

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING
PORTSMOUTH, NEW HAMPSHIRE**

7:00 P.M.

CITY COUNCIL CHAMBERS

NOVEMBER 19, 2002

MEMBERS PRESENT: Chairman Jack Blalock; Vice-Chairman Charles LeBlanc, James Horrigan; Chris Rogers; Alain Jousse, Nate Holloway; and, Alternate, Arthur Parrott.

MEMBERS EXCUSED: Bob Marchewka and David Witham

ALSO PRESENT: Lucy Tillman, Planner I

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Prior to calling the meeting to order, the rules were suspended to allow Mayor Evelyn Sirrell to speak. She introduced the Board's newest member, Arthur Parrott, who was voted in on November 18, 2002 at the City Council Meeting.

She also presented a letter of appreciation and a key to the City to Chairman Jack Blalock, who was stepping down after 16 years of dedicated service.

Vice Chairman LeBlanc, on behalf of the Board of Adjustment Members and the Planning Department, presented a clock to Chairman Blalock as a token of appreciation for his work on the Board.

Chairman Blalock expressed his thanks to the Mayor, the City Council who gave him the opportunity, and, particularly, the Board Members for selecting him as their Chairman over the past several years.

At the conclusion of the presentation, the rules were unsuspended. There were six Board Members present at the start of the meeting.

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I. APPROVAL OF MINUTES

Mr. Horrigan pointed out that a name was misspelled at the bottom of page 19 (Fracher).

A motion was made and seconded to accept the corrected minutes from the meeting of October 15, 2002 and it was approved unanimously with a 5-0 vote, (Arthur Parrott abstained).

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**II. PUBLIC HEARINGS**

1) Petition of **Fanel Dobre, owner**, for property located **off Sagamore** Avenue wherein a Variance from Article III, Section 10-301(A)(9) was requested to allow access to the lot off a private right of way where access is required from a public street or an approved private street. Said property is shown on Assessor Plan 223 as Lot 29 and lies within the Waterfront Business district. Case # 11-1

Lucy Tillman advised the Board that the condition from last month was that, under RSA, Mr. Dobre would need to come back and clarify his right of way.

Fanel Dobre spoke and indicated that he had provided the Board with a copy of his Warranty Deed showing his right of way, along with the original deed dated January, 1964.

Ms. Tillman also stated that, in their research, when Mr. Workman divided the lot off to get access and frontages on the same right-of-way, that lot did come to this Board to get relief to build a house on it. Mr. Dobre is doing nothing different than what Mr. Workman did when he broke off another lot back in the 1950's.

There being no further speakers, the Public Hearing was closed.

**DECISION OF THE BOARD**

Vice-Chairman LeBlanc made a motion to grant the petition as advertised and presented. Mr. Horrigan seconded. Vice Chairman LeBlanc indicated that the Board had passed this last month with the stipulation that the clarification of the right-of-way be taken care of and that has been presented tonight. The conditions that were voted on last month are still in force and this variance can be granted. Mr. Horrigan agreed with Vice-Chairman LeBlanc.

Chairman Blalock reiterated that the Board was aware last month that this matter may come before them and the issue has been addressed. Chairman Blalock supported the motion.

The motion to grant passed unanimously with a 6 - 0 vote

Mr. Parrott stepped down from this hearing.

2) Re-hearing per Order of the Rockingham County Superior Court in the matter of Michael Boccia, et al. v. City of Portsmouth and Raymond A. Ramsey, Intervenor 01-E-552 dated 26 September 02 for the petition of **Raymond A. Ramsey, owner**, for property located **off Kearsarge Way** wherein the following were requested for the construction of a 100 unit four story hotel: 1) a Variance from Article III, Section 10-304(A) Table 10 to allow the 63' x 231' four story building with a: a) 51' front yard where 70' is the minimum required, b) a 16' left side yard where 30' is the minimum required; and 3) a 30' rear yard where 50' is the minimum required, 2) a Variance from Article III, Section 10-304(c)(2) to allow the building to be located 83' from property zoned residentially where 100' is the minimum required, 3) a Variance from Article XII, Section 10-1201(A)(3)(e)(1) to allow off-street parking to be located 15' from property zoned residentially where 100' is the minimum required; and, 4) a Variance from Article XII, Section 10-1201(A)(3)(e)(2) to allow off-street parking, maneuvering space and traffic aisles 15' from the front property line where said use is required to be at least 40' from the front property line. Said property is shown on Assessor Plan 218 as 22 and lies within the General Business district. Case # 11-2

Mr. Parrott stepped down from this hearing.

Mr. Holloway arrived, bringing the Board members to 7.

A motion to table until the next meeting was made by Mr. Rogers. Mr. Jousse seconded the motion. Mr. Rogers stated that just prior to the meeting the Board members were given an "encyclopedia" from Attorney Griffin to look over and there was no way the Board could look over this information and make a proper decision. Mr. Jousse agreed with Mr. Rogers. He felt it was a tremendous amount of information to look through and read.

Chairman Blalock asked if Attorney Griffin would like to give the Board some information about what was in the packet, to help them decide whether to table or not.

Attorney Griffin stated that the packet consisted of a series of exhibits: The decision of 1998, deeds between the city and Mr. Ramsey, a report from Mr Gardner on the impact of the surrounding properties, a report from realty advisors on the need for hotel space in the city, a synopsis of the traffic studies, a series of plans and charts that he would refer to in taking the Board step-by-step through the application. Attorney Griffin stated that he Board had seen some of the information before when this matter went forward in July of 2001.

Chairman Blalock asked Attorney Griffin if, in his opinion, it wasn't necessary for the Board to have to digest everything prior to the meeting but that Attorney Griffin was just going to use some as exhibits. Attorney Griffin agreed but also understood that the Board wants to feel comfortable with the documents.

Chairman Blalock indicated that the discussion with Attorney Griffin was not part of the public hearing but simply allowed him to describe his packet.

Mr. Horrigan stated that this case was a sensitive case that had been remanded back from the Superior Court and in the Superior Court decision some of the Board Members, including Mr.Horrigan, were implicitly criticized. He felt that the Board should proceed as cautiously as possible. He stated that he would like to have some time to study a document as large as Mr. Griffin's packet.

Chairman Blalock stated that he planned on not supporting the motion to table and that he would like to go forward and simply use the packet as a guide. He felt that he may be somewhat influenced by the fact that it was his last meeting and he would like to see this Petition through to the end, adding that this request had almost been before the Board in one fashion or another through his entire tenure.

The motion to table until the December 17, 1002 meeting passed with a 4 – 2 vote, with Chairman Blalock and Mr. Holloway voting in the negative.

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3) Petition of **Tim and Michelle Diep, owners**, for property located at **44 Melbourne Street** wherein a Variance from Article III, Section 10-302(A) was requested to allow a 16' x 20' two story addition to the rear of an existing single family dwelling with a 5' left side yard where 10' is the minimum required. Said property is shown on Assessor Plan 233 as Lot 20 and lies within the Single Residence B district. Case # 11-3

Tim Diep, owner of 44 Melbourne Street, stated that they wanted to add space to their house as their family was growing. They considered many different designs and the plans that they submitted seemed to be the only ones that they could come up with using the existing building. The existing building already has a 4' setback on one side so there wasn't much they could do with the land that they have. Mr. Diep also pointed out that the addition would be built over an existing deck.

Chairman Blalock indicated that essentially their setback was going to remain the same. The existing deck is 4' from the left side yard and Mr. Diep is asking for 5'. Mr. Diep agreed.

There being no further speakers, the Public Hearing was closed.

DECISION OF THE BOARD

Mr. Horrigan made a motion to grant the petition as advertised and presented. Mr. Rogers seconded. Mr. Horrigan stated that this was an addition to a house that was relatively small so the need for additional

space was fairly obvious. The variance is not really creating a new variance. In fact, it continues the house along the same lines although it is brought in 1' more from the side property line, which is a large open lot. Mr. Horrigan did not see how this could have any effect on the property values surrounding the property and predicted that it would enhance the property values of the immediate area. Mr. Rogers agreed with Mr. Horrigan, stating that the applicant is actually decreasing the setback from 4' to 5' and that it didn't appear that there was any other amicable way to place an addition on the house. He felt that this is a minor request that would not cause any diminution of the surrounding properties.

Chairman Blalock also agreed. Upon viewing the property and after hearing Mr. Diep's testimony, he felt that it was clear that all 5 criteria for a variance had been met.

The motion to grant passed unanimously with a 7 - 0 vote

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4) Petition of **Irving Oil Corp., owner**, for property located at **2470 Lafayette Road** wherein a Variance from Article II, Section 10-208(68)(c) was requested to allow outside storage for an ice machine and wire mesh enclosure for propane tanks in a district where outdoor storage is not allowed. Said property is shown on Assessor Plan 285 as Lot 14 and lies within the General Business district. Case # 11-4

Attorney Bernard Pelech spoke on behalf of Irving Oil Corp., who were seeking a variance for their Mainway Store. Approximately one year ago variances were granted to allow this gas station and convenience store to operate on Lafayette Road. Attorney Pelech commented that in recent years, it had been the practice of convenience stores to provide ice machines and the sale of propane tanks. Attorney Pelech thought there were about 7 to 8 convenience store facilities in other locations in the City that offer these services. Attorney Pelech did not believe that it was necessary to appear before the Board for these used. He referred to Section 10-208 that stated that "Customary accessory uses are allowed but not including any outdoor storage". The definition of outdoor storage is "Storage of materials on a lot without benefit of a structure with four walls and a roof to protect the materials from the elements. This definition shall not be deemed to include outside storage of junk or as a temporary structure." Attorney Pelech felt that there was a hardship in that the ordinance, as interpreted by the Planning Department, interferes with the reasonable use of the property. Convenience stores have propane exchange programs. They have ice machines. They are customary accessory uses.

The second part of the hardship test is whether the purpose of the ordinance has a fair and substantial relationship to a particular piece of property. In this case, Attorney Pelech submitted that it does not. He did not believe that the purpose of the ordinance was meant to include ice machines or propane exchange mesh enclosures. He felt that when it says storage of materials it means raw materials, not products for sale. Attorney Pelech did not feel that the intent of the ordinance bears a fair and substantial relationship to this property and certainly no public or private rights are being interfered with.

Attorney Pelech discussed the diminution in value of surrounding properties stating that he did not believe that by allowing an ice machine in front of the store or allowing a mesh enclosure for propane tanks would in any way diminish surrounding property values.

Attorney Pelech felt that substantial justice would be done by granting the request for variance. He did not feel that there would be any benefit to the public in denying the variance. The ice machine is there to benefit the public and the propane tank exchange cage is there to benefit the public. Most of the propane tank exchange programs are used when people cannot get their propane tanks refilled either because their

normal refilling location is closed or it's a holiday whereby convenience stores are usually open and they will pay the few extra bucks to exchange their tank.

Attorney Pelech did not feel that the granting of this variance would be contrary to the spirit and intent of the ordinance because he did not believe that the intent of the ordinance was meant to apply to an ice machine or a propane tank exchange enclosure. As such, Attorney Pelech believed that the five criteria for granting the variance had been met and he asked that the variance be granted.

Vice Chairman LeBlanc asked where the ice machine and wire mesh enclosure would be located on the property. Attorney Pelech stated that they would be located along the right hand side of the building, rather than in the front as represented on the plan that was submitted.

Attorney Pelech indicated that propane tanks cannot be stored inside the building. They are required to be stored outside in a mesh container. The ice machine is a big white cooler that says "ICE" on it. Attorney Pelech believed that the space is leased from Irving Oil. Skip Smith of Irving Oil clarified that the ice company owns the machine and provides the ice and simply leases the space.

Mr. Horrigan asked if there was a safety questions at all with cars banging into them. Mr. Smith, of Irving Oil, indicated that the tanks are all in a locked steel cage. They build them that so that if a car backs into it, it's not going to do anything to the cage

Mr. Holloway asked for clarification if the ice machine and the tanks were going to be in the same enclosure. Attorney Pelech indicated that they would be separate. The propane tanks have their separate wire mesh enclosure. The ice machine is separate and free standing and will be next to the propane tanks.

Mr. Parrott asked what the requirements are with respect to the storage of propane tanks. Attorney Pelech believed that it was in the fire code that they could not store the propane tanks indoors. Mr. Smith indicated that it would be with federal law pertaining to storage of combustible materials. On the tanks themselves, as well as on the storage cages that they have them in, there are labels saying "flammable materials". All of the safety data requirements are on the labels of the tanks as well as the cage itself.

Mr. Parrott asked what it said exactly. Mr. Smith indicated that he did not know what it said exactly but it basically addresses the transportation of the product, that it needs to be in an upright position, the storage of the product needs to be in a contained area, or if it is connected to a gas grill at home it needs to be in a secure place where the tank can't be knocked over.

Mr. Parrott asked if the tanks could be stored in a shed with a roof on it, directly attached to a building. Mr. Smith indicated that it cannot be directly attached to the building and their proposed cage is a free standing unit. Any flammable liquids, under NSDA regulations, cannot be held in a contained area.

Mr. Parrott asked if Mr. Smith had personally discussed this with the Portsmouth Fire Department. Mr. Smith indicated that he had not but added that there is a unit of the Fire Department right nearby and they are subject to an annual inspection by the Fire Department.

Mr. Holloway asked how close the ice machine refrigeration unit would be to the propane unit. Mr. Smith clarified that the refrigeration is on top of the ice machine and it is a self-contained unit that has one grounded plug. The two units are usually spread out at least 8' from each other.

There being no further speakers, the Public Hearing was closed.

**DECISION OF THE BOARD**

Mr. Rogers made a motion to grant the petition as advertised and presented. Mr. Holloway seconded. Mr. Rogers agreed that the regulation is very vague and he would consider this more of a vending unit than storage of materials, adding that there are vending units similar to this throughout the city, which are self-contained units. He believed that by storing the tanks outside there wouldn't be any possible problems with the leakage of the gases into the air and he felt that the request met all of the requirements. He felt that it would not cause a hardship where it is located and therefore would not cause any diminution of value to the property. Mr. Rogers felt that this was a case where the variance is a little bit outdated with what people are selling.

Mr. Holloway agreed with Mr. Rogers. He felt it is safe and that the Board should support the motion.

Chairman Blalock stated that he would support the motion and he did feel that it was appropriate that this request was before the Board. Looking at the zoning ordinance and the Planning Department's interpretation, he agreed that it certainly is outdoor storage and that it should be regulated. Sometimes things can grow and grow and grow and as such it was appropriately before the Board. He also felt that the five criteria had been met in that this is a reasonable type of use for this property and the propane gas is most certainly more appropriate outside for obvious reasons.

Mr. Horrigan stated that he would also vote for the motion and felt that the five criteria had been met. He also joined in with Chairman Blalock and stated that he did not agree with the initial argument from the Petitioner that the Planning Department has "pushed the envelope". He felt that the Planning Department's interpretation was quite appropriate given the zoning ordinance regulations pertaining to this particular district and that if there was ambiguity he would prefer that they err on the side of caution. One never knows that kind of unintended consequences can result. The Board well knows that the newspaper vending machines just proliferated all over the city.

The motion to grant passed unanimously with a 7 - 0 vote

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5) Petition of **Lawrence J. Lariviere, owner** for property located at **11 Larry Lane** wherein a Variance from Article III, Section 10-302(A) was requested to allow a 6' x 12' one story addition to an existing carport (to be enclosed) with: a) an 8' right side yard where 10' is the minimum required, and b) 22.8% building coverage where 20% is the maximum allowed. Said property is shown on Assessor Plan 234 as Lot 40 and lies within the Single Residence A district. Case # 11-5

Larry Lariviere, owner of 11 Larry Lane, stated that he wished to enclose a car port that is currently existing on his property and add a 6' long extension off of the back, as shown on his plans. The house was built in approximately 1965 and was an FHA financed home. He has about 968 square feet in his house and he would like to add to that.

Vice-Chairman LeBlanc asked if the carport was going to be enclosed as part of the addition. Mr. Lariviere indicated that the carport would be enclosed and the addition would extend out the back on the left side.

Mr. Horrigan asked if the magnificent shade tree in the back yard would be saved. Mr. Lariviere indicated that no trees would be coming down. In fact they planted a red maple some time ago and that

is going to be saved also. They did loose a maple in front of the house this spring as it was split down the trunk and a wind storm would have dropped half of it on his house so he took it down.

There being no further speakers, the Public Hearing was closed.

DECISION OF THE BOARD

Mr. Rogers made a motion to grant the petition as advertised and presented. Mr. Jousse seconded. Mr. Rogers stated that, in regards to the building coverage, it is only a 2.8% request, which is a minimal amount. They are actually keeping the same side yard and are basically just bringing the carport straight out along with the rest of the building that is pre-existing. It would look odd to make it jut-in two feet. There is a hardship because the carport is currently existing and he does not feel there would be any diminution of value to the neighbors in that area. Mr. Rogers felt that the request met all of the criteria for the granting of a variance.

Mr.Jousse agreed with Mr. Rogers, that the side yard requirement is just an extension of what is there already. The addition will not be any closer than the present situation. The 2.8% increase in the building coverage is minimal and should be granted. The criteria for granting the variance had been met.

The motion to grant passed unanimously with a 7 - 0 vote

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6) Petition of **J.H Cahill, owner**, for property located at **2837 Lafayette Road** wherein the following are requested: 1) a Variance from Article III, Section 10-301(8) to allow a 60' front yard where 105' is required, 2) a Variance from Article III, Section 10-304(A) to allow a) a 20' right side yard and b) a 28.6' left side yard where 30' is the minimum required, 3) a Variance from Article XII, Section 10-1201(2) to allow a 16' travel way where 24' is required; and, 4) a Variance from Article IV, Section 10-401(2)(c) to allow expansion of a non conforming structure from 1,153 sf to 1,965 sf. Said property is shown on Assessor Plan 286 as Lot 1 and lies within the General Business district. Case # 11-6

Attorney Bernard Pelech spoke on behalf of John Cahill. The setback from the existing building is going to remain at 45.9'. The addition is setback further from Lafayette Road. The building is obviously non-conforming because of the 105' setback requirement on Lafayette Road. Another feature of the plan was the existing curb cut off of Lafayette Road into the parking lot that is going to be abandoned. Access will be moved to Robert Avenue.

The lot in question is obviously a non-conforming lot as it doesn't meet the minimum lot size requirements. The relief that is being requested on the left and right side setbacks is very minimal and not encroaching. They do meet the parking requirements. They are not encroaching any further along the front set back and, in fact, are moving the building back. The other variance that is being requested is for the travel lane. Because they are discontinuing the access from Lafayette Road, an alleyway must be accessed to reach the handicapped parking space and 2 employee parking spaces. This alley way is 16' in width. It could possibly, according to Eric Weinrieb of Altus Engineering, be expanded to 18' but then they would be getting close to the side yard setback and they would like to maintain a row of buffering trees.

Initially four variances sounds like a lot but after looking at the plan and seeing the benefits, they then become reasonable. They do not believe that this addition is going to create any diminution of surrounding property values. They believe the upgraded building with the enhanced landscaping and the pavement removal in the front of the building will certainly result in an aesthetic improvement and will

not impair or diminish surrounding property values. Properties in the area are commercial in nature and this is a commercial use with an outdated building.

Attorney Pelech believes that there is a hardship as the ordinance interferes with the reasonable use of the property. Dr. Cahill likes his location and has been there for years. He does not want to relocate but in order to adapt his practice to today's requirements it is necessary that he expand. They believe that the expansion is reasonable and that they have done several things to mitigate the effect of the expansion. They have not moved closer to Lafayette Road and have recognized the problem with access on to Lafayette Road.

Attorney Pelech stated that the 105' setback on Lafayette Road was created and set forth many years ago. Attorney Pelech did not feel that there was a fair and substantial relationship between the intent of the ordinance and the 105' setback as it relates to this property as there was already a building that predates the ordinance.

Finally, they do not believe that any private or public rights will be interfered with or adversely effected by the granting of the variance.

The third test is whether substantial justice will be done by granting the variance. They believe it will be because they believe the hardship that would result to the owner/applicant, Mr. Cahill, if the variance were to be denied is not outweighed by any benefit to the general public. The property will be accessed by a much safer access off of the side street, rather than Lafayette Road. The building will be built to today's codes and will be ADA accessible.

The fourth criteria is whether granting the variances will be contrary to the spirit and intent of the ordinance. As the addition is not in any way encroaching on the front yard setback any further than what is existing there now, Attorney Pelech does not believe that this is going to be contrary to the spirit and intent of the ordinance. Likewise, granting the side yard variances will not be contrary to the spirit and intent of the ordinance. There will still be adequate provisions in distances of 20' and 28' for light and air, access of emergency vehicles and certainly because one of the side yards is actually on Robert Avenue, they don't have a problem with proximity with adjoining building.

Finally, Attorney Pelech feels that the granting of the variance will not be contrary to the public interest. The building will be enhanced aesthetically. The site access will be safer which is also in the public's interest. The building will be constructed to current building codes, will be ADA accessible, the dangerous access will be discontinued and obviously the tax rates will be enhanced by a substantial addition. Also, if these variances are granted, this project would then go through the Site Review Technical Advisory Committee. Dr. Cahill was present, along with the architect Bill Dogan and the site engineer Eric Weinrieb

Vice-Chairman LeBlanc asked if the property line is a few feet away from the stone wall that runs down the side of the property? The reason that he was asking was because there is a 30' right of way to the city sewers and wondered if half of that right of way was on the property?

Eric Weinrieb answered that the property line is actually the stone wall and the easement is entirely on the parcel to the north, which will add to the advantage that no one will be able to build within 30' of the northerly property line.

Mr. Parrott asked about the monitoring well. Mr. Weinrieb responded that the monitoring well is on the abutting property and they do not know what it is.

Mr. Horrigan asked if this expansion is just a normal growth of the business. Dr. Cahill responded that yes, his practice has been growing and is bursting at the seams. He will use the old or existing structure for business area, office space and things of that area with the new area being all new clinical area, sterilization, x-rays, etc. He went on to say that he is concerned about the safety issue. As a result of the traffic light that is now at the corner of Lafayette and Roberts, it is now impossible to come out of his parking lot and go south. It will be much safer going in and out off of Robert Avenue.

Vice-Chairman LeBlanc asked if he was going to be increasing the green area in front of the building when he takes out the current access to Lafayette Road. Mr. Weinrieb stated that they will be as well as eliminating the encroachment and providing a landscape buffer on the north side of the parking lot.

Mr. Jousse asked if there would be additional signage due to the new entrance to the parking area. Mr. Weinrieb indicated that there would be temporary signage to point out where the new driveway is so that people will know to go around. Once the building is constructed the signage could come down.

There being no further speakers, the Public Hearing was closed.

**DECISION OF THE BOARD**

Mr. Horrigan made a motion to grant the petition as advertised and presented. Mr. Rogers seconded. Mr. Horrigan stated that this is a normal expansion of a non-conforming building. The variances that are being requested at first glance seem substantial but they really are quite minimal. The 60' front yard is already a problem and they are not extending that non-compliance. The 20' right side yard does not cause any undue effect on the surrounding properties as it is a side yard to Robert Avenue, going into an apartment complex. The 28.6" side yard is quite minimal. He saw no problem with allowing a 16' travel way since this is essentially a business where people come on schedule every hour. There are so many positives connected with this proposal, not the least of which is getting the curb cut off of Route 1 and having them come in from Roberts Avenue, which intuitively seems safer for all concerned, including the general public. He felt that this is a suitable business that probably provides service to surrounding residential areas and the new building seemed like it would enhance the appearance of the current building.

Mr. Rogers agreed with Mr. Horrigan completely. He applauded Dr. Cahill for moving the curb cut to Roberts Avenue as it will be a much safer access to this business. He believed that there are special conditions that exist with this property. It is a small lot. More green space is going to be added in front while taking away the curb cut and he felt it was an appropriate use of the property. There is no diminution of value and it is an expansion of an existing business that will make better use of the property.

Chairman Blalock stated that he also agreed with the motion to grant and has nothing further to add as Mr. Horrigan covered everything quite thoroughly, including the five criteria.

Vice-Chairman LeBlanc also stated that he did not believe that the expansion of the existing building from 1153 to 1965 square feet would adversely effect anyone in the area. It would provide for a better working environment for the existing business and wouldn't affect the private rights of others in the area and the Board could in fact grant this variance.

The motion to grant passed unanimously with a 7 - 0 vote

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III. ADJOURNMENT

There being no further business to come before the Board, the Board acted unanimously to adjourn at 8:15 p.m. and meet at the next scheduled meeting on December 17, 2002 at 7:00 p.m. in the City Council Chambers.

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Respectfully submitted,

Jane M. Shouse  
Secretary

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