

**MINUTES OF THE BOARD OF ADJUSTMENT MEETING  
PORTSMOUTH, NEW HAMPSHIRE  
CITY COUNCIL CHAMBERS**

**7:00 P.M.**

**MARCH 18, 2003**

**MEMBERS PRESENT:** Chairman Charles Le Blanc, Vice-Chairman James Horrigan; Alain Jousse, Christopher Rogers; Bob Marchewka, Nate Holloway; David Witham, Alternate Arthur Parrott and Alternate Steven Berg  
**MEMBERS EXCUSED:** n/a  
**ALSO PRESENT:** Lucy Tillman, Planner

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**I. Approval of the Minutes**

A request was made that the letter from Linda Panori relative to the Brora Petition be reviewed to determine whether it was in opposition or just expressed some concerns.

A motion was made and seconded to accept the corrected minutes from the February 18, 2003 meeting and it was approved unanimously with a 7-0 vote.

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**II. Old business**

**A. Request for One Year Extension of Time for Millennium Borthwick, LLC, for property located Off Borthwick Avenue.** Said land is shown on Assessor Plan 259, Lot 14-1, and lies within the Industrial zone.

Mr. Marchewka and Mr. Parrott stepped down and Mr. Berg voted.

Ms. Tillman stated that this project was still alive and they were asking for a one-year extension on their BOA, Conditional Use, and Planning Board approvals so they could continue proceeding forward with the project. If they do not do anything within the next year, then they would have to come back to this Board as well as the other Boards.

Mr. Jousse asked to have his memory refreshed as to what the particular project was. Ms. Tillman stated that it was the proposed office building on the lot located between Liberty Mutual and High Liner Avenue.

Vice-Chairman Horrigan asked if there was a specific reason why the construction had not started? Ms. Tillman believed it had to do with the economy and finding the proper tenants to lease the space.

Mr. Rogers made a motion to grant the one-year extension. Mr. Jousse seconded. Mr. Rogers indicated that the project was still alive and they were still trying to get it organized. The Board had the right to give a one-year extension and he felt they were working with good faith. Mr. Jousse agreed with Mr. Rogers.

The motion to grant the one-year extension until June 18, 2004 passed unanimously by a vote of 7-0.

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**B. Request for Re-Hearing for Brora, LLC, requested by Thomas M. Keane, Esq., for property located off Portsmouth Boulevard.** Said land is shown on Assessor Plan 213, Lot 2 and lies within the Office Research/Mariner's Village Overlay District.

Mr. Marchewka and Mr. Parrott stepped down and Mr. Berg voted.

Vice-Chairman Horrigan made a motion to deny the petition. Mr. Rogers seconded. Vice-Chairman Horrigan indicated that the only reason the Board would grant a re-hearing would be if there was a technical or procedural error made to the detriment of the Petitioner or if there had been some new evidence presented that was not available to the Petitioner at the time of the first hearing, either because of some changed conditions that had occurred since the time of the original hearing or if there was some information that was simply unattainable because of absence of key people or similar circumstances. The Petitioner made no reference to the second criteria and did not present any new evidence for the Board to consider. He did not believe that the Board made any technical or procedural errors. Mr. Rogers agreed with Vice-Chairman Horrigan.

Mr. Witham added that he would support the motion. He believed the case was well presented and met all of the criteria. The Motion for Re-Hearing made reference to the fact that the applicant stated there were other possible uses for the site however just because the Applicant claimed there was another use for the site didn't prohibit him from seeking the requested variance.

The motion to deny the Motion for Re-Hearing passed unanimously with a vote of 7-0.

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**C.** Petition of **Dunya Kutchev Revocable Trust, Joan Gittlein, Trustee, owner, Kris Rick Realty Trust, applicant**, for property located at **6 Sagamore Grove Road** wherein Variances from Article II, Section 10-208 and Article IV, Section 10-401(A)(1)(b) are requested to allow the addition of a 20' x 40' front dormer to create 2<sup>nd</sup> floor bedroom space for the existing dwelling and a 12' x 22' one story garage addition to an existing garage in a district where residential uses are not allowed. Said property is shown on Assessor Plan 201 as Lot 5 and lies within the Waterfront Business district. Case # 2-7.

Chairman Le Blanc indicated that this Petition had been requested to be withdrawn until next month.

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**D.** Petition of **Alan J. Watson, owner, David R. Lemeux, applicant**, for property located at **43 Cornwall Street** wherein a Variance from Article III, Section 10-302(A) is requested to allow the construction of a 32' x 80' 3 1/2 story building for 4 dwelling units after the demolition of the existing building with 2,102.5 sf of lot area per dwelling unit where 3,500 sf of lot area per dwelling unit is required. Said property is shown on Assessor Plan 138 as Lot 42 and lies within the Apartment district. Case # 2-5.

**SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech spoke on behalf of the owner and applicant. Attorney Pelech stated that the property was located on Cornwall Street and was presently known as the Tire Loft. It had an approximately 3 1/2 story structure of about 2,700 sf as a footprint. The remainder of the lot is hot-topped and there is no green space. The existing building is not conforming as it has a 0' setback. It has a non-conforming right side yard and the building is generally in tough condition and it is pretty much impossible to be rehabbed for residential uses. He submitted to the Board opinion letters from SFC Engineering that basically dealt with the difficulties of this building with regard to its rehabilitation for residential units. That was critical because, even though the building is non-conforming, if it was to be rehabbed, four dwelling units would be allowed by right within the building and up to eight dwelling units would be allowed by Special Exception. If the building were rehabbed, 1,000 sf of lot area per dwelling unit would be required, however if you built a new building the requirement per dwelling unit goes from 1,000 sf to 3,500 sf and that was precisely why they were before the Board. They are proposing to demolish the existing building, given the reports they have received from the engineers, and construct a new building that would comply with all of the requirements of the Zoning Ordinance. Attorney Pelech reviewed the proposed site plan with the Board, pointing out that the proposed building would be approximately 160 sf smaller in footprint than what was there and would be the same height. There would be

green space in the backyard where there is currently none. They were proposing 4 condominium type of townhouse units, each would have their own parking spaces inside the first level and there would be two additional parking spaces on the side. They would meet all of the setback requirements, lot coverage requirements, parking requirements, and height requirements. The only requirement that they would not meet is the 3,500 sf of lot area per dwelling unit, but rather would have 2,102.5 sf per dwelling unit. Attorney Pelech asked the Board to look at the area surrounding the property. The apartment district in that area has 35 lots and 27 of those don't have 3,500 sf of lot area per dwelling unit. The area surrounded by Cornwall Street, Langdon Street, McDonough Street and Islington Street, which was the block on which the two lots were located, had an average lot area per dwelling unit of 2,189 sf. Attorney Pelech distributed a computer graphic depicting a rendering of the proposed building. He felt the structure was very appropriate and was keeping with the architecture of the area. It was not located in the Historic District. They were proposing a clapboard exterior that was appropriate and an aesthetic improvement. He felt that one of the most significant pluses was the green space they are proposing. They proposed two curbed driveways on a lot that presently has one unrestricted open curb. They are proposing that the traffic be routed through the site, one way in and one way out. Two curb cuts would certainly improve the situation and would also allow the city to provide parking along that side of Cornwell Street. They proposed landscaping the area extensively, including 6 Canada Red Cherry trees, 6 lilac bushes and the entrances to all units would have brick planters and trellis. They would be creating 2,500 sf of green space that doesn't exist now. In addition, the 2,500 sf of green area would have a dramatic effect on the stormwater runoff on the site, reducing it by approximately 14%. The 2,500 sf of green space would allow for permeability where none currently exists.

Attorney Pelech believed that the five criteria necessary for the Board to grant the variance were met by the application. First, he believed the property was burdened by an unnecessary hardship as defined by Simplex vs the Town of Newington. They had to demonstrate that the zoning restriction as applied to the subject property interferes with the reasonable use of the property, considering the unique setting of the property and it's environment. The zoning restriction as applied to the subject property interferes with its reasonable use. If they were able to rehabilitate the existing structure they wouldn't have been appearing before the Board and it would have already been done. In fact, if someone wanted to push the envelope, they could come before the Board for a Special Exception and put 8 units in the existing building. Unfortunately, the building is in horrible condition and practically unable to be rehabbed. Attorney Pelech felt that went to the hardship argument. The building is non-conforming and it sits on the back property line. What they were proposing, which meets all of the setback requirements and meets the green space requirements is preferable. In addition, because the surrounding lots in question have an average lot area of less than 2,200 sf makes the applicants request a very reasonable use of the property. As the New Hampshire Supreme Court stated in the Simplex case, "our restrictive approach is inconsistent with the notion that the zoning ordinance must be consistent with the character of the neighborhoods that they regulate." Attorney Pelech stated that they were talking about a block that had approximately 2,189 sf of lot area per dwelling unit. The applicant is proposing 2,102.5 sf of lot area per dwelling unit. Attorney Pelech thought that the best example of a comparable that could be looked at was the 6 townhouse units on Islington Street that were developed by Shanley maybe 30 years ago. Those townhouse units have functioned fine on a small lot where the dwelling units have less than 2,000 sf of lot area each. There have been no problems at that location. The applicant is only proposing four units opposed to those six units. He felt it was an appropriate and very reasonable use for the property. Unfortunately, the Zoning Ordinance interferes with that reasonable use. The strict interpretation of the Zoning Ordinance would have you try and rehabilitate the building and put 4, 6 or even 8 units in it.

The second portion of the hardship test requires they demonstration that no fair and substantial relationship exists between the general purpose of the Zoning Ordinance and the specific restriction on the property. They believed that they met the second part of the hardship test. In fact, if they were to convert the existing structure, the four units would be allowed without any relief from the Board. However, if the construction on the site was new, 3,500 sf of lot area per dwelling unit would be required. Only 1,000 sf of lot area per dwelling unit was required if the existing structure were to be rehabilitated. The existing building was not appropriate for conversion. The balloon framing and structural integrity of the building is such that conversion is inappropriate and unfeasible. Secondly, the building is constructed so that the second floor lacks the required ceiling height

by code. Finally, the location of the existing structure on the rear property line and within 3' of the right property line means that you could not have emergency exits from either of those sides of the building which would severely limit the use of the building for residential purposes. Furthermore, if the building were converted to residential, the overall unsightly appearance of the site would remain virtually unchanged.

Attorney Pelech stated that they did not believe there was a fair and substantial relationship between the general purpose of the Zoning Ordinance as applied to this particular piece of property. The applicant, by constructing the proposed structure, would have a structure that not only meets all of the building codes but also all of the requirements of the Zoning Ordinance with regard to lot coverage, green space, parking, front, rear and side yard setbacks and building height. Thus, the granting of the applicant's request for a variance would do more to further the general purposes of the Zoning Ordinance than the conversion of the existing structure, because they would still have a structure that was non-conforming as to setbacks. The third part of the hardship test was whether any private or public rights of others would be interfered with. There were no public or private rights of others that would be effected. There were no easements in place. Abutting properties would be benefited by the erection of fences, the landscaping to buffer the property from the abutters, the substantial rear yard and lawn space. They believed that the public or private rights of others would not be interfered with. They believed that the granting of the variance would not result in any diminution of values. Surrounding properties will be enhanced by the applicant's proposal, given the fact that the non-conforming structure would be removed and a conforming structure would be erected in its place. In addition to the landscaping, which would enhance the property surrounding it, fences would be erected to screen the property where appropriate. Mr. McCormack, an abutter, has an 8' stockade fence along his entire property line. He also has substantial plantings and huge trees which will screen his view of the property. His concern is that the vacant lot that he has overlooked for many years will no longer be vacant, however, that is not a right that anyone has, whether a lot will remain vacant into perpetuity. Traffic flow and safety would be safer with two curb cuts and landscaping. There currently is no curbing whatsoever and it is just one big curbcut. The applicant believed that the granting of the variance would not be contrary to the spirit of the ordinance. Attorney Pelech stated that when the City established the lot area per dwelling it was done to prevent over-intensification of dwelling units in certain areas of the city. The lot area per dwelling unit per structure restriction was not intended to apply to the re-use of properties in the urban district. Most of the surrounding properties are multi-family. They have a lot area per dwelling unit of less than 2200 sf on the Cornwell Street block and 27 of 35 are less than 3,500 sf in the entire district. 3,500 sf of lot area per dwelling unit was intended to apply to construction of new multiple family dwelling units in non-urban settings such as new apartment districts, townhouse apartments, etc. He felt the spirit and intent of the ordinance was best exemplified by the fact that the conversion of structures existing prior to 1980 would allow, as a matter of right, one dwelling unit for every 1,000 sf of lot area.

Attorney Pelech stated that granting the variance would not be contrary to the public interest. Everyone knows about the housing shortage in the City of Portsmouth. They are talking about taking a lot that has no dwelling units and creating four dwelling units, which are well needed. That is one of the ways that the public interest would be benefited. Should the variance be granted, storm water run off from the site would be reduced by approximately 14%. The amount of green space on the site would be increased by 28%. Green space enhances the air quality and enhances the aesthetics of the site. The new structure on the site would comply with the Zoning Ordinance whereas the existing structure would not comply. Granting the requested variance would result in the tax base in the City of Portsmouth being greatly enhanced. The assessed valuation of these four units would certainly be greater than the existing structure.

In conclusion, Attorney Pelech stated that the five criteria needed for the granting of the variance were met by the applicant. They felt that it was a more appropriate proposal than trying to convert the existing structure. They could convert the existing structure into four dwelling units without coming before the Board however they would end up with a structure that wouldn't do anything to enhance the surrounding property values. They felt that the five criteria had been met and they asked that the Board approve the requested variance.

Vice-Chairman Horrigan asked about the statistics that Attorney Pelech referred to regarding square footage of the neighborhood lots. Attorney Pelech referred him to a document that was distributed in the Board's packet.

He went on to state that the cross-hatch properties in the apartment district where the property is located were mapped out by him on that document.

Vice-Chairman Horrigan asked when the current structure came down and they were looking at an empty lot, at that point what was unique about the lot? Attorney Pelech stated that when the current structure comes down, then the lot itself becomes an 8,000+ sf lot in an apartment district. It's uniqueness was twofold at that point in time. If the two lots were merged, it became by far the largest lot in the area other than the 12,000 sf lot where the Shanley apartment complex is located on Islington Street. The other uniqueness of the lot would be that it was a lot which had not been chopped up into multi-family dwelling units as have many of the lots on that block. Many of the existing units had been converted into multi-family units. If this became a vacant lot, it became unique by virtue of that.

Mr. Berg stated that he felt it was a good example of an urban in-fill project and he liked that. He indicated that Attorney Pelech slipped in the word condominium at the end. Were these units intended to be owner occupied units or was it rental housing? David Lemieux, the applicant, indicated that they did make the determination to make the units condominiums, with a condo association.

Mr. Jousse asked about the reference Attorney Pelech made relative to when the lots are combined. Attorney Pelech indicated that the tax maps reflect that the two lots are separate lots but they would have to be combined if a structure was being built across the common property line. Currently the Tire Loft building occupies the entire rear portion of Lot 42 and Lot 41 is a paved parking area.

Chairman Le Blanc stated that one of the plans shows the back of the building with patio areas behind each of the units. The patios are not raised above ground and are permeable.

Michael Rousseau spoke, whose family owns 249 Islington Street that directly abuts the property. He spoke in favor of the applicant. He felt that the aesthetics would be greatly improved. He did not feel that the building was in useable condition. He felt the plans were a big improvement and felt that it would only enhance the properties in the neighborhood.

### **SPEAKING IN OPPOSITION TO THE PETITION**

Attorney Robert T. Ciandella spoke on behalf of John McCormack, who is a direct abutter to the property and opposes the petition. He submitted a written objection to the Board. He had three main points to make. The first was that there was no unnecessary hardship and the best evidence was the applicant's presentation. He demonstrated that the developer had two options, one of which was to renovate and the other option was to tear down the structure and put two dwelling units on the lot. Once they tear down the structure there is nothing unique about the property. As a matter of right, they can build two dwelling units, which is a reasonable use. The law under Simplex is not fundamentally different than before. Variances are still extraordinary relief and they are intended to be granted when the Zoning Ordinance doesn't allow a reasonable use of the property. This was an apartment district and is characterized by many duplexes. The proposed structure is out of scale with the surrounding area and not in character. Coupled with the development option that could be executed as a matter of right, to tear down and put two units, and looking at what the proposal says, a 4 unit, 3 ½ story building which is out of scale and out of context, the variance should not be granted. The scale issue would change Mr. McCormick's enjoyment of his property. Attorney Ciandella felt that they were being asked to re-write the Zoning Ordinance to give this developer a more robust economic development option than he was permitted by a matter of right. The Master Plan has identified this area as very dense and a decision was made about what uses would be permitted. Attorney Ciandella felt that the developer was asking the Board to amend the ordinance to enhance his return on his investment.

Mr. Berg asked how four units in the existing structure vs. two new units would be fair in light of Simplex?

Attorney Ciandella stated that Simplex did not require you to re-write or amend the Zoning Ordinance on an ad hoc basis. There was a legislature determination that the Apartment District in that area had been characterized by old houses, tightly put together and if they were going to renovate then they would have the four unit density as a matter of right, but if they were to go to new construction then the City as a matter of legislative prerogative stated that they wanted some say in what the density would be in that area. Simplex asks if the Zoning Ordinance prevents someone from a reasonable use of a property.

Mr. Berg stated that the size of the new building would be approximately the same size as the old building so how does the scale change? Attorney Ciandella stated that the new building was a rectangular, 3 ½ story apartment block.

Chairman Le Blanc asked what the new building would do to property values in the area? Attorney Ciandella stated that for Mr. McCormack it would decrease his property value because he would be over-shadowed physically. He will lose access to light and space. They felt that the scale of this particular development would degrade property values.

John McCormack, of 48-50 Langdon Street, spoke in opposition. He first passed out photographs of his property. His property abuts lots 41 and 42. When they purchased their house 8 years ago, their property was in much worse shape than it is now and they have invested significant amounts of money to improve the property. He certainly didn't want to stop anyone from improving the neighborhood, however he does not feel that the proposed development is an improvement. He feels the scale is enormous and would block the skyline from his property, depriving him and his neighbors from any form of privacy. When he bought his property, he assumed that the Zoning Ordinance was in effect, protecting his investment from non-conforming development. The proposed structure would be non-conforming. He felt that the property was too small for a four unit dwelling as well as the structure being completely out of character for the neighborhood. The Zoning Ordinance for the Apartment District was already the least stringent in Portsmouth. The neighborhood already suffered from traffic, safety and parking issues. Adding four condominiums to the neighborhood would make it more challenging. Looking into the future, should this variance be granted, what will prevent someone from constructing a 5-6 unit building on the 11,000 sf lot such as the one he owns with his business partner? He asked that the Board enforce the Zoning Ordinance. He also mentioned that the property line that the petitioner used is 2 ½' into his property. He does not mind how the Tire Loft looks and believes it fits into the neighborhood. He didn't see how a 3 ½ story town house was going to increase the value of any surrounding property.

Mr. Jousse asked if Mr. McCormack lived in the property that abuts 43 Cornwall Street. Mr. McCormack confirmed that he lives in one half with his wife and his business partner and his wife live in the other half.

Mr. Jousse asked about the trees in the rear of his property. Mr. McCormack stated that there is a considerable amount of foliage. They are about 80-120 year old maple trees, but there is a lot of light that comes through them because they are tall.

Mr. Berg stated, that Mr. Ciandella stated, an alternative use of the property would be the construction of a duplex but it could be a large imposing structure. If the applicant were to exercise their right to demolish the existing building and put up a large duplex immediately behind his property, wouldn't the effect be the same, blocking the light and imposing structure and character change? Mr. McCormack doesn't believe that that would actually happen because, as Mr. Ciandella pointed out, the applicant is attempting to get the best economic use for the land. However, technically he could build another building that size and block out everything. That speaks to another issue – the building may have a smaller footprint than the current structure but it's much taller and has a lot more volume and is not the same as the existing structure.

Susie Stroud, of 58 McDonough Street, spoke in opposition. She lives in one of three single family homes, built around 1840, to the north of the Tire Loft site. She referred to the density of the area and she reiterated that those three buildings are single family homes. She submitted a written letter to the Board, supporting her

recommendation of a denial of the application. Ms. Stroud indicated that she had sat on a Planning Board for a different NH town and appreciated the challenge that the Board of Adjustment faces and the obligation of the City to help the landowners make reasonable use of their property. To balance this interest, the City enacted Article III, Section 10-302(A), which imposes a lot requirement in the Apartment District in Portsmouth. In terms of the five criteria, her concern as a direct abutter is that the proposed structure will be contrary to the public interest. She would experience a direct and significant loss of privacy, sunlight and a general encroachment because of the structure. It would be an overly dense development for those lots and the City's intention was to regulate that density with the City. Ms. Stroud disagreed with Attorney Pelech's argument that the proposed structure would increase the city tax base. An increase in the density of a residential development in Portsmouth adds more expense than revenue and she submitted a statistical document in support of that. Secondly, concerning the special condition of hardship, she felt that the applicant could make a reasonable use of the property by pursuing any one of the options that they presented in their Petition. Whether the variance is consistent with the spirit of the ordinance, the applicant in his February 18<sup>th</sup> memo referred to the city attempting to prevent the over-intensification of the Apartment District and then went on to say that less than half of the properties meet the lot area per dwelling unit as required by the Ordinance. Ms. Stroud stated that the grandfathered surrounding properties were constructed prior to the enactment of the Ordinance and their unregulated density probably prompted the need for the Ordinance. It is hard for her to imagine the rational for using the average square footage density for surrounding property, when the city looked at that density and decided that it wasn't working. At some point, cities make decisions to take a different approach and this proposal flies in the face of the city's rational for the Apartment District.

Ms. Strout felt that substantial justice was not being done by the proposal. At the February 18<sup>th</sup> BOA hearing, she said that the Board members made comments as part of a basis for denying a variance. They indicated that the proposal would "interfere with the private and enjoyable use of the surrounding property" and it would be a "significant visual intrusion.". She felt that the same observations could be made about this overly intense, intrusive development proposed for Lots 41 and 42, Cornwall Street.

Ms. Strout commented on the applicants presumptions about the diminution of surrounding property. She believed they failed by attempting to predict how abutting property owners would see the impact of this proposal on their properties. The applicant stated that the surrounding properties would, no doubt, be enhanced by the applicant's proposal given the fact that a non-conforming structure will be removed and a conforming structure erected in its place. She did not feel that was a true statement. She felt that her property would not be enhanced because they are removing a non-conforming structure. She chose to purchase and had been living quite happily in a non-conforming structure built in the 1840's. It is unlikely that the surrounding 19<sup>th</sup> century era property buildings will be enhanced by the overly intrusive 4 unit townhouse condominium development simply because it's new. It certainly would not be conforming with the minimum lot requirement.

Finally, Ms. Strout stated that the loss of privacy would have a significantly diminish her property values. Ms. Strout asked the Board to consider a prospective buyer standing in her kitchen, looking into the nine windows planned for the north face of the complex. Then, looking up at the 34' 10" roof line, standing 32' high, within 12' of her south boundary and less than 10' from the southeast corner of her property. Her property value would not benefit from the significant unnecessary privacy intrusion. Contrary to what Attorney Pelech states, she is not interested in seeing the vacant lot behind her property remain vacant. She is interested in seeing the property developed in accordance with the city's ordinance for the lot size requirement.

Chairman Le Blanc asked if Ms. Strout had a problem with the lot line position? She indicated that she had a problem with the site plan where it says "property line unclear". She had a description of her deed with her and indicated that it laid out quite clearly the property line. Chairman Le Blanc indicated that the owners would have to have the property surveyed and that should clear up any problems.

John Considine, of 48 Langdon Street, spoke in opposition. In the interest of brevity he indicated that he supported all of the arguments made so far against the proposal and had two other points to make. The first was the area of parking. He distributed photographs of a recent day, two weeks ago. The proposed building would

allocate 1 ½ spaces per unit. He felt that seemed extremely short-sighted although he understood that is what was allowed. As each unit will most likely have at least 2 occupants, each with a car. A family with children would need even more parking. Mr. Considine felt that they would be looking at a minimum of 8 cars and more realistically with visitors and additional occupants, it would be in the area of 10 – 12 at any one time. It is an extremely tight neighborhood for parking and by allowing the variance they would be making an already clogged neighborhood almost impassable, especially in the winter months with the snow banks. His second point was that the proposed building would block a significant amount of light in his yard, effecting his lawn and garden. The applicant pointed out that he could legally, without a variance, build a building the same size and only put in two units. He felt that 2 units was appropriate and would scale down the size of the building and would not require a variance. He felt the applicant was not trying to make the neighborhood a better place but rather just to maximize profit and in the process he would hurt the neighborhood.

Attorney Pelech spoke in rebuttal. He indicated that the size of the building was not an issue as it met all of the requirements of the zoning ordinance. No relief was being requested for that. He stated that the arguments against the size and scale of the building were not proper arguments. The proposed building would be no higher than the existing building and actually had a smaller footprint. The abutters were addressing parking problems that exist now. The applicant complies with the parking and, in fact, if some wants to park in front of their garage, the lot can accommodate up to 10 vehicles. There is nothing to prohibit someone from parking behind their own car or double parking in their own driveway. He was concerned that some of the abutters made statements that were incorrect. Someone stated that that block was predominately duplexes. That is not the case. On that block there is a six unit structure, two three unit structures, the Cornwall Street unit, Mr. McCormack's duplex, which is the only duplex on the block, and three single family dwelling units. The single family lots were 1,100, 1,200 and 1,200 sf. in size. The lot area per unit is one half of what was being proposed by the applicant. Attorney Pelech stated that they were not over-intensifying the neighborhood. They would be providing twice as much lot area per dwelling unit as those single family dwelling units have. In conclusion, Attorney Pelech asked the Board members not to be misled by Mr. Ciandella's restatement of Simplex. Simplex did change the law. He disagreed with Mr. Ciandella's argument that if there was a reasonable use of the property, then there was no hardship. Attorney Pelech stated that was the old test and the new test asks whether the ordinance interferes with a reasonable use of a property.

Attorney Pelech stated that Simplex also said that Zoning Ordinances and Zoning Boards must be cognizant of the uses surrounding property. What use is a 3,500 sf lot area per dwelling unit when less than 25% of the lots surrounding the property meet the standard?

David Lemieux, the developer of the project, indicated that all the professional services had been completed on the property. Doucet Surveyors from Newmarket had surveyed the property. Christian Smith, PE of Beals Associates had done the civil engineering on the site and a representative of SFC Engineering was present and available for any questions.

Attorney Ciandella spoke in rebuttal. He felt that a variance was to be granted when the zoning ordinance prevented the reasonable use of land because of some peculiar feature of the land. Once they tear down the existing structure, nothing distinguishes the parcel from any of the parcels around it. Also, the City Council made a legislature determination that, in this area of the city, they are going to distinguish between the density that they are going to apply for the use of converting existing structure and new construction. How could that legislative decision have any effect if a variance is granted from that restriction? How is the City ever going to be able to ordain how density will evolve over time in that part of the city unless the ordinance is applied. The applicant can make a reasonable use of his property by tearing down the existing structure and creating two new units.

Wendy Freedman-McCormick of 48 Langdon Street spoke in opposition. She provided another photograph of their yard. Her main concern with the proposed structure is that she will be faced with 36 windows overlooking her back yard. That seemed like a lot of windows and it would effect her lack of privacy.

**DECISION OF THE BOARD**

Chairman Le Blanc handed the gavel to Vice-Chairman Horrigan to act as Chairman and made a motion to deny. Mr. Witham seconded for discussion.

Mr. Le Blanc felt that the Ordinance was written for a specific reason and that the people that buy properties in an area put their faith in the Ordinance to protect their particular dwellings. The developer may be able to build a building as large as he is proposing, however, the density can be brought down and that is the question that is before the Board. He believed that the Board had to enforce it and he did not feel it would be in the public interest to grant it. He believed it would be contrary to the public interest to increase the density of the property. He does not see any special conditions that exist in the lot in relation to the relief being requested. He believed the zoning restriction, as it applied to the specific property, was reasonable. He believed there was a fair and substantial relationship between the general purpose of the ordinance and the specific ordinance on this property, to wit: they have to have 3,500 square feet for new construction within an area. The Tire Loft building would be torn down and, because that building was to be torn down, the ordinance falls into effect and needs to be upheld. He felt that increasing the density would harm the other people within the area. He did not believe that the granting of the variance would be consistent with the spirit of the ordinance. He stated it would increase the density, traffic, and the number of vehicles in the neighborhood. He did not believe that substantial justice would be done by granting the variance for all of the reasons previously stated.

Mr. Witham indicated that he struggled with this petition. He spent some time at the site and it is one of his favorite buildings in Portsmouth and he always looked forward to it's renovation. He was really looking for a good reason to deny the application. He would be sorry to see the building go but he understands that is not why they were before the Board. The question was if four units was a reasonable use for the property in the Apartment District. There is a building on the site that can have four units and up to eight by Special Exception. He believed the variance could be granted. Some of the opposition spoke about issues such as scale, density and he would like to see an agreement made regarding those issues but it was not the issue before them. The building could be built as a duplex so he couldn't really factor in those decisions because the decision to grant the variance is not what effects that criteria. One person, speaking in opposition, stated that the Board had previously denied requests because of light and air but those were probably due to setback requirements. When you talk about setback requirements you do factor in air and light. This was not a setback variance. Mr. Witham said that one Attorney spoke and said they were being asked to amend the ordinance but he did not feel that they would be amending the ordinance by granting the variance. They can grant variances and they are simply going by what the ordinance allows. The fact that if the building currently had four units and the developer came forward and said he would like to rebuild it so that it was more conforming would be one of the goals of the zoning ordinance – to bring properties into stronger conformance. He felt that this project addresses safety by having an access around the building. Mr. Witham was not talking about scale because that is not what the ordinance was about. The ordinance was about 4 units and he believed the four units was a very grantable request for a variance considering what was on the site now and what goes on in the neighborhood. He believed it was a reasonable use of the property. He sympathized with what some of the abutters would be losing, based on the characteristics of the building but, again, they were not voting on the characteristics of the building.

Mr. Rogers stated that he would not be supporting the motion. He understood it was a very sensitive topic to some of the abutters that may find that their view would be obscured or that the building was too large but, as Mr. Witham said, they were working with the number of units that could be applied to that property and, as such, more units could be applied if the building was rehabbed. Unfortunately the existing building could not be rehabbed. Mr. Rogers felt that the application met all of the criteria regarding property being useable with four units, regardless of whether it was for financial reasons or other reasons. Most of the buildings in that area had smaller lot areas and there were duplexes and triplexes in the area. He felt that the building did meet the criteria and they should not approve the motion.

Mr. Le Blanc stated that he thoroughly disagreed with what was said. He disagreed because there was a clause that's put into this. The lot would be able to have four dwellings if the current structure were rehabbed. The current structure was being taken down. The lot does not support four units, pure and simple.

Mr. Jousse indicated he would be supporting the motion. He stated they were being asked to grant relief of 1,400 square foot per unit and he felt that was a large relief and agreed with Mr. Le Blanc.

Mr. Marchewka stated that he struggled with the request and understood that some of the issues were very personal to the abutters, which would effect abutting properties. However, they go back to the question of what was the variance that they were being asked to grant? That request was for four units. For better or worse, they were not voting about open space and they were not voting about loss of privacy and sunlight. He felt that it was clear that the lot could support four units because it does now, by right. The current building is falling down and cannot be rehabbed without a substantial amount of money. The siting of the building on the lot is non-conforming and has its own issues. They were back to the question of whether the applicant had a legal right to use the property for four residential units. In reviewing the analysis for a variance, he did not believe the four units were contrary to the public interest. It was allowed now. The zoning restrictions applied to the specific property interferes with the property owners reasonable use of that property. Mr. Marchewka felt that by right they were able to currently use the property as four units. If they were to build a new building they could not have four units. He read that as interfering with the reasonable use and it comes down to what is reasonable. He believed it was reasonable. Whether the building was considered reasonable by the abutters was not what the Board was being asked. No fair and substantial relationship exists between the general purpose of the Zoning Ordinance and specific restriction on the property. The property can support four units, or more. Why shouldn't it be able to with a new building? The variance would not injure the public or private rights of others. The perceived rights that are being injured by abutters are really due to the scale of the building, which they are not voting on. Substantial justice would be done by granting the variance. That was a gray area but he did believe there was substantial justice. The applicant could use the property for four units now and, in his mind, he should be able to continue to do that. It would be an improved building over what is there now and there certainly would be some justice done by granting the variance. He did not believe the granting of the variance would diminish surrounding properties. For those reasons, Mr. Marchewka could not support the motion.

Mr. Holloway stated that he would support the motion.

Mr. Le Blanc stated that the lot was able to have four or more units in the existing building. When the existing building goes away, that right goes away also.

Mr. Marchewka felt the lot could support four units and they were shown that it could because the applicant wasn't asking for any other variances. There were no setback variances, there were no parking variances and everything else was conforming. That was why he could not support the motion.

Acting Chairman Horrigan stated that he had wrestled with the petition for the past month. He continued to come back to the question of the hardship criteria as established by the Simplex case. He quoted, "That the zoning restriction as applied to the specific property interferes with the property owner's reasonable use of that property considering the unique setting of the property in its environment". It strikes him that two residential units on the lot would be a reasonable use. The problem he had was with the qualification of considering the unique setting of the property. When the existing structure comes down, they essentially had an ordinary lot. He didn't mean that in a derogatory sense but there simply wasn't anything unique about open space on a side street. To argue that it was a big lot and therefore should be given a variance seemed to be essentially saying that the dimensional requirement that the city had established was too restrictive. That gets him to the second point of the hardship criteria, "That no fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific restrictions on the property". The Zoning Ordinance clearly says that the City wishes to control density in this neighborhood and the way it does that is through lot size. It is not a perfect approach but it strikes him as being eminently fair. He did believe there was a fair reason why there was a

minimum lot size requirement. It's not a standard to be negotiated but rather a minimum lot size requirement. He had not heard any argument as to why that would be unfair to hold the Petitioner to that dimensional requirement. Finally, he agreed that the scale of the building was within the Zoning Ordinance and if they put in two units rather than four they could still put up a building that size. They were not in a position to judge the scale of the building. He did believe the abutters had a perfect right to come in and talk about the private enjoyment of their property and he didn't think the Board should dismiss those out of hand. He did think that the scale was being complied with and they had no guarantee that if they were limited to two units that the scale of the building would be different.

The motion to deny as presented and advertised passed with a 4-3 vote.

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A five-minute break was taken.

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**III. Public Hearings**

1) Petition of **Franklin C. Grossman Trust, owner, John H. Grossman, applicant**, for property located at **170 Mechanic Street** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 3' x 5' one story addition to the rear of the existing dwelling with a 8' rear yard where 25' is the minimum required. Said property is shown on Assessor Plan 102 as Lot 7 and lies within the General Residence B and Historic A districts. Case # 3-1.

**SPEAKING IN FAVOR OF THE PETITION**

John Grossman addressed the Board. He indicated that they were taking an existing mudroom and moving it 3' out. The new addition was not going any closer to the existing property line than the building structure that was already there. They were preparing the building as they would like to remain there for many years and one of the things that they are going to be adding on is a bedroom and bath downstairs, which cuts off one of the entrances to the building. That leaves them with two entrances. One is the front entrance which comes up a steep set of stairs and the back entrance is where they want to expand the mudroom, which comes up a set of stairs that aren't nearly as steep. Their objective was to expand back and use it as an entrance for a wheelchair or crutches in case one of them becomes ill.

Mr. Jousse asked whether they were encroaching any closer to the lot line than they currently were? Mr. Grossman indicated that they were not.

Vice-Chairman Horrigan asked if Mr. Grossman had spoken to the abutters? Mr. Grossman stated that they spoken to the abutters about their addition which wasn't before this Board. They invited the abutters over to their house and showed them what they were doing. The most direct abutter agreed wholeheartedly with their plans and had no objections.

**DECISION OF THE BOARD**

Mr. Rogers made a motion to grant the petition as presented and advertised. Vice-Chairman Horrigan seconded. Mr. Rogers stated that he didn't believe the variance was contrary to public interest and he felt it was a very minor application. There was a great deal of hardship with the property. It was surrounded by streets on three sides. The house was situated in a location where there was a jut in the property line. The house itself was within 8' and they were adding 3' onto the existing house. There was no way they could move the house or the property line so the zoning restriction did interfere with the reasonable use of the property. He did not believe any fair and substantial relationship existed between the purposes of the zoning ordinance because the property did jut in and the house was already there and was completely surrounded. He felt the variance was consistent

with the spirit of the ordinance because he was not requesting a great deal of setback, just a very minor amount. Mr. Rogers felt that justice would be done in granting the variance. He did not believe it would diminish the surrounding property. If anything, he felt any improvement to houses, especially egress, adds to the value of the property and other property values. He felt the Board should approve the request.

Vice-Chairman Horrigan agreed with Mr. Rogers and added that the granting of the variance would not injure the public or private rights of others. The only potential rights that could be at issue would be the immediate abutter and it would be difficult to imagine how this very small additional could effect their light or air circulation. Also, Vice- Chairman Horrigan stated that this was the historic district and mudrooms were a standard feature of old New England homes so it was a very appropriate type of addition for this type of house in this setting.

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



2) Petition of **Mary Ellen Burke, owner**, for property located at **101 Crescent Way** wherein a Variance from Article III, Section 10-302(A) is requested to allow a 6' x 8' addition to an existing accessory building with a 20" right side yard where 10' is the minimum required. Said property is shown on Assessor Plan 212 as Lot 150 and lies within the General Residence B district. Case # 3-2.

**SPEAKING IN FAVOR OF THE PETITION**

Mary Ellen Burke, of 101 Crescent Way, described to the Board that she was seeking a variance to add a small building to the front of the existing building that they were in the process of renovating. She had two signatures of neighbors who support her petition, one being the most effected abutter who shares a driveway with her. She needs the garden shed to go where they proposed because there was an existing foundation that extended out from the existing building. They would also like the garden shed in that location so that she would have access from the driveway to the shed.

Chairman Le Blanc asked what the distance was from the existing shed to the property line? Ms. Burke indicated it was less than 1'. As there was a huge pile of snow there it was difficult for her to measure exactly.

Vice-Chairman Horrigan asked for clarification about the abutter. Ms. Burke stated that her neighbor, Laurie Wells, of 111 Crescent Way, shares a driveway so she was the most impacted by the request and she signed a letter of support.

**DECISION OF THE BOARD**

Mr. Jousse made a motion to grant the variance as presented and advertised. Mr. Marchewka seconded. Mr. Jousse felt that there should be a special set of setbacks for that particular neighborhood as if you want to put a lounge chair out on your yard you probably need a variance. All of the houses and garages sit one on top of the other. The request for the variance would not be contrary to public interest. The zoning restriction, as applied to this property and this specific neighborhood, interferes with the property owners' reasonable use of the property. Considering the unique setting of the property, the setbacks were not unreasonable. No substantial relationship existed between the general purpose of the zoning ordinance and the specific restriction on the property. The applicant is requesting less relief, 20" or so, the existing garage is closer to the property line. The variance would not injure the public or private rights of others. It was totally within the spirit of the ordinance to grant the variance. Substantial justice would be done. Mr. Jousse does not believe the granting of the variance would diminish the values of surrounding properties.

Mr. Marchewka agreed with Mr. Jousse. He felt the whole neighborhood was unique in terms of setbacks or lack thereof. Many of the properties had no setbacks on one side and some of the property lines actually dissect

some of the buildings so it is a very unique environment. He felt the setback request was very minimal and, given the plans that they were given, there was an existing foundation that presumably something was built upon at some point in time. Mr. Marchewka felt the variance should be granted.

Vice-Chairman Horrigan felt that a garden shed in the neighborhood would be in the public interest. Atlantic Heights was a nice residential area and the more gardens the better. It certainly was a positive public interest. Also, there were setback problems that exist throughout the neighborhood. Sometimes it was garages, sometimes it was the house itself. It defied any kind of dimensional patterns in the zoning ordinance which puts them up against the second part of the hardship requirement that was handed down by Simplex: No fair and substantial relationship existed between the general purpose of the zoning ordinance and the specific restriction on the property. This was clearly one of those cases where you just couldn't write a dimensional zoning requirement that was going to fit many of the properties in the neighborhood. As far as the private rights of others were concerned, the one set of rights that would be violated would be the abutter to the west, or north west, and she had signed a petition saying that she agreed so there were no issues with anyone's private rights being violated.

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

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 3) Petition of **Bethel Assembly of God, owner**, for property located at **200 Chase Drive** wherein the following are requested: 1) a Variance from Article II, Section 10-206(1) to allow a second dwelling unit over a proposed detached garage in a district where only one single family dwelling is allowed on a lot, 2) a Variance from Article II, Section 10-206(16) to allow two rectories for two ministers for one church in a district where such use is allowed for one rectory by Special Exception; and, 3) a Variance from Article III, Section 10-301(A)(2) to allow two free-standing dwelling units on a lot in a district where only one single family dwelling is allowed on a lot. Said property is shown on Assessor Plan 210 as Lot 2 and lies within the Single Residence B district. Case # 3-3.

### **SPEAKING IN FAVOR OF THE PETITION**

Attorney Bernard Pelech appeared on behalf of the Bethel Assembly of God. Attorney Pelech indicated that they were proposing to take an existing 24' x 33' garage and replace it with a slightly smaller one, 24' x 32' with a second story, which would have a dwelling unit in it to provide living quarters for a youth pastor for the church. This was a 3.09 acre parcel of land which lies between the Market Street Extension and Chase Drive. It was surrounded by Market Street Extension to the south, Chase Drive to the North, Michael Soucy Drive to the East, and three single family residences to the west. Several years ago the property received a Special Exception to allow the Bethel Assembly of God to be constructed as well as the parsonage, the garage in question and the parking lot. In order for the parsonage, or the congregation, to attract a youth pastor, they have found that people that they have interviewed are unable to afford housing in the City of Portsmouth. As such, they would like to be able to provide a housing unit for the youth pastor. Furthermore, it would be to their advantage to have the pastor on site, 24 hours a day. The Church was proposing to remove the existing garage which was fairly dilapidated and replace it with a 2 story type of carriage house/garage.

In responding to the Planning Department's memo stating that the property could be subdivided, Attorney Pelech indicated that in order to do that they would have to chop off 1/3 of the parking lot, make it a separate lot, making the parking inadequate, and leaving the pastor's residence in the middle of a parking lot. It might be feasible but it was not practical. Secondly, Attorney Pelech stated that the Planning Department memo mentioned a lot owned by the Church which was not adjacent but on an adjacent street that could have been built on but was sold. Attorney Pelech stated that it was sold by the church after the Board of Adjustment denied a request to put a single family residence on it. The third point was that an addition could be put on the parsonage that would alleviate the necessity for a variance. Attorney Pelech did not agree with that as two dwelling units, whether they are attached or not attached, would still require a variance. Attorney Pelech felt that they were asking for a very reasonable, apartment over a garage to house a youth pastor who couldn't afford

to live in the city. He felt it would be in the public interest to have a youth pastor to counsel troubled kids. He was not talking about an over-intensification of the land. The minimum lot size is 15,000 square feet and they were talking about a 3 acre lot. For two dwelling units that would be 1.5 acres of land per dwelling unit. He was not talking about a detached single family dwelling but rather a tiny apartment over the garage.

Attorney Pelech felt that the requirements of the Simplex case were met by the variance. Although the rear was a single family district, at some point in time the Board of Adjustment granted a Special Exception to make the 3 acres of land for church use. Therefore, by denying the requested variance they would not be preserving the integrity of a single family neighborhood. The applicant had a petition that was signed by many of the neighbors in support of the variance. The church allows their parking lot to be used as a bus stop for Portsmouth High School, for the Christian Academy and for Coast. The applicant believes that the requested variance would not be contrary to the public interest. The Bethel of God congregation has grown threefold over the last few years and their primary need is for a youth pastor to work with the children and have been attempting get a youth pastor but they cannot find suitable, affordable housing in the area. Therefore, their intention is to provide the Youth Pastor a suitable place to live. Having a youth pastor in the community would be a public benefit. Attorney Pelech could not think of a single argument saying it would contrary to the public interest. Many churches in and around the city have one or more parsonages or rectories. There are more than one pastor or minister for these churches. The Bethel Assembly of God has one pastor and is seeking to have a second. The second part of the five criteria was whether special conditions exists with respect to the property for which the variance was sought, such that literal enforce of the ordinance results in an unnecessary hardship. Attorney Pelech felt this was a reasonable use and the Zoning Ordinance interfered with the reasonable use. The land was unique as it is a 3 acre parcel of land used for religious purposes, located in a single family housing area where the lots are anywhere from 6,000sf to 28,000 sf. The church lot was anywhere from ten times that size to twenty times that size. It is distinct and unique.

Attorney Pelech indicated that there was a fair and substantial relationship between the general purposes of the Zoning Ordinance and the specific restriction on the property. The purposes of the Zoning Ordinance were very clear. If someone was in a residential district and you have a residential use you cannot put two houses on the lot. That would be a way to get around a subdivision. However, the property was not used for residential purposes, the primary and predominant use is for religious purposes. The parsonage is an accessory use. They are not acting in a method that is contrary to the ordinance by allowing two parsonages. The Ordinance says that parsonages are allowed, and other associated uses. There could be a convent if the Bethel Assembly of God had nuns. They were not talking about an over-intensification but were talking about a 3 acre parcel of land with a tiny apartment over a garage in a single family residence.

Attorney Pelech indicated that he did not know of any public or private rights of others that would be effected. He felt the requested variance was consistent with the spirit of the ordinance. The Ordinance specifically allows by Special Exception religious institutions, including a place of worship, parish house, rectory and similar types of establishments or a convent. The fact that the applicant was applying for a small apartment over a garage to allow a second pastor to live on the premises was not contrary to the spirit of the Ordinance. Given the size of the parcel, the size of the church and congregation, it was not contrary to the spirit and intent of the Ordinance to allow a second pastor and a tiny apartment in which he would live.

Fourthly, Attorney Pelech felt that substantial justice would be done by granting the variance. The test as to whether substantial justice would be done was the balancing test where you weigh the hardship upon the church if the variance was denied against a benefit to the public in denying the variance. Attorney Pelech felt there was a benefit in granting the variance. A Youth Pastor was certainly something that any community would welcome. Granting the variance would not diminish the value of surrounding properties. Nine neighbors signed a petition stating they had reviewed the plans for the garage with an overhead apartment and that they approved of the plans.

In conclusion, Attorney Pelech stated that the applicant felt they had met all of the five criteria necessary for the Board to grant the application. The Planning Department stated that the district was established for single

family homes and should be protected from changes that would adversely effect the purpose and integrity of the Zoning Ordinance and the neighborhood. The parcel was approved for a Church by Special Exception many years ago. The Planning Department's position is that the zone was established many years ago to protect single family homes carried very little weight in light of the fact that the 3 acre parcel of land is used for religious purposes.

The applicant believes that if the Board makes a finding of fact and analyzes the criteria for granting the variance that they will answer yes to each of the five criteria for granting the variance. The Pastor was present to answer any questions.

Mr. Marchewka asked if they would be willing to stipulate to the fact that the apartment would only be used by a church employee.

Mr. Witham asked if the second floor deck faced the church or the adjoining lot? Attorney Pelech indicated that it would be facing towards the neighbors.

Chairman Le Blanc asked what went on in each of the buildings? The Pastor indicated that there was the church, there was the parsonage and there was the garage. The daycare was ongoing in the Church. The parking lot goes all the way down from the church to the property line on Chase Drive.

Vice Chairman Horrigan confirmed that the property across the street had been denied by the Board. Ms. Tillman indicated that she was referring to a different lot. She was referring to the lot that the church sold which now has a single family dwelling on it. It is Lot 7 on Cutts Avenue.

Greg Bosselait of 411 Cutts Avenue spoke in favor of the petition. He was a direct abutter to the church, being on the corner of Cutts and Chase. He was all for the proposed plan. The Pastor showed him exactly what they were planning to do on the property and he felt that the building would add a lot to the neighborhood. He would be glad to have a youth pastor join the church. He also thanked the Board for the time and effort that the put into serving as Board Members.

Mr. Jousse if they were also going to tear down the lean-to that was attached to the garage? Attorney Pelech confirmed that the whole thing was coming down.

## **DECISION OF THE BOARD**

Vice-Chairman Horrigan made a motion to grant the variances as presented and advertised, with the stipulation that the second dwelling unit be used by church personnel only. Mr. Marchewka seconded. Vice-Chairman Horrigan stated that the property was in a residential zone but it was a very large lot and it was not intrusive at all on the residential neighborhood and, in fact, provides a buffer between the residential neighborhood and a very busy arterial street. The public interest of the neighborhood was well served. Regarding the hardship, Vice chairman Horrigan stated that a second rectory seemed to be a reasonable use. The church has gotten to the point where they require at least one more assistant pastor so proposing another detached dwelling to be used as a residence is a very reasonable use of this particular property. There was no fair and substantial relationship to turn it down. The general purpose of the zoning ordinance allows rectories through Special Exception, which requires a less demanding analysis than a variance. It was hard to imagine that the Zoning Ordinance intended that they could only have one rectory. The variance would not injure the private or public rights of others. Rather it would certainly benefit the public at large and the private rights as well to allow the church to expand its programs through the employment of an assistant pastor. The requested variance was consistent with the spirit of the Ordinance. It would be hard to imagine that any injustice would be done by adding a second rectory to the property. The granting of the variance would not diminish the value of surrounding properties. The existing garage was an eyesore and the proposed structure looks very attractive. The new building would enhance the values of the adjoining properties, rather than diminish them. Vice-Chairman Horrigan felt it met all of the five criteria for a variance.

Mr. Marchewka agreed with Mr. Horrigan. He did not believe they should be looking at this in the strict terms of the Zoning Ordinance because it wasn't a homeowner looking to put another home on his or her lot. The church was there by right. He considered this a reasonable expansion of the Church's operation as opposed to a further development of the property in a way that was not allowed by zoning. The fact that the church would be using the very small apartment for its own employee pastor speaks to that and he believed, for that reason, it could be allowed.

The motion to grant passed unanimously with a 7-0 vote, with the stipulations that the dwelling over the garage be used strictly for church employees.

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4) Petition of **Fredrick and Mary Ann Watson, owners**, for property located at **1 Clark Drive** wherein Variances from Article II, Section 10-206 and Article III, Section 10-301(A)(2) are requested to allow a second detached single family dwelling to be built on the lot which currently has an existing single family dwelling in a district where only one single family dwelling is allowed on a lot. Said property is shown on Assessor Plan 209 as Lot 33 and lies within the Single Residence B district. Case # 3-4.

Attorney John McGee spoke on behalf of the owners, Frederick and Mary Ann Watson. Attorney McGee stated that the property in question had been a single family home since 1956. It is a 2.8 acre lot. His plan reflected where the current home was situated and also where a second home was proposed to be built. They hadn't definitely set were it will go as there were some issues about ledge. He also wanted to make it clear about building a \$300,000 house. They were not talking about an apartment over a garage, they were not talking about an addition, nor were they talking about a townhouse. They were talking about a separate house. They were also talking about a concept which didn't exist in the 1970's when the sub-division was created. Attorney McGee first dealt with hardship, as defined by Simplex. He usually tells people to give him a piece of land and he can find a hardship and in this case it wasn't very difficult. Looking at the map, it looks like New York City and their lot looks like Central Park.. In surrounding towns, they recognize that someone can meet density needs by having dual access. Portsmouth does have some dual access. Not too far from Clark Drive there is 998 Maplewood Avenue, a house next to Flowers by Leslie, where there is a house on a 1 acre lot that had sufficient frontage but not useable frontage because it was so much lower than Maplewood Avenue and as a result, when the subdivision went through they had a shared driveway. He felt that a shared driveway would probably qualify under the City's Zoning Ordinance as long as there was frontage. The problem with the Clark Drive property is that they have 100' frontage on Clark Drive and they also have frontage on the Market Street Extension but unfortunately the frontage on Market Street Extension is limited access. As a result, they can only come off of Clark Drive. Attorney McGee referred to the Planning Department's memo. They recommended that they could sub-divide and go back to the 1970's plan. Looking at the 1970's plan, the area where they were talking about building a house in would have actually been a double lot and Clark Drive, which was a driveway, would have been a road. Basically, the City has said why don't you put in a road and create a sub-division. They cannot do that because of practicality. The engineer estimated that the cost would be approximately \$200,000. Attorney McGee contends that that would be a fragrant example of economic waste. If they were to create Clark Drive, they would create a road that was going to cost someone \$200,000. Every time it snowed the city would be plowing the stubby road and every week city garbage trucks would go down the road at city cost. So, not only would they be creating economic waste for his client but they would be creating economic waste for the City. A road is ridiculous in this case, not needed and certainly not within the spirit of the times which calls for making an attempt to make use of land and increasing the tax base without adversely effecting the tax rate.

Attorney McGee felt that one of the primary reasons to have zoning was to control density. The idea of zoning predates the current idea of condominiums, two single family homes, each within the \$300,000 range, which would create taxes, make use of land that is doing absolutely nothing. It would not set a precedent because there aren't many lots that have this characterization in the City of Portsmouth.

Given the size of this lot, Attorney McGee felt it screamed for a variance. Otherwise, they would be wasting a valuable acre of land, that could produce revenue. Attorney McGee did not feel that an additional condominium would effect the neighborhood. They provided a Petition signed by 21 neighbors who did not object to the variance request. There are several duplexes in the neighborhood.

Attorney McGee stated that hardship has been defined much more narrowly than they understood it in the past. Essentially, they have to look at whether there is something reasonable in the Zoning Ordinance that requires them to deny the variance. Or, is the reason for the Zoning Ordinance not really related to this particular situation. Even if there was a second home on this lot, there would be more room and less density than they have on many of the single family residences in Portsmouth. Is there something about this lot that really makes it different from the lots around it? Attorney McGee submits that it is huge and it is landlocked by the Market Street Extension which makes it unique. There is nothing that indicates a need under the Zoning Ordinance to deny this.

Attorney McGee addressed whether the granting of the variance was going to be contrary to the public interest. He said not it was not and he had already gone over that. There would be more taxes, there would be the ability to make use of an acre of land that is now land locked and it would make one couple very happy. He also indicated that there would be a lot more fresh air and a lot less pavement that would be necessary to construct a city street.

Attorney McGee indicated that the City Ordinance was to create enjoyable living space and to make sure that people aren't crowded. This variance wouldn't have either, plus there wouldn't be any increased congestion, it certainly was going to be in the spirit of the ordinance because it was consistent with the goals of zoning. Substantial justice would be done because you have a land owner who would be able to make reasonable use of his land. Given the area that this land is in, he cannot make reasonable use of his land because his lot is so big that he is living in the country in Portsmouth and no one wants to live in the country in Portsmouth.

Attorney McGee did not feel that the variance would diminish the surrounding property values. He felt that all of the criteria was met. It is something that should be granted. There was some concern about having two residences on one lot, however, that concern should not exist in this particular circumstance. As Attorney Pelech pointed out, every variance has to be looked at individually. Attorney McGee asked that the Board grant substantial justice and grant the variance.

Mr. Holloway asked if they were talking about a condominium? Attorney McGee stated that yes, they were setting up a condominium. It wouldn't be realistic to have two separate homeowners on one lot of land due to the difficulty that would arise when trying to sell it. If you have two buildings and one of them was forced to be renter-occupied, in a single family district, that would be a bad thing. This particular plan was to have condominiums so that each structure would be independently owned. They are talking about \$300,000 homes. They could be sold independently and there wouldn't be the danger of having to rent one on a single family lot.

Vice-Chairman Horrigan stated that Attorney McGee had indicated that this was a landlocked site. He asked if he meant that Market Street Extension locked it in, because Vice-Chairman Horrigan couldn't see that. Attorney McGee described where the property was. In 1969 the Interstate Bridge went through and that led to the interruption of Cutts Avenue and it was further impacted by Market Street Extension that went through in 1973-1974. The home itself has been there since 1956. There has been a lot of realignment in the area.

Vice-Chairman Horrigan asked about Attorney McGee's reason for not sub-dividing being the cost of \$200,000 to widen Clark Drive. Attorney McGee stated that Mr. Pope's 1979 subdivision plan, which realigned things, originally planned to have Clark Drive go in towards the house and have a separate lot. Attorney McGee assumes that the cost of putting in that road back then stopped Mr. Pope from subdividing. Mr. Watson certainly doesn't have \$200,000 to put in a road either. In the 1970's they weren't familiar with the idea of condominiums but since that time they have become popular and would be perfect for this lot of land.

Chairman Le Blanc asked about the building envelop and whether that is where the building would be situated rather than covering that entire half acre? Attorney McGee confirm that they do not have an exact location at this point and they didn't want to put a house somewhere and then come back and say they had to move it. So, the house would be somewhere in the yellow area on the plan, consistent with setbacks. The house would be at least 2200 square feet, which is a good sized house and consistent with the surrounding homes.

Mr. Jousse asked if the fence was actually on the property line? Mr. Watson believes that it is.

Tom Heney spoke in support of the petition. He is the Real Estate Broker who is representing the parties who are trying to buy the condominium that they are trying to create, Mr. & Mrs. Berg. He had three points that he wanted to make. The first was that he understood that the residents who purchased homes in the area purchased their homes with certain expectations for the enjoyment of their property. He pointed out that in this case 21 of the members of the neighborhood signed a Petition in favor of the condominium creation. The second point was that, in looking at the requirements for the variance tests, he felt that four points were very clear: the granting of the variance would not be contrary to the public interest, the requested variance is consistent with the spirit of the ordinance, substantial justice would be done by granting the variance and granting the variance would not diminish surrounding property values. Therefore, the only point that the Board needs to look at is hardship. The first question was if the zoning restriction applied to the specific property interfered with the property owner's reasonable use of the property, considering the unique setting of the environment. Mr. Heney felt it was the unique setting that the Board should consider. The first thing to look at was that the owner was penalized because of the 400' of frontage on Market Street Extension that was not accessible. The second thing to look at was the density of the property. In a neighborhood where the average home is on 12,000 sf lot and where 15,000 sf of lot area is required, these condominium lots would be almost 3 times the minimum provided and 5 times the minimum required. The subject property has a total of 519 feet of frontage where 100 is required. That means the new condominium lots would both have 2 ½ times the minimum requirement. A couple of other things to think about are that three of the properties that directly abut the subject property are duplexes and within the immediate area there are 3 additional duplexes. There are four family units and a ten unit apartment building in the neighborhood. Interesting to note is that two of the lots in the neighborhood are approved with two attached dwellings. The second test is whether any fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property. The purpose of zoning is to regulate density in established districts. In approving the application they would create two single family residential properties in an area of single family residential properties. The last test asked whether the variance would injure the private or public rights of others and he felt that it did not. He felt that was evidenced by the 21 signatures that were gathered on the petition. Mr. Heney pointed out that additional family dwelling units in single family districts were approved on October 16, 2001 for 559 Maplewood Avenue and also on July 16, 2002 and June 18, 2002.

Chairman Le Blanc asked if the frontage on Cutts Street is over 100'? Mr. Heney indicated that the frontage on Cutts was 75'. The frontage on Market Street Extension was over 400', totalling 518. Chairman Le Blanc clarified that the part where you actually drive into the lot is 75'.

Vice-Chairman Horrigan stated that Mr. Heney made reference to the hardship of the Market Street Extension frontage. He was having trouble understanding that argument as the Market Street Extension was built in the late 1970' and the Watson house had been there since the 1950's, clearly the frontage has always been Cutts Street. Vice-Chairman Horrigan does not understand the constant reference to frontage on Market Street Extension. Mr. Heney stated that there is over 400' of frontage on Market Street Extension. Vice-Chairman Horrigan asked why this was considered a hardship? Mr. Heney stated because it was a limited access highway, it could not be accessed. Mr. Horrigan stated that it could have been accessed when the original house was built.

Ms. Tillman stated, for the record, that the city does not recognize condominium lots. The City looks at a condo as a subdivision. What the City does recognize is the building it self being made into a condo with the land

around it being common area with the other condos and the land would be held as one lot in common ownership. There may be some limited area around the dwelling that would be for that particular dwelling but someone could not put "meets and bounds" on an area and condominiumize that out as a lot because then it would have to go through subdivision approval.

Vice-Chairman Horrigan asked if they could put two dwelling units on the lot as long as the land was held in common? Ms. Tillman confirmed that they would still have to get a variance to do that because it was in a single family zone that allows one dwelling on one lot. They are asking for a second dwelling unit. They indicated that they were creating a condominium lot. That would be considered a sub-division. She understood that they were applying for a footprint of the building to be located somewhere in the yellow area they have indicated but not to create a condominium lot.

Attorney McGee stated less than 15% of the lots in the area conform to the Zoning. In response to Vice-Chairman Horrigan's question concerning hardship, the hardship is not Market Street Extension per se but rather he was talking about the size of the lot and the circumstances and it's unique setting in that area. In terms of the condominium, Ms. Tillman was right. They were asking for the right to build a second building and in response to Vice Chairman Horrigan's questions, it was their intent not to have that second building under the same ownership as the first building because that was not good for what they want to do. The Declaration of Condominium Ownership would give the owners the right to use certain areas, almost like an easement. Attorney McGee went on to say that a hardship was much different than it was. Under Gelinas they thought it had to be something very unique with the land but the Court defined that under Simplex and it's not as narrow as was first thought. It is something that makes it unique in the context of it's setting.

## **DECISION OF THE BOARD**

Mr. Marchewka asked Mr. Tillman if Clark Drive was a City Street, they wouldn't need a variance? Ms. Tillman indicated they could go through the Planning Board for subdivision. Right now Clark Drive has not been brought up to City specifications.

Mr. Witham made a motion to deny the petition as presented and advertised. Mr. Holloway seconded. Mr. Witham stated that the applicant made some very good points and met several of the criteria for a variance however they did not meet all of them. Mr. Witham addressed the first criteria, whether the requested variance would be contrary to the public interest and he supports the applicant's position that it would not be contrary to the public interest. The abutter's signatures attest to that. Mr. Witham addressed whether special conditions exist with respect to the property for which the variance is sought that literal enforcement of the ordinance results in unnecessary hardship. The first criteria was whether the zoning restriction as applied to the specific property interferes with the property owners reasonable use of the property, considering the unique setting of the property. There was talk of part of the unique setting being the porkchop shape but that shape was self-created a long time ago and he did not see that as a hardship. There was a plan to resolve that. Also part of the unique setting is that only 15% of the lots in the area meet zoning but he still doesn't believe that was enough to satisfy the conditions with respect to the request for the second unit. In terms of reasonable use, he felt that the owner has reasonable use. He has a house and lives in his house in a single family district. The next part of the criteria was whether a fair and substantial relationship existed between the general purpose of the zoning and the specific restrictions on the property. Mr. Witham indicated that there was repeated reference that the purpose of zoning is to control density. Mr. Witham felt that it went beyond that. It went to help define the character of the neighborhood and controls how land is used in the neighborhood. Adding a second dwelling unit on the lot goes against what the zoning is attempting to do. The requested variance is not consist with the spirit of the ordinance and that goes back to his position on the zoning purpose. The spirit of zoning is also to control growth and he did not feel that allowing second dwelling units on lots was a way of controlling growth. He did not believe that substantial justice would be done by granting the variance. The only substantial justice that he found was the economic gain. They kept referring to this one acre as wasted. Someone could just as easily argue that a large lot in Portsmouth is a great asset. Lastly, Mr. Witham felt that the granting of the variance

would not diminish the values of surrounding properties. He felt that the applicants met quite a bit of the criteria but not all of it which was necessary to grant the variance.

Mr. Holloway indicated that the hardship is that the land is landlocked as they cannot go through the Market Street Extension. He remembers back in the late 1960's, he believed, when the Market Street Extension cut them off and only gave them Cutts Street, which originally went completely across Market Street Extension. Therefore he felt this was caused by the City. However, he does agreed with Mr. Witham that it appears to be an economic gain based on the testimony and therefore he will support the motion.

Mr. Marchewka indicated that he would support the motion. He personally felt that this type of development was a good thing. It looks like they could create a legal subdivision if they brought Clark Drive up to City standards and, personally, he didn't see why two lots couldn't share a driveway as opposed to a city street. However, this was not what the Zoning says and it was not what the Planning regulations read and in interpreting them literally, he came to the same decision regarding hardship as Mr. Witham and Mr. Holloway.

Mr. Jousse indicated that he would not be supporting the motion. He agreed with Mr. Witham on point one but the zoning restrictions as it applied to the particular piece of property does interfere. They have a very large lot and only one unit on it. Putting a second building on this second piece of property with a shared driveway would be consistent with the spirit of the ordinance and would not injure the private rights of others. He believed it would be beneficial to the city and the public at large to have the second dwelling on the property.

Vice Chairman Horrigan stated that he supported the motion but he added that the second house on the lot was certainly a reasonable proposal. It was a very large lot. On the other hand he does not know where they end with the notion of shared driveways. It seems to him that they were getting into dangerous territory. There were issues bringing in fire engines, for example. Once they start allowing other houses on a road such as this, they are starting to get into the area of public interest. He did not feel that it was in the interest of the City of Portsmouth to allow multiple houses on a large lot with a shared driveway. Also, when you look at the potential uses of the property, a subdivision would be quite viable economically and as far he could tell, the hardship argument that they were being presented with was basically an economic argument. They did not want to spend \$200,000 to bring a road up to City specifications. He would be very reluctant to grant a variance on economic grounds, without further evidence of where that \$200,000 estimate came from for starters. He has had serious misgivings about the public interest so he was reluctantly voting for the motion.

Mr. Jousse stated that he felt they were getting muddied with the condominium issue. If the applicant had proposed to build a house for his mother to live in, they would not be having the same discussion as the proposed condominium concept that was going to be applied to this piece of property.

The motion to deny was granted with a 5 – 2 vote.

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A motion was made to continue past the 10:00 p.m. rule and it was unanimously granted.

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5) Petition of **Bruce N. and Lisa Marie Schlieper, owners**, for property located at **163 Rockingham Avenue** wherein a Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow: a) an 8' x 12' one story addition with a basement and a 6' x 12' porch with a 7'± front yard where 30' is the minimum required, and, b) a 485 sf one story addition with a basement with a 19'± front yard where 30' is the minimum required. Said property is shown on Assessor Plan 220 as Lot 85 and lies within the Single Residence B district. Case # 3-5.

**SPEAKING IN FAVOR OF THE PETITION**

Mr. Schlieper spoke on behalf of his petition. He indicated that he was seeking the approval of an addition that would benefit his growing family. It would also improve the appearance of his entrance for people coming to his house. His house was in a unique situation where it was facing Myrtle Avenue, which was a road that doesn't exist any more. The people who come to his house see the garage and the back of the house. He spoke to a number of his neighbors and everyone was in favor of the addition and no one was in disagreement.

Mr. Jousse asked about the lines that were painted in the snow at Mr. Schlieper's house and whether they were approximately where the new addition was going to be? Mr. Schlieper indicated that the lines were a very rough idea of where the addition would go. It was something that he did for his wife so that he could get her perspective.

Mr. Marchewka confirmed that Mr. Schlieper's frontage was now on Rockingham Avenue. Mr. Schlieper confirmed that was correct, although the frontage used to be Myrtle Avenue until they built the highway.

**DECISION OF THE BOARD**

Mr. Marchewka made a motion to grant the petition as presented and advertised. Vice-Chairman Horrigan seconded. Mr. Marchewka stated that this was a unique setting of a house as his frontage was on a deadend street and his frontage was actually on Interstate 95. Realistically he has a lot more frontage than what was legally shown on his plan. Mr. Marchewka did not feel that the variance would be contrary to public interest in any way. In terms of the zoning restriction applied to the specific property, Mr. Marchewka felt that it did interfere. Specific adherence to the zoning would not allow him to add on to his home and Mr. Marchewka felt that would be wrong. He is not affecting anyone except the Interstate. Therefore, no fair or substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property. The site was really completely different from when the house was built. There used to be a street with traffic issues. The variance would not in any way injure the public or private rights of others. There really wasn't anyone effected. The variance was consistent with the spirit of the ordinance. It allows him to expand the house, really with the least impact on the neighborhood. Substantial justice was done for both the homeowner and the neighborhood. It would increase the value of his property in such a way that it will have the least impact on the neighborhood. Granting the variance would not diminish the value of the surrounding properties. If anything, it would increase the value of the subject property and the surrounding neighborhood.

Vice Chairman Horrigan stated that he agreed with Mr. Marchewka. They have a house that is essentially as far back from the street as the other houses to the west. This property was unique because the street literally ends at their house. It was more like a parking lot with a large sound barrier that they look out at which is along the approach to the interstate bridge. Vice Chairman Horrigan felt that the spirit of the ordinance requirements on frontage requirements was concerned with insuring that the use of the property did not interfere with the flow of traffic and other activities but it was not an issue here. In the same vein, he really couldn't see any public interest that was going to be effected by an addition to the house. Other than the people who were driving by on Interstate 95. It would enhance their public interest as their view of the house would be much nicer and would enhance the values of the surrounding properties. Vice-Chairman Horrigan felt this request was obvious and it fit the Simplex hardship requirements to a tee.

The motion to grant as presented and advertised passed unanimously by a 7-0 vote.



- 6) Petition of **Beth P. and Marc C. Griffin, owners**, for property located at **239 Broad Street** wherein Variances from Article III, Section 10-302(A) and Article IV, Section 10-401(A)(2)(c) are requested to allow: a) a 17' x 22'4" two story addition with a basement with a 7" left side yard where 10' is the minimum required, b) a 3'6" x 9'6" rear deck with a 6'± left side yard where 10' is the minimum required, c) a 3'6" x 9' front deck with a 3' x 6' cantilevered second floor addition above the deck with a 6'± left side yard where 10' is the minimum required; and, d) an irregular shaped 199.5 sf two story addition with a basement with a 9'3" right

side yard where 10' is the minimum required Said property is shown on Assessor Plan 131 as Lot 15 and lies within the General Residence A district. Case # 3-7.

### **SPEAKING IN FAVOR OF THE PETITION**

Marc Griffin spoke on behalf of his petition. Mr. Griffin explained that he planned to take down the existing garage and use that footprint to go up and tie it in with the existing house. This would make a bigger room on the right side and add two decks. The lot was very narrow. Everything was set up when the street was just a right of way. To fit any type of addition on to the house and stay within the lot coverage issues and setbacks, the only way he could get an addition on was to use the existing space. To make it look right he felt it should be in line with the driveway. He felt it would greatly improve the neighborhood. Most of their neighbors were in favor of the addition. Rose Sloan, the abutter who was most directly effected, wrote a letter of support which was in the Board Members packets.

Chairman Le Blanc asked about the 7" setback and whether it was where the garage was currently. Mr. Griffin confirmed that. Chairman Le Blanc indicated that that was awfully close to the property line and couldn't he move it back? Mr. Griffin felt that, if it was moved back, it wouldn't be lined up with the driveway and it would start to look like it didn't fit.

Mr. Witham clarified that the garage was built on a foundation and asked if he couldn't simply go up? Ms. Tillman stated that, if he was going to demolish the building, he needed a variance to rebuild. If he took the roof off the garage and went up from there and didn't demo the existing structure, that would be one thing. But, as he is tearing it down, he has the opportunity to make the addition more in conformance with the ordinance. The intention of the ordinance is to bring things more into conformance. At 7" it was not in conformance.

### **DECISION OF THE BOARD**

Mr. Witham asked whether building the addition 7" from the property line, would they have to dig 2-3 feet for the foundation so they would be digging in a City street? Ms. Tillman reminded the Board that there was no survey on this plan and they had no idea how accurate that 7" was. Ms. Tillman indicated that Mr. Witham was correct and to build that close to the property line, they would have to over dig to get in there and she truly did not know how that was going to happen. Bersum Lane was owned by the City of Portsmouth. City Council approval would be required to do anything in a City street. The Board could table the matter until the applicant got approval from the City Council.

Vice-Chairman Horrigan indicated that Bersum Lane was the issue and it looked very narrow. Ms. Tillman indicated that the city standard for streets was a 50' right of way with 32' of pavement for a residential street. This street was probably an old right of way that became a city street many years ago. It was only 14' wide, similar to streets that are in the South end.

Mr. Holloway made a motion to table the petition until they received accurate information regarding the boundaries of the property.

Mr. Witham asked Mr. Griffin how they determined the 7". He indicated that he consulted with his abutting neighbor and they reviewed their deeds. He located the pins and although there was a little angle to it, he believes it is within 1" – 2" of the actual boundary. He would move the addition in 2" – 3" but that's as far as he could move it.

There was no second on the tabling motion.

Mr. Rogers made a motion to deny the petition as presented and advertised. Mr. Witham seconded. Mr. Rogers stated that this was a hard one because he understood how people wanted to improve their property. Bersum Lane was very small and this building was 7" from the property line. Mr. Rogers did not feel that it met the

required criteria. He felt the public interest would be better served if there were more space. They are always trying to improve the dimensions away from the city streets and not increase them or leave them the same. In this case, 7" was an awful small area. If they do the digging and excavating, they will have to go into the street. He felt that the zoning restrictions as applied to this area were reasonable because the setback rules were necessary in this particular situation. He could not say that the variance was inconsistent with the spirit of the ordinance as they were looking at a very tight space. There was a lot of space behind it and there was the possibility that the addition could be moved to the back of the building. Mr. Rogers understood why the applicant wanted to use the same footprint of the preceding garage but he felt they needed to consider safety and the fact that the street was only as wide as a one way street. He also felt it would diminish the values of the surrounding properties.

Mr. Witham felt that the petition was grantable. He felt there were similar situations in the South end. He realized it would require some digging on city property but there was a procedure for doing that. This was always a hard one for him when someone wants to use an existing footprint. If he was lucky enough to have a footprint and have a foundation, everything would be okay. It was unfortunate that his garage never had a proper foundation. There may be some creative ways for him to get in there and get a foundation in without getting a variance but that doesn't make sense to him. He understands the argument that when you rebuild you have to become more conforming and that was where he struggles with these decisions. Mr. Witham stated that this was not a busy street and for all intent and purposes it was an alleyway. The property has been 7" for many, many years and he doesn't see how having the property remain at 7" would have an adverse impact. The other setbacks are all reasonable given the situation of the house on the property and the existing conditions. He felt it was grantable and therefore would not support the motion.

Mr. Marchewka agreed with Mr. Witham. He believed it was reasonable to allow the applicant to build on the existing footprint. Bersum Lane was not a street, it was more like a path and, as Mr. Witham pointed out, there are ways to deal with the City to get approval to go into the street if they have to. Mr. Marchewka didn't feel it would be a problem if they had to shut down Bersum Lane for awhile. It was not like Bersum Lane was Miller Avenue or a well-traveled street. Overall, he felt it was a reasonable request and felt it should be granted.

Mr. Jousse agreed with Mr. Marchewka. He felt that, if they denied the denial of the petition, the closest they could come to the property line would be 7" and, personally, he would be more comfortable if it was 18", but Mr. Griffin would have guidance on that from City Council to move it any closer. Mr. Jousse felt that to rebuild the garage or structure on the lines that exist at this time on a very narrow lot was grantable.

The motion to deny was granted by a vote of 4-3.

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**IV. Adjournment**

There being no further business to come before the Board, the Board acted unanimously to adjourn at 11:15 p.m. and meet at the next scheduled meeting on April 15, 2003 at 7:30 p.m. in the City Council Chambers.

Respectfully submitted,

Jane M. Shouse  
Secretary

/jms