front which allowed the building to be pushed back. Furthermore, a signalized intersection into the shopping center is now possible with the Commerce Way signals now in place. Access to the restaurant would be to the rear. Such a proposal was originally suggested by the Traffic/Safety Committee and the Technical Advisory Committee.

This time around, Attorney Pelech reported, that the Traffic/Safety Committee unanimously recommended approval of the plan in one meeting. The same was true with the Technical Advisory Committee. He explained that this is a plan that everybody has endorsed wholeheartedly. The new signalized intersection would be another means of access/egress for the shopping center and would take a load off the intersection at Applebees especially the exit lines on Arthur Brady Drive.

All utilities have been brought on site. The drainage study and calculations were part of the Master Plan for the shopping center, and the properties which are now Home Depot and the Hampton Inn. All drainage enters an existing stormwater drainage system and wetland

mitigation area behind T J Maxx. Attorney Pelech stated that the landscaping would be subject to the approval of the City Arborist or her designee.

The Chair made three calls for speakers. There being none, the Public Hearing was closed.

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

Mr. Smith inquired as to the snow storage area. Attorney Pelech responded by stating that the majority would be taken off site. Mr. Smith asked that the plan be so noted. Mr. Smith asked if the dumpster would be screened or fenced. Dennis Moulton of Millette, Sprague & Colwell, addressed the Board and stated that there would be plantings around the dumpster. Mr. Smith asked that a fence be added.

Mr. Smith also asked that stop signs be installed as one exits out of the restaurant parking lot into the shopping center parking lot. Paul Konieczka of CLD indicated that there would be a three-way stop at the intersection.

Mr. Carrier asked for an explanation of the retaining wall. Mr. Moulton spoke to a side slope down from a higher elevation and to the ledge on site. The finished floor is as high as possible. The wall would retain existing soils creating a flat space.

The Chair inquired if the handicapped spaces met code with the response being that they do meet ADA specifications.

Mr. Jankowski moved for approval of the site plan subject to the stipulations from the Board and the Technical Advisory Committee. Mr. Hopley seconded the motion. The motion passed on a 9-0 vote.

Stipulations:

#### **From the Technical Advisory Committee:**

1. That the applicant apply for Final Subdivision Approval as part of the application process;
2. That the site plan indicate sloped granite curbing for the island;
3. That the landscaping plan be reviewed by the City Arborist or her designee;
4. That the applicant's traffic engineer be available for the "tweaking" of any traffic signalization interconnect;
5. That the new traffic signal pedestrian regular heads be LED and all markings be plastic taped with the exception of the lane lines on Woodbury Avenue;
6. That the building be sprinklered;
7. That the master box be connected to the municipal system;
8. That the conduit for the fire alarm system be installed during the construction process; and,
9. That the drainage study be submitted to the City's engineering department for review.

**From the Planning Board:**

- 1. That the dumpster be fenced; and,
- 2. That a stop sign be installed as one exits out of the restaurant parking lot.

.....

E. The application of **Irving Oil Corporation** for property located at **2470 Lafayette Road** wherein site plan approval is requested for the construction of a 2,995 s.f. service station/convenience goods II store and a 1,740 s.f. lube facility with related paving, utilities, landscaping, drainage and associated site improvements. Said property is shown on Assessor Plan 285 as Lot 14 and lies within a General Business district.

**SPEAKING TO THE APPLICATION**

Attorney Bernard W. Pelech addressed the Board and stated that he was present on behalf of Irving Oil Corporation. He stated that they had appeared before the Technical Advisory Committee and the Traffic/Safety Committee and had received unanimous favorable approval from both committees. Suffice it to say, that they have reconfigured the plan on several occasions with John Burke, the City’s Transportation Engineer, the Police and Fire Departments and the Planning Director.

Attorney Pelech went on to state that the site is adjacent to the previously approved Pizza Hut restaurant. The site is fully utilitied. The landscaping plan will be modified to comply with Article V of the *Zoning Ordinance*.

Attorney Pelech informed the Board that Frank Monteiro, the site engineer, Robert Tracey of Irving Oil and Steve Pernaw, the traffic engineer, were present to answer any questions the Board might have.

Mr. Coker inquired about the wetlands on site. Mr. Monteiro addressed the Board and stated that they were probably around 5,000 s.f. He went on to state that a turn-around area had been deleted from the plan. Attorney Pelech commented that the area is way below jurisdictional and that there are no plans to fill the wetlands.

The Chair stated that he had questions related to traffic. Steve Pernaw, traffic engineer from Pernaw and Company from Concord, addressed the Board. The Chair asked about the expected traffic in and out on a daily average week day. Mr. Pernaw stated that morning and evening peak hours would see about 100 trips with some 70 being pass by. The morning peak hour is from 8:00 a.m. to 9:00 a.m. and the evening peak hour is 4:45 p.m. to 5:45 p.m. Projections come from actual field data collected on site. The total traffic flow on Route 1 is some 1,202 during morning peak and some 1,962 during evening peak.

Mr. Hopley spoke about the adjacent lot having an alternative access to the signalized intersection at Heritage. Mr. Monteiro stated that the applicant for the site in question has no rights to that easement adding that they were not able to acquire any easements.

Mr. Carrier inquired how gas spills would be handled at the tank locations. Mr. Monteiro spoke to the fire suppression system contained in the canopy as well as the hooded catch basins which could be cleaned out and material removed from site. Mr. Carrier referred to the concrete pad around the gas pumps. Mr. Monteiro stated that there are actual grooves along the concrete

which stop potential spillage from running along the concrete pad. He also referred to Best Management Practices.

Mention was made of the oil change facility and the proposed three bays which are actually three rectangular pits; three service bays open to the floor. The question was asked if the drainage system had been reviewed by the City's Engineering Department and approved. The Planning Director, David Holden, replied in the affirmative.

Mr. Smith inquired as to any monitoring wells for any spills around the storage gasoline tanks. Mr. Monteiro replied that two observation wells would monitor groundwater quality. Mr. Smith asked about the ventilation pipes for these tanks. Mr. Monteiro stated that the vent lines are typically in the landscaped areas adding that the tanks need to be permitted by The State of New Hampshire. Mr. Smith expressed his concern of their proximity to the driving area. Mr. Monteiro spoke to U shaped bollards just off the curb line. Mr. Smith asked that details be added to the drawings.

Discussion was had on floor drains. Attorney Pelech stipulated that a note would be added to the plan that no floor drains would be installed. It was noted that every catch basin around the perimeter of the site would have hooded outlets.

Mr. Sullivan inquired if the entrance would be wide enough to accommodate tractor/trailers coming and out. Mr. Monteiro responded in the affirmative adding that the entrance would be 50' wide. Mr. Sullivan expressed his concern about tractor/trailers pulling out on Route 1 and going north.

There being no further speakers, the Chair declared the Public Hearing closed.

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

Mr. Holden interjected that the applicant had worked well with the City; that a compromise had been reached over the two driveway entrances which are now one. He also spoke to the offsite improvements for the Fire Station adding that all requirements of the *Zoning Ordinance* had been dealt with and that the provision for the truck fueling facility had been eliminated.

Mr. Jankowski asked about the review by the Traffic/Safety Committee. Mr. Holden read the e-mail from John Burke, the City's Transportation Engineer, which was in the folder adding that the Traffic/Safety Committee had looked at this application almost as much as the Technical Advisory Committee.

The Chair asked that the old sign be taken down noting that the buffet had not been there for a long time.

Mr. Smith moved to approve as presented with stipulations from the department's memo as well as others mentioned at the meeting including the Traffic/Safety stipulations. Mr. Jankowski seconded the motion. Mr. Carrier stated that he was not convinced that everything is right and asked that the Engineering Department carefully look at the oil/water separators to be sure they are adequate. Mr. Holden indicated that a written report would be available at the next meeting. The motion passed on a 9-0 vote.



Stipulations:

**From the Technical Advisory Committee:**

- 1. That the site plan be reviewed by the Traffic/Safety Committee with a report back to the Planning Board;
- 2. That a note be added to the site plan indicating that no approval has been granted for a truck fueling facility;
- 3. That drainage calculations be forwarded to David Desfosses, Certified Engineering Technician, Public Works Department; and,
- 4. That the landscaping plan be reviewed by the City Arborist or her designee

**From the Planning Board:**

- 1. That a note be added to the plan that there will be no floor drains installed in the pits; and,
- 2. That a detail regarding the bollards be added to the plan.

**From the Traffic/Safety Committee:**

- 1. That stop bars, stop pavement markings and stop signs on access aisles be installed within the site as proposed by the City Engineer.

.....

F. The application of the **City of Portsmouth** for property located **off Junkins Avenue** wherein site plan approval is requested for improvements to the parking lot located at the rear of the Municipal Complex with associated site improvements. Said property is shown on Assessor Plan 110 as Lot 1 and lies within the Municipal district.

Let the record show that this application was tabled to the Board's September 20, 2001, meeting.

.....

G. The request of **Siegel Limited Partnership, Ocean Castle Limited Partnership and 40 Longmeadow Portsmouth LLC** for property located at **2995 Lafayette Road and 40 Longmeadow Road** for approval of an amended site plan indicating the filling in of 10,234 s.f. of a man-made detention basin that is no longer functional. Said property is shown on Assessor Plan 291 as Lots 1 and 4 and lies within a General Business district.

**SPEAKING TO THE APPLICATION:**

Richard P. Millette of Millette, Sprague & Colwell addressed the Board and spoke to the detention area for the former Speakeasy establishment. The site plan was proposed in the early '80s with a design to double the size of the parking lot. A detention area was also designed to handle the runoff from that parking lot. The detention area was built. The Speakeasy went on its way. The parking lot was never constructed.

Subsequently, the NH DOT completely reconstructed the Ocean Road/Longmeadow/Route 1 intersection and constructed a 36” storm drain line down Longmeadow which drains off in the back. Catch basins near the detention pond were restructured and connected to the 36” drain line. Everything that used to run into the detention pond has stopped running into it.

Some area has turned into a wetland. The Conservation Commission recommended approval of and the NH Department of Environmental Services approved a wetlands fill permit.

A small area of the detention pond is being left open to accommodate an existing culvert which would adequately carry off a 50 year storm. In other words, some additional capacity would remain for any additional runoff.

Mr. Coker inquired as to the property located southerly of the catch basin with Mr. Millette responding by stating that to the south is a trailer park; that a culvert runs down a green strip between where the trailers are located and the runoff ultimately gets down to the larger wetland down to Berry’s Brook. It was stated that there are no wetlands located directly to the south of the site in question.

There being no further speakers, the Chair declared the Public Hearing closed.

**DISCUSSION AND DECISION OF THE BOARD**

Mr. Carrier moved for approval. Mr. Will seconded the motion. The motion passed on a 9-0 vote.

.....

H. The application of **Ervin Fazekas d/b/a Mr. Bubbles Car Wash** for property located at **1725 Woodbury Avenue** wherein site plan approval is requested for the addition of three landscape areas with associated site improvements. Said property is shown on Assessor Plan 215 as Lot 10 and lies within a General Business district.

The Chair opened the Public Hearing. As there was no one present to present the application, a motion was made and seconded to table the application to the September 20, 2001, meeting. The motion passed on a 9-0 vote.

.....

**IV. OTHER BUSINESS**

A. Item not on the Agenda – impact fees

It was the consensus of the Board that a Public Hearing would be scheduled for the September 20<sup>th</sup> meeting.

.....

**V. ADJOURNMENT**

There being no further business to come before the Board, adjournment was had at approximately 10:15 p.m.

Respectfully submitted,

Barbara B. Driscoll  
Acting Secretary

These minutes were approved by the Planning Board at its 2001 meeting.